

Case Name:

McFlow Capital Corp v. Simcoe Condominium Corp. No. 27

**RE: McFlow Capital Corporation, and
Simcoe Condominium Corporation No. 27 and Kenneth James**

[2011] O.J. No. 5660

2011 ONSC 7389

Court File No. CV-09-00376660

Ontario Superior Court of Justice

K.L. Campbell J.

Heard: November 14, 2011.

Judgment: December 12, 2011.

(27 paras.)

Counsel:

Ken Prehogan and Hilary Book, for the Applicant, McFlow Capital Corp.

George F. Vella, for the Respondent, Simcoe Condominium Corp. No. 27.

Martin Greenglass, for the Respondent, Kenneth James.

ENDORSEMENT

K.L. CAMPBELL J.:--

INTRODUCTION

1 This is a motion for directions in relation to the litigation of a motion by a court-appointed administrator of a condominium corporation. The administrator seeks court approval for his work on behalf of the condominium, and for the passing of his accounts and those of his solicitor.

THE BACKGROUND FACTS

2 Simcoe Condominium Corporation No. 27 (Simcoe) is a condominium property which consists of some 44 residential townhouse units in Orillia, Ontario. McFlow Capital Corporation (McFlow) has a mortgagee interest in 14 of these units. These 14 units are owned by 1652030 Ontario Limited, but this numbered company has defaulted on its mortgage. Kenneth James, a lawyer and a former director of Simcoe, has an interest in almost all of the remaining 30 units.

3 For more than a decade there have been ongoing disputes and litigation between Simcoe, McFlow and Mr. James.

4 On May 27, 2009, Forestell J. appointed Joseph Vero as administrator of Simcoe. Mr. Vero has now brought a motion seeking court approval of his report on his activities in that capacity through to the end of 2010, and court

approval for the passing of his own accounts, and the accounts of his solicitors, Vella & Pratt Professional Corporation (Vella & Pratt) for that same time period. That motion has not yet been heard.

5 The parties cannot agree on the documentation necessary for the passing of these accounts. Indeed, they sharply disagree as to the nature of the accounts that must be passed, and the materials that must be assembled to permit the parties, and ultimately the court, to properly review the actions of the administrator and the accounts. To address this contentious issue prior to the hearing of the motion to pass the accounts, McFlow has brought an interim cross-motion for court directions as to the materials that are required to permit the court to determine the motion by the administrator.

THE ORDER OF MADAM JUSTICE FORESTELL - MAY 27, 2009

6 In her May 27, 2009 *Endorsement*, Forestell J. concluded that "substantial misconduct or mismanagement or both" had been demonstrated in relation to the affairs of Simcoe over the previous 10 years. Accordingly, she granted the application by McFlow to suspend the powers of the Board of Directors, and to appoint Mr. Vero as the administrator of Simcoe under s. 131 of the *Condominium Act, 1998*, S.O. 1998, chap. 19. See: *McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27*, 2009 CanLII 28400 (S.C.J.) at para. 38, 43.

7 Forestell J. ordered Mr. Vero to "manage the affairs" of Simcoe "as if he were the board of directors" of the corporation, and expressly empowered and authorized him to obtain insurance, collect the common expenses payable by the owners, levy and collect any special assessments, enter into or terminate contracts for property management, maintain exclusive control of all corporate records, retain legal counsel, retain an accountant and auditor to prepare audited financial statements, employ advisors and experts, prepare and sign status certificates, be the sole signing officer (but with the power to delegate) on all corporate bank accounts and all documents, and to take any other steps "reasonably incidental" to the exercise of these powers.

8 With respect to the payment of fees, Forestell J. ordered that any expenditure or liability properly made or incurred by the administrator, including the fees of the administrator and the fees and disbursements of his legal counsel, be allowed in the passing of accounts. Forestell J. also ordered the administrator and his legal counsel to "pass their accounts from time to time" before a judge of this court. Forestell J. provided, however, that prior to the passing of such accounts, the administrator could, from time to time, "apply reasonable amounts" out of the corporation's monies against the "fees and disbursements" incurred at the normal rates and charges of the administrator or his counsel, on the basis that such amounts would constitute "advances" against "remuneration and disbursements" when and as approved by the court.

THE MOTION TO PASS ACCOUNTS

A. Introduction

9 Mr. Vero has brought a motion seeking court approval of: (1) his report in relation to his activities as the administrator of Simcoe for the time period from May 28, 2009 to December 31, 2010; (2) his own accounts as administrator in the amount of \$30,459.10, plus \$1,522.95 in taxes; and (3) the accounts of his solicitors in the amount of \$229,579.08 for fees and \$14,482.38 for taxes and disbursements. The accounts of the administrator and his solicitors relate to payment for services rendered during this same time period through to the end of 2010.

B. The Affidavit of the Administrator

10 In support of this motion, the administrator filed a 15-page affidavit, with many attachments. In this affidavit the administrator explained some of the history of Simcoe, and the unfortunate state of the condominium's affairs when he took over as the administrator. Simcoe had no Reserve fund and no bank accounts. McFlow and Mr. James had been fighting for years over the payment of common expenses and a large special assessment, and had engaged Simcoe in this litigation. McFlow had taken the position that, as it was not a tenant in possession of the units but only a mortgagee, it was not required to pay any monthly common expenses or any special assessment. 1652030 Ontario Ltd. had not paid any common expenses since March or April of 2008, and had not paid the special assessment.

11 The administrator also explained that, in April of 2009, Simcoe launched enforcement proceedings concerning the 14 units owned by 1652030 Ontario Ltd. for failure to pay the common expenses and a special assessment. In response, McFlow brought an application under s. 135 of the *Condominium Act, 1998* for an "oppression" remedy and sought injunctive relief. This was the situation when Forestell J. appointed Mr. Vero as the administrator of Simcoe.

12 Since that time, Mr. Vero has, according to his affidavit, been engaged in a variety of matters on behalf of Simcoe. With respect to 2009, he outlined how he had engaged in other litigation with Mr. James over the whereabouts

of various funds, including \$2,000,000 which was apparently being held in trust by Mr. James for clients resident in the Turks and Caicos. The administrator also opened a corporate bank account, levied a special assessment for common expenses (\$12,982.07 per unit), created a short-term budget for future expenses, and increased the insurance coverage to that which is typical for town house condominiums. When the unit owners and mortgagees failed to make any payments for most of 2009, Mr. Vero instructed his solicitors to register liens against all of the units, and then commence sale proceedings in relation to every unit of Simcoe. This led to the payment of \$451,636.77 by Mr. James in December of 2009. Most of this money was used to satisfy a construction lien held by a roofing company, with most of the remainder going to pay legal fees and disbursements.

13 As the administrator's affidavit outlined, in 2010 Mr. Vero caused the units not owned by Mr. James to be listed for sale for an aggregate price of \$1,276,000, in accordance with appraisals that had been received. Noticing that the common elements were in poor condition, Mr. Vero commissioned engineers to prepare a Reserve Fund Study required under the *Condominium Act, 1998*. When this report revealed that \$1,750,000 would have to be spent in the near future on repairs, Mr. Vero prioritized the matters requiring immediate attention, prepared a budget through to the end of 2010, and levied another special assessment against the unit owners. When no payments were received, Mr. Vero had his solicitors register liens against all of the units, and start sale proceedings in relation to every Simcoe unit. This resulted in further litigation amongst the parties. More particularly, McFlow brought a motion to have Mr. Vero removed as the administrator of Simcoe. This motion was dismissed by Himel J. on November 16, 2010. As part of her decision in relation to this issue, Himel J. ordered the administrator to provide his report to the court and pass accounts within two years of his appointment date (May 27, 2009) and every two years thereafter. See: *McFlow Capital v. Simcoe Corporation*, 2010 ONSC 6260, especially at para. 27.

14 With respect to his own accounts as the administrator, in his affidavit Mr. Vero has indicated that these were prepared on a monthly basis, but that on many occasions they could not be entered into the books of account for Simcoe because there were insufficient funds for him to be paid. He has concluded, however, that his accounts total \$30,459.10 for his fees and an additional \$1,522.95 for taxes on those fees. In support of this conclusion, Mr. Vero attaches a series of monthly invoices from his company, Vero Property Management Services Inc.

15 In relation to the accounts of his lawyers, Mr. Vero noted the significant participation of his counsel in the affairs of Simcoe during this time period, and he attached all of the legal accounts received by Simcoe from Vella & Pratt, during the relevant time period, totaling \$229,579.08 plus \$14,428.38 in taxes. Mr. Vero stated that, in his opinion, all of these legal services were necessary in order to carry on the business of Simcoe.

16 Finally, Mr. Vella attached to his affidavit the audited financial statements of Simcoe from June 1, 2009 to December 31, 2009, and the unaudited financial statements of Simcoe from January 1, 2010 to December 31, 2010. Mr. Vella explained that, based upon the documents and records that he received from Mr. James, the firm that Mr. Vella retained to prepare these financial documents could not provide an audited financial statement for the first half of 2009. These statements show that, as of December 31, 2010, Simcoe was in "overdraft."

C. The Current Positions of the Parties

17 The parties advance different positions as to what is required to be put before the court by the administrator to pass his accounts.

18 McFlow and Mr. James contend that the materials filed by the administrator and his counsel are wholly inadequate to permit the passing of accounts. They contend that, based upon these materials, the motion to pass the accounts should be dismissed, with costs. Further, they argue that until their accounts are passed with court approval, based upon further and better materials, the court should order that the administrator cease spending any further funds of Simcoe, and both the administrator and his solicitor should pay into court most, if not all, of the monies already advanced to them.

19 The administrator, on the other hand, while eager for the court's guidance as to the materials that are necessary for the passing of accounts, contends that the only accounts that need to be passed are the billing accounts of the administrator personally, and his counsel. In other words, the administrator contends that he need not provide any detailed information as to how he has run Simcoe since his appointment as its administrator, or account for how he has spent any of the funds of the condominium other than the funds advanced to himself and his solicitor. Further, the administrator contends that, in relation to the passing of the accounts of his solicitor, he need not give detailed explanations of the legal services provided, especially given that Simcoe is locked in ongoing litigation with McFlow

and Mr. James, and such detailed explanations would necessarily disclose confidential and privileged solicitor-client matters.

**THE PASSING OF ACCOUNTS BY AN ADMINISTRATOR OF A CONDOMINIUM CORPORATION -
THE APPLICABLE LEGAL PRINCIPLES**

20 Court-appointed professionals are obliged to formally report on their activities, and pass their accounts, in a variety of different circumstances. However, in each context, whether it be as a receiver of an ongoing business, as a trustee of a deceased person's estate, as a guardian of property, or as an administrator of a condominium corporation, the duties of such professionals in this regard are strikingly similar.

21 In *Re Bakemates International Inc.* (2002) 219 D.L.R. (4th) 72, Borins J.A., delivering the judgment of the Court of Appeal for Ontario, provided very helpful and detailed guidance, especially at para. 30-41, 64-72, as to the manner in which such court-appointed professionals should report to the court on their activities, the materials that are necessary to permit the court to pass on their accounts (and those of their lawyers), and how any disputes that arise in these circumstances may be resolved. Borins J.A. provided this legal guidance in the specific context of a court-appointed receiver who was reporting on his activities in relation to the sale of an ongoing business, and seeking to pass his own accounts and those of his lawyers. But, this guidance is, in my view, equally helpful in the present context, where a court-appointed administrator is reporting on his activities in relation to his running of a condominium corporation and is seeking court approval to pass his accounts and those of his solicitors.

22 Accordingly, for the purposes of providing the parties with the directions they seek, the following is a summary of the main principles of the *Re Bakemates International Inc.* decision as they should be applied in the factual context of the present case:

- (1) ***Report on the Affairs of the Condominium:*** The administrator should provide the court with a detailed report as to how he or she has administered the affairs of the condominium corporation during the time period in question. This report is required because the administrator is accountable to the court and to all other interested parties, and because the administrator, as a court officer, is required to discharge his or her duties properly. This report should contain a narrative description of what the administrator did during the specified time period, and detailed financial information (*ie.* a statement of the affairs of the corporation setting out its assets and liabilities, and a statement of receipts and disbursements). This report should include specific reference to the fees the administrator has claimed for him or herself, and the fees the administrator has paid to the solicitors retained to act on behalf of the condominium corporation. The payment of those fees is, of course, part and parcel of the business affairs of the corporation. The court will rely upon this report in reviewing the manner in which the administrator has conducted the affairs of the corporation. This report may (but need not) be verified by affidavit. See: *Re Bakemates International Inc.*, at para. 30, 32, 34.
- (2) ***Affidavit Regarding the Fees of the Administrator:*** The administrator should file with the court an affidavit that provides a detailed accounting of the fees that he or she has charged the corporation. Indeed, it is the duty of the administrator to render his or her account and verify it by affidavit. This affidavit should be drafted with the understanding that it must provide sufficient detail so that the administrator can satisfy his or her legal burden of proving to the court that the remuneration sought is "fair and reasonable" in all of the circumstances. This requirement ensures the veracity of the time spent by the administrator in carrying out his or her duties on behalf of the corporation, as well as the disbursements incurred by the administrator. It also provides an opportunity, if necessary, for interested parties to cross-examine the affiant under rule 39.02(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. See: *Re Bakemates International Inc.*, at para. 31-32, 35-36, 38-39, 64-65.
- (3) ***Affidavit Regarding the Fees of the Solicitors:*** Similarly, the law firm retained by the administrator to act on behalf of the condominium corporation should file an affidavit verifying the accounts that have been submitted to the administrator during the relevant time period. In other words, the bill of costs submitted by a solicitor should be supported by a detailed affidavit substantiating the hours spent and the disbursements. Again, this

affidavit ensures the accuracy of the bill of costs and disbursements, and provides an opportunity, if necessary, for interested parties to cross-examine the affiant under rule 39.02(1). See: *Re Bakemates International Inc.*, at para. 32, 35, 38-40, 64-65.

- (4) ***The Nature of the Accounts:*** The accounts must disclose, in detail, the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. The accounts should be prepared and assembled in a form that can be easily understood by any judicial officer who may be required to assess the accounts. They must also be understood by other legally interested parties. The accounts must also reveal the amount of time spent by any employees or contractors hired by the administrator in respect of any discrete aspects of the administration of the corporation. See: *Re Bakemates International Inc.*, at para. 37. See also: *BDO Dunwoody LLP v. Gottardo*, [2010] O.J. No. 277 (S.C.J.) at para. 21-22.
- (5) ***The Rights of Interested Parties:*** Any legally interested party may review the materials filed in support of the administrator's motion for purposes of assessing the affairs of the condominium corporation and the performance of the administrator. In an effort to reach their own conclusions regarding the affairs of the corporation and the management of those affairs by the administrator, interested parties may make informal inquiries of the administrator, and may cross-examine the administrator and/or the representative of the law firm who filed the affidavit regarding the legal accounts of the firm. Any interested parties also have the right to have the solicitor's accounts assessed. If an interested party objects to the accounts proposed to be passed, the party may also, prior to conducting any cross-examinations, tender their own affidavit evidence. In short, other interested parties must be given a "fair opportunity" to challenge the remuneration claimed. That requires that the interested parties have access to the relevant documentation, access to and the co-operation of the administrator, an opportunity to present any additional relevant evidence as to the appropriateness of the accounts, and the opportunity to cross-examine the affiants. See: *Re Bakemates International Inc.*, at para. 33, 39-41, 64-66.

23 It is important to recall that one of the purposes of the passing of accounts is to afford the administrator judicial protection in carrying out his or her professional duties, and to satisfy the court that the fees and disbursements charged to the corporation are both fair and reasonable. Another purpose is to afford other legally interested individuals the opportunity to question the administrator's activities during this time period. On the passing of accounts, the court has the jurisdiction to approve (or disapprove) of the administrator's past and current activities, even if the original order appointing the administrator was silent on this issue. The court can only address this issue, however, where the report from the administrator accurately summarizes all of the material activities, including disclosure of all receipts and disbursements arranged chronologically and supported by vouchers. The court will inquire into any complaints that may be raised about the calculations in the accounts and whether the administrator proceeded appropriately or in excess of the authority set out in the appointment order. The court may, in addition, consider complaints from legally interested parties concerning any alleged negligence by the administrator and/or any challenges to the administrator's remuneration. In summary, the passing of accounts provides an opportunity for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time the administrator has taken to perform his duties. See: *Re Bakemates International Inc.*, at para. 36.

THE SPECIFIC DIRECTIONS IN THE PRESENT CASE

24 These are the legal principles that are applicable in the present case. Further, I am prepared to provide the parties, and the administrator in particular, with the following more specific directions in this case. This list of directions is not meant to be an exhaustive list of ways in which the current materials may be improved, or serve as a warranty that, if followed, the materials will necessarily be viewed by the court as adequate. That decision will, of course, be for the judge hearing the motion itself.

- (1) ***Audited vs. Unaudited Financial Statements:*** The administrator has provided the audited financial statements of Simcoe for the latter half of 2009, which have been prepared by a firm of chartered accountants. To-date, however, the administrator has only provided unaudited financial statements of Simcoe for 2010, which have been prepared by Vero Property Management Services Inc. The administrator should provide audited financial

- statements for Simcoe for 2010, or provide an explanation as to why such audited statements are not available.
- (2) **Monthly Invoices for Services of Administrator:** The administrator should provide a detailed explanation for his services in relation to each of the monthly invoices provided to Simcoe by Vero Property Management Services Inc. The administrator should also outline what amounts have been paid by Simcoe to-date, and which amounts have been invoiced to Simcoe but remain unpaid.
 - (3) **Other Invoices for Services of Administrator:** The administrator should provide a detailed explanation for the other invoices that Simcoe has received from Vero Property Management Services Inc. in relation to his fee as administrator. For example, Simcoe received an invoice from Vero Property Management Services Inc. dated March 15, 2010, charging Simcoe a total of \$14,070.00 for the "Administrator's Fee" for the period of November 1, 2009 to March 15, 2010. There are other monthly invoices for the services of Mr. Vero for nearly the same overlapping time period of November 2009 to March 2010, totaling \$11,119.68. An explanation is required for the work that is being billed for under each separate invoice.
 - (4) **Other Invoices from Vero Property Management Services:** The administrator should provide the particulars for other invoices that Simcoe received from Vero Property Management Services Inc. For example, there is an invoice to Simcoe from Vero Property Management Services Inc. dated March 15, 2010 that charges a "unit price" of \$952.38 for a quantity of 10 units that are described on the invoice only as "Management Fee" for the 10 month period of June 1, 2009 to March 31, 2010. What is required is a detailed explanation of the services provided under this umbrella of "management."
 - (5) **Supporting Affidavit Regarding Invoices From Vella & Pratt:** The administrator should obtain an explanatory affidavit from a representative of Vella & Pratt verifying the accuracy of the fees and disbursements charged Simcoe by the firm. The solicitor's actual accounts should be presented as they would be on an assessment between a solicitor and his own client. Docket entries as well as a narrative of the nature of the legal work undertaken are to be provided. Of course, given that there is ongoing litigation between the parties, to the extent that there may be privileged information in the docket entries, that information may be redacted.
 - (6) **Revenues/Disbursements and Debts/Receivables:** The administrator should provide a clear and detailed record of all revenues and disbursements, recorded chronologically by date, showing the name of the payor/payee and the amount paid/received. The administrator should also provide an accounting of the current debts of Simcoe, together with Simcoe's current receivables.
 - (7) **Timetable for Motion:** Finally, subject to any other order of the court, the parties are to adhere to the following timetable in relation to this matter: (1) the administrator has until February 10, 2012 to finalize and serve his materials in support of his motion for court approval for his work for Simcoe, and for the passing of his accounts and those of his solicitor; (2) the other interested parties have until March 9, 2012 to prepare and serve their list of objections, and any evidentiary materials they may wish to provide in response to this motion; (3) any necessary cross-examinations are to be completed by March 30, 2012; and (4) the parties should now arrange to have the motion heard as soon as conveniently possible after March 30, 2012.

25 There may well be other issues that the administrator, his solicitors, and/or the other interested parties will want to address on the motion, but those are the directions that are appropriate at this time. It may be that, after the evidentiary record is complete, including any necessary cross-examinations, the administrator will need to consider preparing a *Factum* addressing any continuing contentious issues between the parties in an effort to assist the court.

OTHER ORDERS REQUESTED

26 McFlow and Mr. James argued that an order should issue preventing the administrator from spending any further monies in relation to the affairs of Simcoe, and requiring both the administrator and his solicitors to immediately pay back into court a significant portion of the funds that have been already advanced to them to-date for their professional services. I decline to make such an order. In my view, the propriety of the conduct of Mr. Vero in his

administration of the affairs of Simcoe, and the reasonableness of his accounts and those of his solicitors should await determination by the court, unencumbered by any implicit expression of the preliminary views of another judge who has not viewed the entire evidentiary record (as it may yet be significantly supplemented pursuant to these directions) and who has not heard full argument from the parties.

COSTS

27 The costs of this motion for directions are reserved to the judge hearing the motion by the administrator.

K.L. CAMPBELL J.

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