No. S2111109
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROPERA CREDIT UNION

PETITIONER

AND:

1143924 B.C. LTD.
BUFFALO-GENTAI (ST. JOHNS) INVESTMENTS LIMITED PARTNERSHIP
BUFFALO-GENTAI DEVELOPMENT LTD.
HONGYU TINA MU
YU YANG
GENTAI DEVELOPMENT CORP.
BUFFALO HOLDINGS INC.
WJY 2015 TRUST
CANADIAN WESTERN BANK

RESPONDENTS

APPLICATION RESPONSE

Application Response of: BUFFALO HOLDINGS INC. and WJY 2015 TRUST (the "Application Respondents")

THIS IS A RESPONSE TO the Notice of Application of MNP Ltd. (the "Receiver") filed February 24, 2023.

PART 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in paragraphs 1(b), (c), (e), (f); and 2(b), (c) as outlined in this Response, and (d) of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the orders set out in paragraph 1(d) of Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the orders set out in paragraphs 1(a) or 2(a) of Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. This Reply will address the Notice of Application of the Receiver and the relief requested both by what will be referred to as "PKT", being Hongyu Tina Mu, Yu Yang, Gentai Development Corp., and PKT Holdings Inc. and by Xuemei Huang ("Huang").

2. Both the Receiver's Third Report and its Notice of Application omit a number of extremely relevant facts.

3. As is indicated in that Third Report, the sale transaction which was approved by this Honourable Court on October 22, 2022, was highly unusual. The property had been advertised and offered for sale as development property, and the offers received as a result of the sales process were for purchase of the actual property. The offer approved, from PKT and Chace Energy Holding Corp. was for the sale of the shares in the Trustee holding the property, 1143924, and/or the beneficial interest in the Property of the Limited Partnership, thereby avoiding property transfer tax.

4. It was, moreover, in essence, a credit bid, whereby part of the purchase price was paid by way of a Promissory Note in the amount of $4,600,000 from PKT. The amount of that note was estimated to be equal to the distribution which would be made to PKT as a limited partner from the sale proceeds. That entitlement would be netted against the note, when the proceeds were distributed.

5. The effect of structuring the transaction in that way, was that it was therefore necessarily the case that the cash remaining from the sale proceeds, after payment of encumbrances and Receiver's fees, would be entirely payable to Buffalo-Megan. PKT, in essence, would obtain its share by offset against the Promissory Note.

6. PKT developed, with the Receiver, a spreadsheet, indicating how the transaction would take place. That spreadsheet is attached as Exhibit A to the Affidavit of Gerald Chiang. On the approval application, negotiations took place between PKT and Buffalo-Megan, resulting in a number of agreements.

7. The first such agreement was that loans made by PKT, during the development, in the approximate aggregate amount of $500,000, would be accounted for and paid as a debt of the Partnership, rather than as a debt of Buffalo-Megan, as PKT had alleged.

8. The second agreement recognized that the cash proceeds from the sale would be payable to Buffalo-Megan in their entirety. Indeed, it was further agreed that in order to have sufficient cash to pay to Buffalo-Megan proportionately to the credit of $4,600,000 to PKT, PKT might have to advance funds as were necessary to make up any shortfall in the cash proceeds.

9. That agreement was outlined in open Court, and acknowledged by PKT, as set forth in the transcript attached as Exhibit "E" to the Affidavit of Gerald Chiang. It is not clear why the Receiver would omit that crucial agreement and those crucial facts from its Report and Notice of Application. It is clear, however, that the cash proceeds being held by the Receiver are the property of Buffalo-Megan, and should be paid to it, subject

to the various creditor claims being advanced against those funds, including the approximately $500,000 payable by the Partnership to PKT. Other than as a creditor seeking security for their claims, which will be commented on later, no other party has a claim to any of those funds.

THREATENED LITIGATION

10. These Application Respondents have been less than satisfied with the conduct of the Receiver. There was an agreement reached, prior to its appointment, that the Receiver would employ, in its discretion, of course, the development team then in place headed by Mr. Chiang. That agreement was recorded in an email from counsel for Prospera Credit Union, and later incorporated in paragraph 2(o) of the Amended and Restated Receivership Order. These Application Respondents alleged the Receiver did not do that and had it done so, third reading could have been obtained much earlier.

11. More significantly, however, the Receiver reconfigured the Development Application prior to obtaining third reading, to greatly increase the amenities offered the Municipality as part of the proposal. It did so over the objections of these Application Respondents, and without direction from the Court. It was the position of these Application Respondents that the Receivership Order did not authorize the Receiver to do so, without consent of the parties or Court direction, and that doing so reduced the equity in the project by about $3,500,000.

12. However, these Application Respondents have decided, and have so advised the Receiver, that they will not be pursuing litigation against it.

THE CLAIMS AGAINST BUFFALO-MEGAN

A. THE CLAIM OF PKT

13. PKT claims that the entire receivership is as a result of Buffalo-Megan breaching the terms of the Limited Partnership Agreement between them with respect to the providing of ongoing capital contributions as the project required. It attaches a draft Notice of Civil Claim to its material.

14. In turn, Buffalo-Megan attaches to its material, its draft Response to Civil Claim and will, as well, if PKT's litigation is actually commenced, not only file a response generally in those terms, but also a counterclaim against PKT and Chace Energy Holding Corp. The draft Response is found at Exhibit "G" to the Affidavit of Gerald Chiang.

15. The foundation for PKT's Notice of Civil Claim is the following:

> Pursuant to Article 5.3 of the Partnership Agreement, equity injections were to be made as and when required by the Limited Partners in proportion to their respective unit entitlement.
>
> Draft Notice of Civil Claim, Factual Basis, para. 26

16. Under the Partnership Agreement, Buffalo-Megan was required to contribute its 40% proportionate share of ongoing required expenses and capital costs.

Notice of Civil Claim, Legal Basis, para. 5

17. Neither is a correct statement of fact nor an accurate summary of the provisions of the Partnership Agreement dealing with ongoing contributions.

18. Rather, the Partnership Agreement contains very complicated provisions as to any requirement to contribute further capital, in order to ensure the prospective investor partners would not be worried about such ongoing requirements.

19. Those provisions are found in clause 5 of the Limited Partnership Agreement, attached as Exhibit "D" to the Affidavit of Mu in Action S219671. Essentially, however, they indicate that additional capital could be required in an aggregate amount of not more than $1,500,000, on the issuance of a Capital Call Notice issued by the General Partner. No such Notice was ever issued.

20. Moreover, the clause goes on to provide for a scheme of loans if a partner is unable to make any properly demanded contribution. Indeed, PKT relies on part of those provisions to claim 7.5% on the funds it advanced to the Partnership. The provenance of the threatened claim is more than a little dubious.

21. It is on the basis of that claim, however, that PKT claims that Buffalo-Megan is liable, as damages, for PKT's share of the Receivership's fees and expenses.

22. On the other hand, the Response and Counterclaim allege and will allege that PKT was responsible for obtaining financing for the project as part of its Partnership duties and Mu's Director duties. Had PKT arranged a smallish bridge loan of $1,500,000, the project would have proceeded, third reading would have been obtained and no Receivership would have ever happened.

23. It is alleged that Mu no longer wished to be partners with Mr. Wang. However, the provisions of the Agreement prevented her from terminating the Partnership or demanding her funds be returned to her and she determined, in breach of her duties, to extricate herself from the situation by conducting herself in such a fashion as to trigger a Receivership. The fact that PKT and Chace Energy Holding Corp., who has advanced considerable funds, are carrying on with the project gives credence to that claim.

B. THE CLAIMS OF HUANG

24. It is difficult to know how to respond to the Response of Huang.

25. Its allegations are two-fold:

(a) An agreement to transfer 3.98% of Buffalo-Megan's units in the Limited Partnership; and

(b) An agreement to secure 55% of a loan to Buffalo Properties Inc. of $500,000 or $275,000, plus interest, on the Property.

26. The alleged Agreement is not produced.

27. The Notice of Civil Claim, attached to the Affidavit of Fan Yang alleges:

(a) A Loan Agreement with Mr. Wang, and funds advanced to Buffalo Properties Inc. earmarked for a project at Cambie and 64th;

(b) An advance of $500,000 to Buffalo Properties pursuant to that Agreement;

(c) Breach of the Loan Agreement, and wrongful diversion of the funds and ends to properties in Vancouver and Richmond;

(d) Certain misrepresentations made by Wang to Huang.

28. It goes on to allege a fairly complex written agreement, not produced, the relevant portions of which are, for purposes of this application, paragraphs "17a and b".

> 17. On or around May 12, 2019, the plaintiff was materially induced by the Representations to enter into a written agreement with Buffalo Megan Holdings, the terms of which are:
>
> a. Buffalo Megan Holdings shall transfer 3.95% of its shares in the Buffalo Group port Moody Project to the plaintiff, in satisfaction of 45% of the Loan ($226,329.16), resulting in the plaintiff holding a 1.6% of the total shares in the Port Moody Project;
>
> b. Buffalo Megan Holdings shall acknowledge having borrowed the remaining 55% of the Loan from the Plaintiff ($273,670.84) at an annual interest rate of 7.5%, secured by the Port Moody Lands;

29. The Notice of Civil Claim seeks damages for misrepresentation and for breach of the Loan Agreement and the subsequent Agreement.

30. The only proprietary claims advanced in that litigation are as against the two properties to which it is alleged the Cambie Funds were wrongfully diverted.

31. There is no property claim advanced in the Notice of Civil Claim against either the Port Moody property, or the partnership units of Buffalo-Megan.

32. The relief sought with respect to the Port Moody project and property are as follows:

> Part 2: RELIEF SOUGHT
>
> 6. A declaration that Buffalo Megan Holding breached the Port Moody Agreement and that the company, the Partnership, Mr. Wang, and Ms. Lv., jointly and severally, are liable for damages for breach of contact in that

regard, or in the alternative, a declaration that the Port Moody Agreement is rescinded for misrepresentation;

7. An order against Buffalo Megan Holding, the Partnership, Mr. Wang, and Ms. Lv, jointly and severally, for damages for breach of contract, or in the alternative, misrepresentation with respect to the Port Moody Agreement;

Part 3: LEGAL BASIS

Breach of Contract

1. The plaintiff claims from the Partnership, and each of its partners jointly and severally, damages for breach of contract for failure to repay the funds according to the Loan Agreement.
2. The plaintiff claims from Buffalo Megan Holding, against the Partnership, and each of its partners jointly and severally, damages for breach of the Port Moody Agreement.

Affidavit #1 of Fan Yang, made on March 3, 2023

33. In other words, Huang does not advance any propriatary claim either to Buffalo-Megan's partnership units or to the Port Moody Property. It's claims in that regard sound exclusively in damages.

34. The Response to Civil Claim claims the Port Moody Agreement was made under duress. It also appears to have been made without any consideration, (such as forbearance) being alleged. Moreover, Buffalo-Megan as a Limited Partner had no ability to grant security over the Property. The Limited Partnership Agreement also prohibited the transfer of units without the consent of the General Partner.

35. Most importantly, however, Huang's claims as against Buffalo-Megan with respect to Port Moody are not, as alleged in the Response to Petition filed by Huang, to enforce the alleged security agreement. There is no such claim in the Notice of Civil Claim.

36. Rather, Huang's claims are for damages for its breach.

C. CALCULATIONS

37. PKT was responsible for maintaining the books and records and financial information of the Partnership. In paragraph 42 of its Third Report, the Receiver informs the Court that the last unaudited financial statements of the Partnership (which were prepared by or on the instructions of PKT) disclosed two loans: $496,295 from PKT and $100,055 from Buffalo Investments. In its material, PKT has disputed the Buffalo loan without explanation. The records and statements were maintained and prepared by PKT and that loan should be recognized.

38. Attached as Exhibit "G" to the Affidavit of Gerald Chiang is a calculation based on the documents provided by the Receiver. It says that, from the sale proceeds, the sum of $3,256,445.42 should be paid to Buffalo-Megan and the sum of $ to PKT.

PART 5: LEGAL BASIS

1. These Application Respondents oppose any orders being made to secure the claims of PKT that Buffalo-Megan should be liable for the costs of the Receivership based as those claims are, on allegations of breach of contract and of duty.

2. Not only are those allegations disputed, on the face of them, they substantially lack any merit. More importantly, however, what PKT seeks is for funds to be held as security for claims it wishes to advance against the Buffalo Group as damages. That is made abundantly clear in paragraphs 14 and 15 of the Affidavit of Tina Mu and in paragraph 30(i) of the Application Response of the PKT Respondents.

> 14. Gentai Group seeks an Order that any damages which may be awarded to it on account of its Receivership Expense Claim in consequence of Buffalo Group's refusals and failures to pay their share of Project expenses, thereby occasioning the Receivership, be set off against the share otherwise payable to Buffalo-Megan on the proposed distribution. In the meantime, Gentai Group seeks an order that a reasonable amount be held back.
>
> 15. I am concerned that, if the proposed holdback amount is released to either Buffalo and its assignee, and given Buffalo's proven serious financial difficulties and its past failures to pay amounts due in respect of the Project, Gentai Group's Receivership Expense Claim will be pointless as there will be no funds available to pay it.
>
> Affidavit #1 of Tina Mu, filed March 1, 2023
>
> 30. Gentai Group requests:
>
> (i) An Order that $395,505 of the amount otherwise payable to Buffalo-Megan or its assignee be held back on account of Gentai Group's set-off claim pending further Order of the Court; and
>
> (ii) Advice and directions as to whether Gentai Group's claims ought to proceed in the within action, by amendment of the Gentai proceedings, or by way of new proceedings.
>
> Application Response of Mu, Yang, Gentai and PKT Holdings

3. The Amended and Restated Order, approved by all parties, provides, as does the Model Order, for the Receiver's costs to be paid to it from the estate.

4. The holdback proposed by PKT, therefore, is no more or less than security for a damages claim included or to be included in its draft Notice of Civil Claim attached to the Affidavit of Mu.

5. The claims advanced by Huang also sound exclusively in damages.

6. Both parties, in other words, seek prejudgment execution for their damage claims. Since *Lister v. Stubbs,* that practice has been variously described as profoundly unfair, harsh, abhorrent, and unacceptable as set forth in *Aetna Financial Services v. Feigelman,* 1985 CanLII 55 (SCC).

7. *Aetna,* of course, deals with the issue of Mareva injunctions, but it reaffirms, in forceful language, the principle in *Lister v. Stubbs*.

> 8. A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stuffs,* [1886-90] All E.R. 797, at p. 799, as follows:
>
> > I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant has been ordered to give a security till the debt has been established by the judgment or decree.
>
> Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets was referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532, (affirmed (1904), 7 O.L.R. 72), at p. 533, by Boyd C.:
>
> > The plaintiff or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.
> >
> > There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.
>
> The principle has been restated in modern times in *Barclay-Johnson v. Yuill,* [1980] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:
>
> > In broad terms this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise,

> the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

This problem has been stated and restated many times in this country in the courts of Manitoba and elsewhere: *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 1978 CanLII 1260 (ON SC), 88 D.L.R. (3d) 446, 7 C.P.C. 57 (Ont. H.C.); *Pivovaroff v. Chernabaeff* (1977), 16 S.A.S.R. 329; *Bedell v. Gefaell (No. 2),* 1938 CanLII 65 (ON CA), [1938] O.R. 726 (C.A.); *Hepburn v. Patton* (1879), 26 Gr. 597; *Pacific Investment Co. v. Swan* (1989), 3 Terr. L.R. 125; *Ferguson v. Ferguson* (1916), 1916 CanLII 433 (MB KB), 26 Man. Rep. 269.

9. The general rule in *Lister* has had wide application in the law. See Sharpe, *Injunctions and Specific Performance* (1983), at pp. 94-97. However, the abhorrence which the common law has felt toward allowing execution before judgment has always been subject to some obvious exceptions.

43. There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. I would, with all respect to those who have held otherwise, conclude that the order should not have been issued under the principles of interlocutory *quia timet* orders in Canadian courts functioning as they do in a federal system.

Aetna Financial Services v. Feigelman, 1985 CanLII 55 (SCC), paras. 8, 9 and 43

See also Tracy v. Instaloans Financial Solutions Centres (BC) Ltd., 2007 BCCA 481, paras. 37, 41 and 46

10. *Aetna* does not confine itself to Mareva injunctions, however. Rather, it applies much more broadly to include any pretrial order which is not procedural in nature and affects a party's substantive rights. That was made clear, if it was necessary to do so, by the B.C. Court of Appeal in *Canwest Pac. T.V. Inc. v. 147250 Can. Ltd.,* 1987 CanLII 2653.

> [18] At p. 166, Estey J., for the court, distinguished between interlocutory applications of a procedural nature and those which affect the parties' substantive rights, stating:

> As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the court prior to trial.

After referring to the need of the applicant to show irreparable harm if the order sought does not go, he went on to state:

> A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets *or otherwise restricting the rights of the defendant without a trial.*

These passages make it plain that the essential distinction is not between Mareva orders and other types of interlocutory orders, but between interlocutory orders of a procedural nature and interlocutory orders which restrict a party's substantive rights before trial. Th broad concept of execution as that word is used in *Aetna* extends to any order abrogating the defendant's rights prior to trial. Such orders, apart from certain exceptions, will not be granted.

Canwest Pac. T.V. Inc. v. 147250 Can. Ltd.,
1987 CanLII 2653 (BC CA), para. 18. See also para. 6 and 7.

See also *Northwestpharmacy.com Inc. v. Yates,* 2018 BCSC 41, para 9

See also *Investor First Financial Inc. v. Lawton,*
1996 CanLII 3347 (BC CA), paras. 10 and 11

11. There are four exceptions listed in *Aetna.* The only one being even arguably remotely applicable is the fourth of those exceptions:

> Quia timet injunctions generally permitted under extreme circumstances which include a real or impending threat to remove contested assets from the jurisdiction.

12. The Mareva cases, of course, deal with that exception, and emphasize the extraordinary nature of such relief and reaffirm the heavy onus described in *Aetna.*

13. In essence, there are two factors on which PKT and Huang both fail:

a. A strong *prima facie* case; and

b. Any evidence at all of the untoward disposal of assets to defeat claims.

Tracy v. Instaloans Financial Solutions Centres (BC) Ltd., supra

See *Otal v. Azure Foods Inc.,* 2019 BCSC 1510, para. 22

See *ProSuite Software Limited v. Infokey Software Inc.*,
2013 BCSC 2227, paras. 22-28

14. Both claims, in fact, far from being a strong *prima facie* case are fundamentally flawed and there is no evidence at all that Buffalo-Megan is disposing of any of its assets, let alone doing so in order to defeat its creditors. There should be no holdbacks made from the funds, which are otherwise the property of and payable to Buffalo-Megan.

PART 6: MATERIAL TO BE RELIED UPON

1. Affidavit of Gerald Chiang, filed March ___, 2023 herein.

These Application Respondents estimate that the application will take 1.5 hours.

The Application Respondents have filed in this proceeding a document that contains the Application Respondents' address for service.

Dated: March 3, 2023

H.C. Ritchie Clark, K.C.
Lawyer for these Application Respondents