

CITATION: D'Amore v. Banwell Development Corporation, 2021 ONSC 2665
COURT FILE NO.: CV-11-17088
DATE: 2021-04-09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kevin D'Amore

Applicant

AND:

Banwell Development Corporation, 928579 Ontario Limited, Scott D'Amore and Royal Timbers Inc.

Respondents

BEFORE: Regional Senior Justice Bruce G. Thomas

COUNSEL: Cynthia B. Kuehl, Counsel for the Applicant, Kevin D'Amore

Tony Van Klink and Sherry A. Kettle, Counsel for BDO Canada Limited, Court-Appointed Receiver of Banwell Development Corporation and Royal Timbers Inc.

Steven Pickard, Counsel for the Respondent, Scott D'Amore

Robert J. Reynolds, Counsel for the Respondent, J. Murray Troup and 928579 Ontario Limited

Sheri Medaglia, Counsel for the Execution Creditor, J. Lepera Contracting Inc.

James K. Ball, Counsel for the Execution Creditor, M.R. Dunn Contractors Ltd.

William V. Sasso, Counsel for D'Amore Construction Inc.

Philip S. Chandler, Counsel for the Estate of Patrick D'Amore and Simba Group Developments Limited

James Branoff, Counsel for the Estate of Patrick D'Amore and Simba Group Developments Limited

Peter R. Greene and Jacob Millar, Counsel for Affleck Greene^{LLP}

Mark P. Nazarewich, Counsel for the Corporation of the City of Windsor

David B. Williams, Counsel for Anthony Giannotti

HEARD: In writing.

ENDORSEMENT

- [1] I have reviewed the materials filed, including the motion record and supplementary motion record prepared by Miller Thomson^{LLP}, lawyers for BDO Canada Limited, Court-Appointed Receiver of Banwell and Royal Timbers.
- [2] The materials indicate no opposition to the following relief:
1. An approval and vesting order regarding Banwell Road Parcels 5-10, including a sealing order with regard to the Confidential Supplement to the Thirteenth Report.
 2. An ancillary order approving the Thirteenth Report, the Confidential Supplement, the actions of the Receiver, the Banwell / Royal Timbers / Royal Ranches receipts and disbursements, and the fees and disbursements of Miller Thomson and the Receiver.
 3. An order amending the approval and vesting order dated June 18, 2019 regarding Part 24.
- [3] I am content that the material filed supports the granting of each of these three uncontested orders and I have signed the draft orders provided.
- [4] The only contentious issue before me now relates to a proposed distribution order for the payment of the unsecured creditors of Royal Timbers Inc. Those unsecured creditors are the following:
- (a) Affleck Green McMurtry^{LLP};
 - (b) M.R. Dunn Contractors Ltd.;
 - (c) D'Amore Estate; and
 - (d) D'Amore Construction (2000) Ltd.
- [5] The amounts owed to these unsecured creditors at the time of the appointment of the Receiver and then to-date, including appropriately calculated post-Receivership interest, is detailed below:

Creditor	Principal Owing	Interest calculated by Receiver	Total
AGM	\$129,662.34	\$33,089.39	\$162,751.73
Dunn	\$50,028.46	\$116,642.98	\$166,671.44
D'Amore Estate	\$5,500.00	-	\$5,500.00
DAC	\$25,000.00	\$2,307.53	\$27,307.53

- [6] I have written submissions from William Sasso, counsel for D'Amore Construction (2000), (DAC), and from counsel for the Receiver. DAC maintains that my Reasons for Judgment

dated June 12, 2017, determined that by application of the interest stops rule, no post- Receivership interest should be paid to the unsecured creditors of both Royal Timbers Inc., and Banwell Development Corporation until a surplus is available after the satisfaction of all principal debts.

[7] DAC's submissions include the following:

... DAC submits that the payment of interest, particularly the payment of post- Receivership interest to creditors at significantly different interest rates, is inconsistent with the principle that the creditors of these inter-related and interwoven companies would receive, to the extent that the Receiver's recoveries permit it, their *pro rata* share of the principal debt owed to them by the companies in Receivership as at the date of Receivership.

[8] DAC's concern arises from the real possibility that, while the sale of Royal Timbers Inc. assets will yield a surplus, the sale of Banwell Development assets may result in a significant shortfall.

[9] DAC, it seems, believes the interest that must be paid to Royal Timbers' creditors should instead be paid on a *pro rata* basis to the creditors of Banwell Developments.

[10] Counsel for the Receiver maintains there was never an intention to consolidate the Royal Timbers and Banwell Receivership estates. These corporate entities have separate creditors, separate and easily identifiable assets, and the Receiver has, at all times, kept segregated accounts and records. The Receiver argues that my Reasons for Judgment imposed the interest stops rule on Royal Timbers' creditors, only until the surplus was apparent for the payment of those creditors (emphasis added).

[11] I agree with the position taken by the Receiver. It was never my intention to saddle the unsecured creditors of Royal Timbers with the debts of Banwell Development, even recognizing they are related corporations. The unsecured creditors of Royal Timbers supplied services to a defined and separate corporate entity. It is unfair to suggest that corporations can rely upon their individual legal status when it assists them but abandon recognition of that status when it does not.

[12] The revenue now available to satisfy the unsecured creditors of Royal Timbers, together with interest, is generated by the vesting order I have just granted and by the sale of land owned by Royal Timbers pre-Receivership.

[13] On a motion for summary judgment dated February 1, 2018, I granted judgment in favour of DAC as against Banwell Developments. Counsel for DAC suggests that the submissions regarding the summary judgment contemplated that no post-Receivership interest would be paid unless there was a surplus after the payment of all creditors, not just those of Royal Timbers. Presumably then, the argument is the summary judgment might have otherwise be structured differently.

[14] It is difficult to accept this submission after considering the preamble in the Judgment itself. I have set out below paras. (a) to (c) of the Judgment of February 1, 2018:

- (a) Judgment against Banwell Development Corporation (“Banwell”) for:
- (i) \$487,376.73 for work done and material supplied under written agreement made between D’Amore Construction (2000) Ltd. and Banwell dated January 10, 2005 (“Contract”) as certified as due and payable under the Contract;
 - (ii) Prejudgment interest at the Contract rate of 12% annually from the Certification dates for payment under the Contract until October 24, 2017, totalling \$696,142.70 to that date, and interest thereafter accruing at the Contract rate until payment; and
 - (iii) Costs of D’Amore Construction (2000) Ltd.’s claim against Banwell in such amount as is determined to be fair and reasonable;
- (b) Directing payment of the principal amount of the judgment, prejudgment interest at the Contract rate from the Certification dates for payment under the Contract until the date of the receivership order dated June 5, 2013 (“Receivership Order”) in the amount of \$439,448.72, payable forthwith from the Estate of Banwell in receivership;
- (c) An order declaring that the balance of the judgment for interest from the date of the Receivership Order until the date of payment shall be payable out of any surplus of the Estate of Banwell on a *pro rata* basis with other creditors of Banwell or as may be further directed by the court;

[15] Taking into account the content of those paragraphs, it is hard to understand how the Judgment could have otherwise been structured. The debt was owed by Banwell. The debt with significant interest to be paid from the “Estate of Banwell”. I am unable to find that DAC has been prejudiced by its interpretation of my 2017 Judgment.

[16] In conclusion, the unsecured creditors of Royal Timbers will have their post-Receivership interest consistent with the distribution order I have granted.



Regional Senior Justice B. G. Thomas

Date: April 9, 2021.