

Court File No. CV-13-10331-00CL  
Court of Appeal File No. .

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

8527504 CANADA INC.

Applicant  
(Respondent)

and

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

**NOTICE OF MOTION FOR LEAVE TO APPEAL**

The moving party creditor, Liquibrands Inc. (“Liquibrands”), will make a motion in writing to the Court of Appeal, pursuant to Rule 61.03.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The Court of Appeal will hear the motion in writing 36 days after service of the moving party’s motion record, factum and transcripts, if any, or on the filing of the moving party’s reply factum, if any, whichever is earlier.

**PROPOSED METHOD OF HEARING:**

The Motion is to be heard in writing under subrule 61.03.1(1) and the moving party requests that this motion be heard together with the motion for leave to appeal in Court File No.: CV-14-10543-00CL, which is the companion appeal to the within appeal.

**THE MOTION IS FOR THE FOLLOWING RELIEF:**

1. An order, if necessary, to extend the time to serve and file the moving party's motion record and factum to 30 days after the parties receive a signed, issued and entered order from The Honourable Justice Newbould of the Ontario Superior Court of Justice.
2. An order granting the moving party leave to appeal to the Court of Appeal from the Order of Justice Newbould dated December 4, 2014, in which he failed:
  - (a) to direct the trial of an issue for a declaration that 8527504 Canada Inc. ("852") and Bridging Capital Inc. ("Bridging") breached the terms of a "Forbearance Agreement" (defined below) among those parties, Sun Pac Foods Limited ("Sun Pac") and Liquibrands as herein described; and
  - (b) to require Sun Pac's current receiver, BDO Canada Limited ("BDO"), to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.
3. If the order for leave to appeal be granted, an order that this appeal and the appeal from the order in Court File No. CV-14-10543-00CL be consolidated or heard together.
4. An order granting the moving party its costs of the motion.
5. Such further and other relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

**The Appeal**

1. The moving party cannot proceed until there is a signed, issued and entered order in its motion record from which leave to appeal is sought.
2. Justice Newbould heard the Liquibrands motion on November 28, 2014 and released his endorsement on December 4, 2014.
3. The motion was brought by Liquibrands in its capacity as a creditor within an Application under Section 243 of the *Bankruptcy and Insolvency Act*. Leave to appeal to the Court of Appeal is required pursuant to section 193(e) of the *Bankruptcy and Insolvency Act*.
4. Liquibrands seeks leave to appeal the decision made by Justice Newbould in three matters heard together on November 28, 2014 and in respect of which a single endorsement was released December 4, 2014:
  - (a) a motion brought by Liquibrands in Court File No: CV-13-10331-00CL for, *inter alia*, an order for the trial of an issue to determine whether 852 and Bridging (collectively the “Lenders”) were in breach of a Forbearance and Amending Agreement between 852, Liquibrands and Sun Pac dated September 11, 2013 (“Forbearance Agreement) and, if so, appointing a receiver over the litigation commenced by Sun Pac and Liquibrands against 852 and Bridging and for leave to continue the litigation;
  - (b) a motion brought by BDO in Court File No: CV-13-10331-00CL for approval of receiver’s reports and for distribution of liquidation proceeds; and

(c) an application brought by 852 in Court File No. CV-14-10543-00CL for an order appointing a receiver over Liquibrands.

5. The appeals are closely related and the orders arise from a single written endorsement as a result of the motions and application being heard together, so it would be inappropriate for this motion or for the appeals to be determined independently.

6. The issues raised in the proposed appeal are of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice as a whole; are *prima facie* meritorious; and the appeal will not unduly hinder the progress of the insolvency proceeding since the liquidation is complete and the majority of liquidation proceeds have been disbursed, with the exception of the disbursement to 852.

7. Sections 182(2), 193 and 195 of the *Bankruptcy and Insolvency Act*; Rules 61.03.1(1), 61.16(1), 63.02(1) of the *Rules of Civil Procedure*; and sections 6(1)(b), 6(2) of the *Courts of Justice Act*.

### **Applicable Law**

8. This appeal will address four points of law:

**I. Whether the organizing principle of good faith and the common law duty of honesty is implied in a lending agreement and guarantee and is preserved by the terms of the agreement and guarantee**

9. The moving party asserts that under the rule in *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII) a duty of honesty applies to the lending agreements and the guarantee, and the Lenders breached the duty.

10. The moving party asserts that a duty of good faith arises when necessary to ensure that the parties do not act in a way that defeats the objects of the very contract the parties have entered. An implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties is implied to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into. *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII); *Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764 (CanLII).

11. The Motions Judge erred in finding the Forbearance Agreement and the Liquibrands guarantee excluded those duties.

**II. Whether an action by a debtor against a lender forms part of the lender's security and can be sold as part of the security transferred to a receiver**

12. The moving party adopts the rule in *239745 Ontario LTD v. Bank of America Canada*, 1999 CarswellOnt. 2665 (S.C.J.) that it is “absurd and manifestly unfair” if a security agreement gives the lender the right, upon default, to pursue causes of action belonging to the debtor against the lender itself. To avoid the absurdity, a security agreement applies only to causes of action against third parties and not the debtor.

13. The Motions Judge erred in directing BDO to auction the Sun Pac Action.

**III. Whether an event of default under a loan agreement caused by a lender's breach of contract to advance funds is actionable**

14. The appellant adopts the principle and rule in *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 that a party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party who seeks to obtain a benefit under a continuing

contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

**IV. Whether the appellants as second secured lenders must show a proprietary interest in the proceeds of realization of a first security lender for the proceeds to be paid into court under Rule 45.02 pending determination of the threshold issue whether the lender's breach of contract caused a default.**

15. The appellants adopt the rule in *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475 (CanLII) that rule 45.02 requires that the legal right to the specific fund claimed by the plaintiff need not be a proprietary right.

**Background Facts and the Decision of Newbould J. (Note: These mirror the Background Facts in the Notice of Motion for Leave to Appeal in Court File No. CV-14-10543-00CL)**

16. Bridging provided financing to Sun Pac.

17. Bridging assigned the loan to 852.

18. 852 is a shell corporation.

19. Liquibrands is second secured creditor of Sun Pac. Liquibrands is also the sole shareholder of Sun Pac.

20. Liquibrands asserts that the Lenders relied upon an Event of Default created by their own wrong to place Sun Pac into receivership.

21. Pursuant to the Forbearance Agreement, 852 agreed, among other things, to advance a Facility D loan calculated to be \$1.15 million on or about October 1, 2013, and agreed not to

take any steps to enforce any loan agreement or security prior to the earlier of: (a) December 9, 2013; or (b) the occurrence of an Event of Default.

22. The purpose of the loan was to finance Sun Pac while it sold its “Breadcrumb Division” and while it refinanced.

23. The Forbearance Agreement is underpinned by the general organizing principle of good faith and honest performance.

24. Liquibrands is a party to the Forbearance Agreement.

25. Liquibrands gave additional security for the Forbearance Agreement.

26. On October 4, 2013 the Lenders refused to advance the Facility D Loan.

27. Failure to advance the Facility D loan made continued operation of Sun Pac impossible while it refinanced to execute a new advantageous contract to supply Loblaws.

28. Between October 4, 2013 and November 12, 2013 Sun Pac solicited interim financing to repay the defendants. The defendants refused to postpone their security to facilitate the financing notwithstanding their failure to satisfy their obligation to fund the Facility D loan.

29. Between October 4, 2013 and November 12, 2013 Sun Pac was unable to find alternative financing.

30. Liquibrands and Sun Pac issued a Statement of Claim on November 12, 2013 (the “Action”) against 852 and Bridging prior to the Order of Justice Mesbur dated November 12, 2013 placing Sun Pac into receivership (the “Receivership Order”). The Action asserted the defendants breached an agreement to fund the Facility D loan.

31. Liquibrands and Sun Pac asserted in the Action:

(a) it within the reasonable contemplation of the parties to the Forbearance Agreement that if the lenders breached their obligations to fund the Facility D loan Sun Pac would be to unable to continue as a going concern, complete anticipated replacement equity financing and sell the Breadcrumb Division to satisfy the lender's loan.

(b) 852 owed a duty of honesty and good faith in the performance of the Forbearance Agreement, in funding the Facility D loan and facilitating the financing necessary to repay the lenders and perform the Loblaws contract.

32. 852's breach of contract eviscerated the purpose of the Forbearance Agreement. 852 acted in a way that defeated the objectives of the agreement that the parties entered into.

33. On November 12, 2013, 852 applied for the appointment of a receiver on the ground Sun Pac defaulted in its obligation to 852 to continue operating.

34. Justice Mesbur appointed a Receiver of "the assets, undertakings and properties of the Sun Pac acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property")".

35. Justice Mesbur ordered that "no Proceeding in respect of Sun Pac be continued except with the written consent of the Receiver or with leave of the Court and any and all Proceedings under way in respect of Sun Pac were stayed and suspended pending further Order of Court."

36. The Action was outstanding on the date of the Receivership. Liquibrands concluded the Action was stayed.

37. The order authorized BDO to continue prosecution of proceedings. BDO declined to continue the Action against 852 and Bridging.



38. Liquibrands sought leave to appoint a receiver to continue the Action on behalf of Sun Pac.

39. 852 sought to put Liquibrands into receivership as a guarantor of Sun Pac.

40. The Motions Judge found:

(a) In August 2013 Sun Pac decided to sell the Breadcrumbs Division for \$3.1 million and requested additional funding to continue operating.

(b) On September 11, 2013, 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement to provide Sun Pac with a temporary bridge loan pending obtaining equity and debt financing for an anticipated Loblaws contract; to complete a sale of a Breadcrumbs Division to repay the bridge loan.

(c) 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.

(d) On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced a receivership application heard on November 12, 2013.

(e) BDO was appointed as receiver of Sun Pac on November 12, 2013.

41. Liquibrands applied for an Order directing the trial of an issue for a declaration that the lenders breached the terms of the Forbearance Agreement and, if the declaration be given, an Order:

(a) lifting the stay of proceedings in the Action and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging;

- (b) declaring Liquibrands entitled to claim under its general security agreement in priority to claims by 852 and Bridging;
- (c) appointing msi Spergel Inc. (“Spergel”) as receiver of the remaining assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation; and
- (d) declaring that Liquibrands’ guarantee of Sun Pac debt is unenforceable; and an Order requiring BDO to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.

42. Liquibrands argued that there was a threshold issue of whether the lenders breached their duty of honest performance and their obligation to advance the Facility D loan.

43. The Motions Judge acknowledged there was a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan but he erred in concluding, "I do not intend to get into that issue, although I was invited to do so."

44. Liquibrands took the position the order of Mesbur J. stayed the Action and, as BDO declined to advance the Action, Liquibrands sought an order appointing a receiver to advance Sun Pac's Action.

45. The Motions Judge found BDO and Liquibrands was entitled to continue the Action on behalf of Sun Pac without the necessity of obtaining leave to do so.

46. Liquibrands sought an order that the remaining proceeds of Sun Pac’s liquidation be paid into Court pending determination of the threshold issue.

47. The Motions Judge erred in finding that Liquibrands was not entitled to an order for payment of the proceeds of the Liquidation into Court as it did not have a proprietary claim against specific funds beyond the funds utility to satisfy the plaintiffs claim against the defendant. Liquibrands, as a second creditor, has security over the assets of Sun Pac second to the security of 852.

48. The Motions Judge erred in finding there is no question that the security of 852 is valid and what Liquibrands was doing is attempting to secure before judgment its claim for damages against 852 and Bridging and the claim amounted to a collateral attack on the order of Mesbur J.

49. Liquibrands asserted there was a serious issue to be tried on the lenders breach of contract and if the contract was breached the lenders claim on the proceeds of realization.

50. The Motions Judge erred in finding there was no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by BDO and that 852 has the right to those proceeds.

51. The Motions Judge found there may be a serious issue to be tried regarding the Action for damages by Sun Pac and Liquibrands against 852 and Bridging.

52. Liquibrands asserted that its guarantee included a duty of honesty and good faith pursuant to section 16 of the *Personal Property Security Act* and as repeated in the lenders' responding affidavit.

53. The provisions of the Guarantee provided:

(7) Due Execution, etc. This Guarantee has been duly executed and delivered by or on behalf of the Guarantor and constitutes a valid and binding obligation of the Guarantor enforceable in accordance with its terms, except as enforceability may be limited by ..... general principals of equity (regardless of whether enforcement is sought in a proceeding in equity or at law.

54. The Motions Judge erred in finding Liquibrands contracted out of the equitable rules regarding guarantees and the terms of the guarantee precluded Liquibrands from contending that the guaranteed may be unenforceable if it succeeded in its action against 852.

55. The Motions Judge erred in finding that the Action was collateral.

56. The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action.

57. The Motions Judge erred in approving the distribution of the proceeds of realization to pay fees and disbursements and to make a distribution to 852 and/or Bridging.

58. A party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations.... *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2010 ONCA 310 (CanLII), 2010 ONCA 310, 104 O.R. (3d) 784, at para. 13:

59. [N]o man can take advantage of his own wrong.... A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations. *Alghussein Establishment v. Eton College*, [1991] 1 W.L.R. 587 H.L. (Eng.), at p. 594.

60. 852's default put Sun Pac in the position that it could not pay employees. That, in turn, caused 852 to declare a default by Sun Pac ceasing business operations. 852 impermissibly

benefited by its own breach or wrong by relying on the cessation of business operations as an Event of Default.

61. 852's failure to make the Facility D loan payments was a material contributing cause of Sun Pac's insolvency. 852 is barred by its own wrong from relying on Sun Pac's cessation of operations as a basis for terminating the transaction.

62. A commercial contract is to be interpreted: (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said; (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract); (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity. *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII) at para. 24

63. 852's conduct breached the common law duty to perform the terms of the Forbearance Agreement honestly, and specifically: (i) 852 unilaterally accelerated the date for Sun Pac to present a contract for the sale of its breadcrumbs division; (ii) 852 misled Sun Pac about its intention to place Sun Pac into receivership; and (iii) 852 refused to advance funds it was to be obliged to advance contrary to the terms of the Agreement knowing that the failure to advance funds would result in the termination of Sun Pac's operations and the inability to finance an advantageous contract with Loblaw's.

64. Contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing a contract.

65. The motions judge erred by declining to direct the trial of an issue with respect to 852's breach of contract by failing to advance a loan.

66. Security agreements are interpreted so as to avoid commercial absurdity.

67. The motions judge erred in finding that Sun Pac and Liquibrands claim is a collateral attack on the Sun Pac Receivership. The Action was issued and counsel to 852 was notified of the Action prior to obtaining the receivership order against Sun Pac on November 12, 2014.

68. The Motions judge erred by failing to find that the Liquibrands guarantee was subject to the laws of equity and by finding that the terms preclude Liquibrands from contending that the guarantee may be unenforceable.

69. It would be an absurd commercial result for a guarantee to remain enforceable despite the demand being made on the guarantee as a consequence of the lender's wrongful and dishonest conduct.

70. The motions judge erred in finding that the Subordination, Assignment, Postponement and Standstill Agreement dated October 1, 2012, precluded Liquibrands from challenging or objecting to any act taken or proceeding commenced by 852 in connection with the enforcement of 852's security. If enforcement is 852's security is upheld despite the lenders' wrongful and dishonest conduct, this creates a commercially absurd result.

71. The motions judge failed to inquire into the substance of the motion to determine whether 852 was in breach of the Forbearance Agreement and breached its common law duty of honesty in the performance of the Forbearance Agreement.

72. The motions judge erred in finding that Liquibrands must have a proprietary claim against the specific funds to satisfy its motion under Rule 45.

73. The motions judge erred in determining that it was just and convenient to appoint a receiver over Liquibrands.

74. Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

- (a) The endorsement of Justice Newbould dated December 4, 2014;
- (b) The Order of Justice Newbould dated December 4, 2014;
- (c) Relevant portions of the record from the proceedings below; and
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 15, 2014

**WIRES JOLLEY LLP**  
Barristers and Solicitors  
90 Adelaide Street West  
Suite 200  
Toronto, Ontario  
M5H 3V9

David E. Wires (LSUC# 18017P)  
Email: dewires@wiresjolleyllp.com  
Tel: (416) 366-4006

Krista Bulmer (LSUC# 52198H)  
Email: kbulmer@wiresjolleyllp.com  
Tel: (416) 366-6516

Tel: (416) 366-0000  
Fax: (416) 366-0002

Lawyers for the moving party respondent,  
Liquibrands Inc.

TO: **CHAITONS LLP**  
Barristers and Solicitors  
5000 Yonge Street, 10th Floor  
Toronto, Ontario  
M2N 7E9

Harvey Chaiton (LSUC# 21592F)  
Email: harvey@chaitons.com  
Tel: (416) 218-1129  
Fax: (416) 218-1849

Sam Rappos (LSUC# 51399S)  
Email: samr@chaitons.com  
Tel: (416) 218-1137  
Fax: (416) 218-1837

Tel: (416) 222-8888  
Fax: (416) 222-8402

Lawyers for the responding party, applicant,  
8527504 Canada Inc.



AND TO: **LIPMAN, ZENER & WAXMAN LLP**  
Barristers & Solicitors  
1220 Eglinton Avenue West  
Toronto, Ontario  
M6C 2E3

Anthony J. O'Brien (LSUC#27440E)  
Email: [aobrien@lzwlaw.com](mailto:aobrien@lzwlaw.com)

Tel: (416) 789-0652  
Fax: (416) 789-9015

Lawyers for the Receiver,  
BDO Canada Limited

8527504 CANADA INC.  
Applicant

-and- LIQUIBRANDS INC.  
Respondent

Court File No. CV-13-10331-00CL  
Court of Appeal File No: .

---

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

---

**NOTICE OF MOTION**

---

**WIRES JOLLEY LLP**

Barristers and Solicitors  
90 Adelaide Street West  
Suite 200  
Toronto, Ontario  
M5H 3V9

David E. Wires (LSUC# 18017P)

Email: dewires@wiresjolleyllp.com  
Tel: (416) 366-4006

Krista Bulmer (LSUC# 52198H)

Email: kbulmer@wiresjolleyllp.com  
Tel: (416) 366-6516

Tel: (416) 366-0000

Fax: (416) 366-0002

Lawyers for the moving party, creditor, Liquibrands Inc.