

December 30, 2009

## ENDORSEMENT

[1] The applicant seeks to enforce a Request for International Judicial Assistance issued on October 29, 2009 by the United Bankruptcy Court for the District of Delaware (the "Request"). The Request seeks an order that the respondent be examined as a third party to the claim initiated by the applicant against MI Developments, Inc. ("MID") and certain other defendants and, in that connection, produce all relevant documents in his possession.

[2] The Request, as modified at the hearing, contemplates examination of the respondent limited to 7 hours (i.e., one day) on 100 documents to be selected by the applicant dealing with eight broad topics.

### *Analysis*

[3] The applicable law is set out in *Presbyterian Church of Sudan v. Rybiak* (2006), 275 D.L.R. (4<sup>TH</sup>) 512 (C.A.) per Goudge J.A. To grant the order sought, the Court must first be satisfied by the applicant that the criteria set out in that decision for enforcing a foreign request are met. There is no suggestion that the order sought is contrary to public policy. I will address the remaining considerations in turn.

### *Relevance of the Evidence*

[4] The Request was issued on an unopposed motion without an opportunity for the respondent to object. It was based on an affidavit of counsel for the applicant that provides no support for the order sought. There is no evidence in the record that oral representations were made to the United States court with respect to relevance, necessity and whether the information sought is otherwise obtainable.

[5] The application in this proceeding includes two statements of potential relevance in affidavit materials. First, as the chief financial officer of MID at the time of the impugned loan transactions, the respondent possesses relevant knowledge regarding the applicant's claims of equitable subordination of such loans. Second, the respondent was an executive of the MID while MID was under contract to assist MEC with a plan to sell its assets to avoid a bankruptcy, which also results in relevant knowledge. The affidavit materials do not, however, state that the respondent was involved in such sales.

[6] In a supplementary affidavit, the applicant's representative also identified two documents as examples of the fact that the respondent has information that cannot be obtained from anyone else. The first is a note to himself upon becoming the chief financial officer of MID; the unique information would be his reasons for making the notations thereon including two references to "FS control", one of the issues on which the applicant seeks to examine. The second is a power point presentation the respondent prepared for the board of directors of MID recommending against a proposed transaction. It is unclear whether the transaction proceeded. In any event, the

board of directors would have much better information with respect to the use actually made of his recommendation and the reasons for its decision.

[7] It is relevant that this represents the totality of the applicant's evidence with respect to the relevance of the respondent's evidence despite extensive documentary production and the completion of discoveries of the senior MID and MEC officers since the issue of the Request.

*Whether the Evidence is Otherwise Obtainable*

[8] The evidence in the materials on this issue is also modest. On the one hand, insofar as the Request contemplates examination of the respondent in respect of the identified loan transactions, it is implied although not expressly stated that he would have unique knowledge. Similarly, it is implied but not stated that only the respondent could address the extent, if any, to which he considered his actions as the chief financial officer to have been subject to inappropriate control by the defendant Stronach. On the other hand, the applicant has failed to demonstrate that evidence of at least equal value in respect of all other matters upon which it seeks to examine the respondent cannot be obtained elsewhere – for example, from the most senior MID officers, who have already been examined. In particular, there is no evidence that he would otherwise have unique knowledge or better knowledge than any other person regarding MEC's asset sales or any relevant decisions of the MID board of directors including any decisions regarding the impugned transactions. The bald statements in the applicant's affidavit materials are totally inadequate, particularly given the extent of the discovery process to date.

*Whether the Evidence Sought is Necessary for Trial and will be Addressed if Necessary*

[9] Given the very broad categories of examination described in the Request, it is clear that the evidence sought is more in the nature of pre-trial discovery than evidence to be used at trial. That is not *per se* objectionable. However, as framed, the Request is sufficiently broad as to constitute a "fishing expedition". This is troubling given the status of these proceedings, with the trial commencing in several weeks. If the applicant has been unable to obtain evidence to support its claims of, among other things, wrongful influence on the part of the defendant Stronach and the equitable subordination of the impugned loans, it is highly unlikely that the respondent's evidence will assist them on the basis of the record before the Court. In any event, I am satisfied that the evidence sought will only be used for trial if it turns out to be relevant and this cannot be said to be highly probable based on the record before the Court.

*Are the Documents Sought Identified with Reasonable Specificity?*

[10] As MID has furnished all documentation in its possession relating to the proposed areas of examination, the respondent is only being requested to provide documentation solely in his possession. This is understood not to be very onerous as he ceased to be employed by MID in September 2009.

*Whether the Order Sought is Unduly Burdensome*

[11] There is little doubt that the order sought would require the respondent to devote at least one day to preparation for his examination as well as the day for the examination. He says this is

burdensome, particularly at this time of year given his new responsibilities as the chief financial officer of a Canadian real estate trust.

[12] I assume it is somewhat burdensome on the respondent to take time away from his current responsibilities. However, he did occupy a senior position at MID, in which capacity he participated in certain of the events that are the subject of the applicant's action as the responsible officer. His knowledge of such events was not erased by his resignation. Moreover, any difficulties with the actual timing of his examination are solely his own responsibility. He evaded service for a considerable period of time to the point where the applicant required an order for substituted service. In addition, I do not think that the time required to comply with the order granted below is unduly burdensome given the nature of this action and the respondent's prior role with MID.

*Conclusion*

[13] Based on the foregoing, reading the Request and the application materials generously in view of the policy of comity toward other jurisdictions where reasonably feasible and fair as between the parties, I think the applicant has satisfied the test required to examine the applicant in respect of the Second Bridge Loan and 2008 Loan as well as the MID March 31, 2008 Reorganization Plan, all of which occurred during his tenure as the chief financial officer of MID. As the chief financial officer of MID, the respondent would have had primary responsibility for the conception, negotiation and implementation of such financial transactions. Whatever the information provided by other officers of MID regarding these transactions, it is therefore probable that the respondent has the best information available to the applicant regarding these transactions. In addition, the applicant has satisfied the test required to examine the respondent in respect of the extent of any control exercised by the defendant Stronach over him in the discharge of his responsibilities as MID's chief financial officer in respect of these transactions. Apart from these categories, however, the applicant has failed to establish that the information sought meets the criteria in the *Presbyterian Church* decision, including, in particular, relevance, necessity and the inability to obtain the information sought otherwise than by examination of the respondent.

[14] Based on the evidence before the Court, it would not appear that a full day is required for the respondent's examination. Also, given the focus of the examination, far less than 100 documents should be necessary. Accordingly, it is ordered that the respondent submit to examination no later than January 8, 2010. Such examination shall be limited to five hours, of which the applicant's examination shall be limited to 3 ½ hours. Further, such examination shall be limited to the matters described above and, for such purpose, the applicant shall be restricted to 70 documents to be provided to the respondent not less than two clear days prior to his examination.

  
Wilton-Siegel J.

DATE: December 30, 2009