File No. CI 15-01-98054

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: The Appointment of a Receiver pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280

BETWEEN:

ROYAL BANK OF CANADA,

plaintiff,

- and –

KELLER & SONS FARMING LTD. and KELLER HOLDINGS LTD.,

defendants.

ERNST & YOUNG INC.
Receiver of Keller & Sons Farming Ltd. and Keller Holdings Ltd.

FIFTH REPORT OF THE RECEIVER

April 14, 2022

INTRODUCTION

1. On October 8, 2015 this Honourable Court granted an Order (the "Initial Order") appointing Ernst & Young Inc. as receiver ("EY" or the "Receiver") of all the assets, property and undertaking of Keller & Sons Farming Ltd. ("KSF") and Keller Holdings Ltd. ("Holdings") (collectively "Keller") pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), and Section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280 (the "QB Act").

2. EY filed its first report dated January 19, 2016 (the "First Report"), which provided information on the background of Keller, the activities of the Receiver, the Receiver's efforts to sell the assets of Keller and the Receiver's recommendations and conclusions. On the same date, the Receiver also filed its first confidential report (the "First Confidential Report") that was subject to the Receiver's application for an order to seal certain commercially sensitive material from the public record.

3. EY filed its second report dated March 30, 2016 (the "Second Report"), which principally dealt with the Receiver's efforts to sell the assets of Keller. A second confidential report dated March 30, 2016 (the "Second Confidential Report") was filed subject to the Receiver's application for a sealing order.

4. On April 8, 2016, following submissions by legal counsel for (a) Shilo Farms Ltd. ("SFL") and (b) Mr. Mark Keller in opposition to the Receiver's application for a sealing order, the Receiver agreed to provide parties in attendance with a partially redacted version of the Second Confidential Report.

5. On June 30, 2016, the Receiver filed a certificate with this Honourable Court confirming that the related transactions relating to the assets described in the First Confidential Report and the Second Confidential Report had closed, such that the First Confidential Report and the Second Confidential Report should no longer be sealed.

6. EY filed its third report dated August 5, 2016 (the "Third Report"), which described the Receiver's efforts to liquidate Keller's assets, its analysis of the claims of various stakeholders to the proceeds from the sale of assets, a proposed initial interim distribution to certain of Keller's creditors, and the Receiver's conclusions and recommendations.

7. EY filed its fourth report dated June 5, 2017 (the "Fourth Report"), which updated this Honourable Court with regard to the Receiver's efforts since the Third Report to liquidate and otherwise realize upon Keller's assets, including in respect to its analysis of the claims of various stakeholders to the proceeds from the sale of assets, a proposed second interim distribution to certain of Keller's creditors, and the Receiver's conclusions and recommendations.

8. The purpose of this fifth report of the Receiver (the "Fifth Report") is to advise and update this Honourable Court with respect to:

    a) the activities of the Receiver since the date of the Fourth Report;

    b) the Receiver's continuing efforts to realize on the assets of Keller;

    c) the Receiver's statement of receipts and disbursements;

    d) the Receiver's proposed distribution of remaining funds on hand;

    e) the professional fees of the Receiver and its legal counsel;

    f) the Receiver's motion seeking its discharge in respect of these proceedings; and

    g) the Receiver's conclusions and recommendations.

9. Capitalized terms not defined herein are as defined in in the Initial Order, the First Report, the Second Report, the Third Report or the Fourth Report.

10. The Receiver has established a web-site (www.ey.com/ca/keller) to facilitate communications with creditors and stakeholders. Copies of the First Report, the Second Report, the Third Report, the Fourth Report, this Fifth Report, notices to creditors, service lists and orders granted by this Honourable Court have been posted to the web site.

DISCLAIMER

11. In preparing this Fifth Report, the Receiver has relied upon unaudited financial information, books and records of Keller, financial information prepared by Keller and discussions with management of Keller and the Applicant.

12. The Receiver has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants (Canada) Handbook. Accordingly, the Receiver expresses no opinion or other form of assurance on the information contained in this Fifth Report.

13. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

ACTIVITIES OF THE RECEIVER SINCE JUNE 5, 2017

Employee and Payroll Matters

14. The Fourth Report described the deemed trust claim of Canada Revenue Agency ("CRA") related to the portion of withheld and unpaid income tax, and deducted, yet unremitted employee portion of employment insurance and Canada Pension Plan source deductions.

15. Pursuant to the Second Interim Distribution Order granted by this Honourable Court on June 30, 2017, the Receiver paid the amount of $54,396.96 to CRA, representing full payment of CRA's deemed trust claim.

Bankruptcy of KSF

16. As set out in paragraph 3(r) of the Initial Order, the Receiver's powers included the ability to assign either of KSF or Holdings into bankruptcy. On August 2, 2017, the Receiver executed the statutory documents to assign KSF into bankruptcy.

17. On August 3, 2017, the Office of the Superintendent of Bankruptcy ("OSB") issued a certificate of appointment, appointing Ernst & Young Inc. as trustee of the estate of KSF (the "Trustee"), subject to the ratification of the creditors of KSF at a first meeting of creditors on August 29, 2017. The Trustee's appointment was confirmed at this first meeting of creditors.

18. As the Trustee can complete its administration of the bankruptcy proceedings, and no funds are available for distribution to the unsecured creditors of KSF, Ernst & Young Inc. expects to file materials in the near future to seek its discharge as Trustee pursuant to the provisions of the BIA.

Closing of the Sale of Land, Buildings and Equipment

19. The Receiver's efforts to sell Keller's land, buildings and equipment assets (the "Keller Lands") are described in the First Report, the Second Report, the Third Report and the Fourth Report. The Receiver's application to sell the Keller Lands was opposed by SFL and Mr. Keller. On April 15, 2016, this Honourable Court approved the sale of the Keller Lands by way of an Approval and Vesting Order (the "Keller Lands AVO"). SFL and Mr. Keller filed notices of appeal in respect of the Keller Lands AVO. On May 2, 2016, the Manitoba Court of Appeal dismissed the appeals, with costs.

20. On July 26, 2016, the Receiver's Bill of Costs in respect of the appeals was taxed and allowed in the amount of $3,442.50 (the "Cost Award"); payable by SFL and Mr. Keller in equal portions.

21. SFL paid 50% of the Cost Award and a notice of satisfaction was filed. As of the date of this Fifth Report, Mr. Keller's 50% portion of the Cost Award in the amount of $1,721.25 remains unpaid (the "Residual Costs Award"). Given the administrative costs to pursue the Residual Costs Award, the Receiver will seek an order of this Honourable Court assigning its right, title and interest in the Residual Cost Award to RBC.

Amounts owed to Keller from SFL

22. The First Report, the Second Report, the Third Report and the Fourth Report describe transactions between Keller and SFL, including a lease of all of the land, buildings and equipment owned by Keller (the "SFL Lease").

23. The Receiver filed a statement of claim against SFL in Queen's Bench File No. CI-16-01-03621 (the "SFL Statement of Claim"). The SFL Statement of Claim also included a claim by the Receiver in its capacity as Receiver of all the partners of the Elk Haven Farms partnership ("Elk Haven") for reimbursement of fertilizer, crop inputs and subsoiling activities prior to the receivership.

24. SFL filed a statement of defence and counterclaim to the SFL Statement of Claim, denying that the Receiver was entitled to the relief sought, and counterclaiming against KSF for an order that, *inter alia*, any amounts payable by KSF to SFL be set off against any amounts that SFL as defendant may be found liable to pay against the Receiver.

25. Since the date of the Fourth Report, both the Receiver and SFL attended to examinations for discovery, and each party responded to a series of undertakings to provide additional information requested by the other party during the

examinations for discovery. Thereafter, the action was set down for trial, which proceeded on September 9 through 12, 2019.

26. On November 26, 2019, a Judgment was issued by this Honourable Court in respect of the SFL Statement of Claim. A copy of the decision (the "QB Decision") is attached as Appendix "A" to this Fifth Report.

27. The QB Decision made the following findings in respect of the SFL Statement of Claim:

    a) The Receiver was entitled to recover from SFL:

        i. the sum of $260,495.56 due pursuant to the SFL Lease, plus pre-judgment and post-judgment interest as set out in the SFL Lease; and

        ii. The sum of $42,000.00 on account of annual payments due by SFL pursuant to an easement agreement, plus interest as determined by the QB Act (the "Easement Claim").

    b) All other claims of the Receiver were dismissed; and

    c) SFL's claims for set off were dismissed.

28. The Receiver advised SFL that in accordance with the provisions of the SFL Lease, interest of approximately $194,900 had accrued on amounts due to KSF from the due date of such amounts to the date of the QB Decision.

29. On January 30, 2020, the Receiver filed a Notice of Appeal of the QB Decision (the "Appeal"), claiming, *inter alia*, that the QB Decision failed to consider or conduct any analysis of the Receiver's claim (on behalf of Elk Haven) against SFL on the basis of unjust enrichment relating to crop inputs for which SFL obtained the benefit.

30. On February 6, 2020, SFL filed a Notice of Cross Appeal (the "Cross Appeal"), claiming, *inter alia*, that the QB Decision found that the evidence did not support collateral agreements between SFL and Mr. Keller entitling SFL to set-off any amounts due pursuant to the SFL Lease.

31. On June 7, 2021, the Manitoba Court of Appeal released its decision in respect of the Appeal and the Cross Appeal. A copy of the decision (the "Appeal Decision") is attached as Appendix "B" to this Fifth Report.

32. The Appeal Decision dismissed the Receiver's appeal, and partially allowed a portion of SFL's cross appeal, such that SFL was permitted to set-off amounts payable by SFL in respect of the Easement Claim due to KSF against amounts owed by KSF to SFL in respect of unpaid rent arrears.

33. The Appeal Decision upheld the portion of the QB Decision that the Receiver was entitled to recover the amounts due pursuant to the SFL Lease, plus pre-judgment and post-judgment interest as set out in the SFL Lease.

34. Subsequent to the QB Decision, SFL had remitted funds to legal counsel for the Receiver in the amount of $503,490.43, representing amounts owing by SFL pursuant to the QB Decision. Based on the Appeal Decision, legal counsel returned a portion of these funds to SFL and remitted the balance to the Receiver. As a result of the foregoing, the Receiver was entitled to and realized the sum of $455,011.26 in respect of its aggregate claims against SFL.

Claim of Custom Truck Sales

35. The Second Report, the Third Report and the Fourth Report describe a purported garage keeper's lien claim filed by Custom Truck Sales Inc. ("CTS") in respect of a 2008 Kenworth T800 truck owned by KSF (the "T800").

36. Paragraph 70 of the Third Report noted that the Receiver had realized proceeds of $41,000 in respect of the T800. CTS had claimed a purported garage keeper's

lien against the proceeds realized on the T800. Pursuant to distribution orders granted by this Honourable Court, the Receiver has held the sale proceeds in a separate interest-bearing trust account. As of the date of this Fifth Report, the Receiver is holding aggregate proceeds of $43,825.04 (the “Disputed Proceeds”) in this account.

37. In July 2016, CTS commenced an action against SFL in Queen’s Bench File No. CI-16-01-02918 (the “CTS Action”). SFL subsequently sought leave of this Honourable Court to file a third-party claim against the Receiver in the CTS Action.

38. On December 14, 2017, this Honourable Court declined to grant leave to SFL to issue the third-party claim against the Receiver. Costs of $2,256.75 were awarded to the Receiver, which was paid to the Receiver by SFL.

39. As described in paragraph 74 of the Third Report, and as further set out at pages 9 and 10 of the security opinion provided by legal counsel for the Receiver found at Appendix “A” to the Third Report, the Receiver remains of the view that the proceeds from the sale of the T800 are subject to the general security interest of RBC.

Complaint filed with the Office of the Superintendent of Bankruptcy

40. On March 26, 2018, the Receiver was advised by the OSB that Mr. Keller had filed a complaint in respect of the Receiver’s conduct. The principal allegations raised included:

   a) the conduct of Ernst & Young Inc. prior to the receivership;

   b) the Receiver’s process to sell the assets of KSF; and

   c) a specific allegation that the Receiver had omitted information in reports filed with this Honourable Court in respect of a pipeline construction project.

41. On April 4, 2018, the Receiver provided its written comments in respect of Mr. Keller's complaints to the OSB. The Receiver expressly denied all allegations raised by Mr. Keller and provided supporting information to the OSB to substantiate the Receiver's denial of the allegations.

42. The OSB provided the Receiver with a copy of a letter dated April 30, 2018 addressed to Mr. Keller. A copy of the letter to Mr. Keller is attached as Appendix "C", confirming that the OSB would be taking no further action in the matter. As of the date of this Fifth Report, the Receiver has had no further communication from Mr. Keller or the OSB in respect of Mr. Keller's complaint.

REALIZATION OF ASSETS

Sale of Land, Buildings and Equipment

43. Subsequent to the date of the Fourth Report, the Receiver was paid an amount of $207.99 in respect of the final residual proceeds from trust accounts operated by the Receiver's legal counsel. As a result, the final cash proceeds realized by the Receiver in respect of the Keller Lands is $20,030,677.60. Inclusive of a property tax credit in favour of the purchaser, the aggregate proceeds realized by the Receiver for the Keller Lands is $20,049,640.60.

Refunds of Operating Costs

44. In August 2017, the Receiver received a payment from Manitoba Hydro in the amount of $47,756.60, which was deposited into the receivership estate trust account. This payment related to interconnection revenue received by Manitoba Hydro for former KSF-owned lands.

45. The Receiver has made subsequent inquiries with Manitoba Hydro to determine whether any additional revenue was received for other parcels comprising the

Keller Lands. Manitoba Hydro officials have confirmed that no additional payments are outstanding to be processed.

Proceeds realized in respect of Elk Haven

46. During the course of the receivership proceedings, the Receiver realized aggregate proceeds of $126,698.01 in respect of proceeds belonging to Elk Haven, all of which were deposited in a separate interest-bearing trust account under the control of the Receiver:

    a) Cash proceeds from a pre-receivership Elk Haven bank account at Bank of Montreal in the amount of $45,000.00;

    b) Producer refunds from the Keystone Potato Processors Association in the amount of $81,563.99; and

    c) Interest earned on funds on hand of $134.02.

47. Prior to the receivership, Elk Haven had provided a limited guarantee in the amount of $125,000 in favour of MLT Aikins LLP ("MLT") which was further supported by a general security agreement, to secure obligations of KSF in respect of legal services provided to KSF.

48. The Receiver's legal counsel provided its opinion that the security held by MLT was valid and enforceable in accordance with its terms. Based on a demand for payment of pre-receivership legal fees payable to KSF's legal counsel, the Receiver in its capacity as receiver of the partners of Elk Haven issued a payment of $125,000.00 in full satisfaction of the secured claim of MLT.

49. As a result, the Receiver is in possession of net funds of $1,698.01, which has been held in a separate trust account on behalf of Elk Haven. No other creditors or parties have either contacted or filed claims with the Receiver claiming an interest in these funds.

50. The Receiver is of the view that these net funds would accrue to KSF and Holdings, the partners of Elk Haven.

51. Concurrent with the Receiver's application for its discharge, the Receiver recommends that this Honourable Court grant an order authorizing the Receiver to distribute these funds to the secured creditors of KSF and Holdings, in accordance with the Intercreditor Agreement.

THE RECEIVER'S ANALYSIS OF THE CLAIMS OF VARIOUS STAKEHOLDERS TO THE PROCEEDS FROM THE SALE OF KELLER'S ASSETS

Independent Security Opinion from TDS

52. The Third Report included an opinion from the Receiver's legal counsel confirming the security interest of RBC over the property of KSF ranked in priority to the claims of all other creditors, including a subsequently appointed bankruptcy trustee, with the exception of certain equipment financiers.

53. The Receiver's legal counsel further confirmed that both RBC and NBC had valid prior-ranking security positions with respect to all of the pari passu security described in an intercreditor agreement between RBC and NBC, subject only to a claim of Concentra Financial Services Association and certain defined statutory claims of CRA in respect of unpaid employee source deduction remittances. These prior-ranking claims were paid by the Receiver pursuant to distribution orders issued by this Honourable Court.

Claims to Proceeds for Specific Pieces of Equipment

54. The Second Distribution Order dated June 30, 2017 directed the Receiver to continue to hold the proceeds of the T800 in a separate interest-bearing trust account, pending agreement with the claimants or further order of this Honourable Court.

55. To date, no additional information has been provided to the Receiver that would change its previous conclusions and recommendations in respect of the Disputed Proceeds. As a result, the Receiver's recommendations and conclusions as set out in the Third Report, including its conclusion that the Disputed Proceeds are subject to the prior-ranking general security interest of RBC, remain unchanged.

56. Based on the foregoing, the Receiver recommends that this Honourable Court grant an order authorizing the Receiver to distribute the Disputed Proceeds to RBC in accordance with the Receiver's recommendations in the Third Report.

PROFESSIONAL FEES OF THE RECEIVER AND ITS LEGAL COUNSEL

57. A summary of the accounts for the Receiver and its legal counsel were attached as Appendix B to the Fourth Report.

58. Updated accounts for the Receiver and its legal counsel are set out in Appendix "D" to this Fifth Report. In aggregate, the Receiver's total fees during the receivership are $574,876.11 (excluding GST).

59. A summary of the aggregate bills and costs (excluding GST) for TDS is also set out in Appendix D. The total fees and disbursements paid to TDS to date are $252,103.02 (excluding GST).

60. The Receiver has examined the legal bills of costs referred to above. In the Receiver's opinion, the services referred to therein have been duly authorized and rendered and the charges therein are reasonable.

61. In the Receiver's view the fees and disbursements incurred by the Receiver and its counsel are reasonable. The hourly rates charged by the Receiver and its counsel throughout the course of these proceedings are comparable to the hourly rates charged by EY and TDS for services rendered in relation to similar proceedings. If so requested by this Honourable Court, detailed invoices relating

to the professional services provided by the Receiver and its counsel can be made available.

THE RECEIVER'S STATEMENT OF RECEIPTS AND DISBURSEMENTS

62. The Receiver's statement of receipts and disbursements for the period May 29, 2017 to April 10, 2022 (the "Reporting Period") is attached as Appendix "E" to this Fifth Report.

63. The Receiver's statement of receipts and disbursements also includes a column indicating the Receiver's aggregate receipts and disbursements for the period from the commencement of the receivership on October 8, 2015 to April 10, 2022 for reference purposes.

64. Receipts during the Reporting Period totalled approximately $522,000, comprised of the following:

    a) Proceeds of approximately $455,000 in respect of the SFL Statement of Claim;

    b) Various refunds of approximately $52,000, representing payments from Manitoba Hydro for revenue realized related to the Keller Lands and the Cost Award; and

    c) Miscellaneous receipts of approximately $15,000 comprised of interest earned on estate trust funds.

65. Disbursements during the Reporting Period totalled approximately $662,000, comprised of the following:

    a) Interim distributions pursuant to the order of this Honourable Court to CRA, RBC, and NBC in the amount of approximately $438,000

b) Professional fees of approximately $209,000, representing payments in respect of advances on the Receiver's fees and disbursements, as well as the fees and disbursements of TDS; and

c) Miscellaneous disbursements of approximately $15,000 which principally represents amounts paid for GST and PST on disbursements, and other miscellaneous disbursements.

66. As at April 10, 2022, the Receiver had cash on hand of approximately $586,000, which represents the cumulative excess of receipts over disbursements for the period from the commencement of the receivership to April 10, 2022. As set out in Appendix E, this amount is comprised of approximately $43,800 related to the Disputed Proceeds (with accrued interest), and the balance in the Receiver's estate trust bank account of approximately $542,300.

67. All outstanding and previously issued Receiver's Certificates that supported outstanding borrowings in respect of the Receiver's Borrowings Charge (as defined in the Initial Order) have been fully repaid, such that the outstanding borrowings of the Receiver are $nil.

THE RECEIVER'S PROPOSED DISTRIBUTION OF EXCESS FUNDS ON HAND

68. As noted above and inclusive of the Disputed Proceeds, the Receiver has cash on hand of approximately $586,000. Based on the information as set out in the Third Report, the Fourth Report and this Fifth Report, the Receiver is of the view that RBC and NBC are entitled to the remaining funds on hand.

Claims of RBC and NBC

69. Each of RBC and NBC have advised the Receiver that the amounts owed to them are as follows:

a) RBC – approximately $16,908,000, less previous interim distributions of approximately $12,696,000 as authorized by this Honourable Court, for a balance owing of approximately $4,212,000; and

b) NBC – approximately $9,012,000, less previous interim distributions of approximately $8,224,000 as authorized by this Honourable Court, for a balance owing of approximately $788,000.

70. The Receiver has reviewed the provisions of the Intercreditor Agreement between RBC and NBC, which, *inter alia*, stipulates repayment to each creditor based on certain types of asset realizations. The Receiver is recommending that this Honourable Court authorize distributions of the following amounts:

a) $444,103.38 be distributed to RBC in accordance with the terms of the Intercreditor Agreement; and

b) $92,037.75 be distributed to NBC in accordance with the terms of the Intercreditor Agreement.

71. The Receiver has communicated to each of RBC and NBC that it would maintain a reserve of approximately $50,000 to fund the balance of the receivership, including the hearing for the Receiver's discharge. Based on the Intercreditor Agreement, any residual amounts remaining will be distributed 44.73% to NBC to the extent of its claim, and the balance to RBC.

72. The Receiver recommends that in addition to the foregoing distributions, this Honourable Court grant an order authorizing the distribution of any remaining Elk Haven proceeds to RBC.

CONCLUSION AND RECOMMENDATIONS

73. The Receiver respectfully recommends that this Honourable Court grant an order:

a) approving the Fifth Report and the conduct and activities of the Receiver described herein, including the Receiver's Statement of Receipts and Disbursements and the accounts of the Receiver and its legal counsel;

b) assigning the Receiver's right, title and interest in the Residual Cost Award to RBC;

c) authorizing the distributions proposed by the Receiver as described herein, including any residual distributions; and

d) discharging the Receiver, subject to any residual activities to conclude the distribution of final amounts to RBC and NBC.

All of which is respectfully submitted this 14th day of April, 2022.

ERNST & YOUNG INC.
In its capacity as the Court-Appointed Receiver of
Keller & Sons Farming Ltd. and Keller Holdings Ltd.

Per:

Joe Healey, CPA, CA, FCIRP, LIT
Senior Vice President

APPENDIX A

to the Fifth Report of the Receiver

dated April 14, 2022

Date: 20191126
Docket: CI 16-01-03621
(Winnipeg Centre)
Indexed as: Ernst & Young Inc. v. Shilo Farms Ltd.
Cited as: 2019 MBQB 173

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	APPEARANCES:
ERNST & YOUNG INC. in its capacity as Court-appointed Receiver of KELLER & SONS FARMING LTD. and KELLER HOLDINGS LTD., and the partnership carrying on business under the firm name and style ELK HAVEN FARMS,	Ross McFadyen for the plaintiff
plaintiff,	Richard Schwartz and Amanda Verhaeghe for the defendant
- and -	
SHILO FARMS LTD.,	
defendant.	Judgment delivered: November 26, 2019

TOEWS J.

Introduction

[1] This is an action advanced by the plaintiff Ernst & Young Inc. in its capacity as the court appointed receiver (the "Receiver") of Keller & Sons Farming Ltd. ("KSF") and Keller Holdings Ltd. ("KH") as against the defendant Shilo Farms Ltd. ("Shilo"). The Receiver also brings this action on behalf of a partnership consisting of KSF and KH known as Elk Haven Farms ("Elk Haven").

[2] The Receiver was appointed by this court on October 8, 2015. There is no dispute that prior to its appointment, the Receiver had been involved with KSF and KH for a period of approximately one year in its capacity as the financial advisor for one of their primary secured creditors, National Bank of Canada ("NBC"). In or about March of 2015, the Receiver was also appointed to act as the financial advisor for the other primary secured creditor of KSF and KH, Royal Bank of Canada ("RBC").

[3] The Receiver's claim is summarized in its written argument filed with the court. It can be broken down into the following three categories:

> (a) A claim for unpaid rent (and a related, but smaller, claim for damage to equipment) arising pursuant to the written Farm Lease entered into between KSF and KH, as Lessors, and Shilo, as Lessee, on May 1, 2015 (the "Farm Lease");
>
> (b) A claim asserted on behalf of Elk Haven, for crop inputs and work that was completed in the fall of 2014, after harvest, in respect of land that was subsequently farmed by Shilo in the 2015 crop production season; and
>
> (c) A claim arising pursuant to an Easement Agreement dated as of December 2007 between KSF, as grantor, and Shilo, as grantee (the "Easement Agreement").

The Evidence

[4] Numerous documents have been included by the parties in an agreed book of documents (Exhibit 1) for the purposes of this action. In addition to the *viva voce* evidence presented at the trial of this matter, the parties have filed an agreed statement of facts with the court (Exhibit 2). It is instructive to reproduce those facts for the purposes of these reasons:

> 1. Ernst & Young Inc. (the "Receiver") was appointed as receiver of Keller & Sons Farming Ltd. ("KSF") and Keller Holdings Ltd. ("KH") pursuant to an Order of this Honourable Court dated October 8, 2015 in Queen's Bench

File No. CI 15-01-98054, which is found at Tab 25 of the Agreed Book of Documents.

2. Prior to the appointment of the Receiver, the following had occurred:

(a) Shilo Farms Ltd. ("Shilo"), as Lessor, and KSF, as Lessee, entered into a written Farm Lease dated July 31, 2013 (the "Shilo Farm Lease"), which is found at Tab 5 of the Agreed Book of Documents. The Shilo Farm Lease was to be for a three year term commencing in the 2014 crop year. The total rent payable by KSF to Shilo for the 2014 crop year was $2,900,000.00 plus Goods and Services Taxes ("GST"). KSF defaulted under the payment terms of the Shilo Farm Lease, leaving the sum of $1,567,500.00, inclusive of GST, owing to Shilo by the end of the 2014 crop year. Shilo terminated the Shilo Farm Lease on April 1, 2015, and the said Termination of Lease is found at Tab 10 of the Agreed Book of Documents.

(b) In or about late 2014, National Bank of Canada, a secured creditor of KSF and KH, retained Ernst & Young Inc. to undertake a review of the financial affairs of KSF and KH. Subsequently, in March of 2015 the Royal Bank of Canada, another secured creditor of KSF and KH also retained Ernst & Young Inc., thus creating a joint retainer arrangement; and,

(c) KSF and KH, as Lessors, and Shilo, as Lessee, entered into a written Farm Lease dated May 1, 2015 (the "KSF Farm Lease"), which is found at Tab 15 to the Agreed Book of Documents.

3. The total rent payable by Shilo under the KSF Farm Lease to KSF and KH was $750,000.00, plus applicable GST, for an aggregate total of $787,500.00. The following payments were made by Shilo to KSF on account of the KSF Farm Lease:

(a) $225,000.00 on May 4, 2015;
(b) $168,750.00 on May 8, 2015; and
(c) $133,254.44 on October 1, 2015.

4. Aside from those referenced in the paragraph above, no further payments have been made by Shilo on account of rent pursuant to the KSF Farm Lease.

5. Following the return by Shilo to the Receiver in early 2016 of equipment which was the subject of the Farm Lease, the Receiver alleges it incurred the following costs relating to certain items of such equipment:

(a) $726.77 for welding and fabrication of new brackets relating to the bucket on a John Deere 7630 tractor unit, as reflected in invoice No. 3324F dated February 19, 2016 from TOTAL Works Truck & Equipment (found at Tab 37 of the Agreed Book of Documents);

(b) $3,366.78 to replace the front hood grill and headlights on a John Deere 7630 tractor unit, as reflected in Invoice No. T33673 dated March 16, 2016 from Enns Brothers (found at Tab 44 of the Agreed Book of Documents);

(c) $417.50 to replace flat tires on a John Deere 8630 tractor and auger unit, as reflected in the invoice dated March 3, 2016 from John Skrzypek Tire Service Ltd. (found at Tab 40 of the Agreed Book of Documents);
(d) $25,581.98 to repair and replace damaged boom and systems on a John Deere 4940 sprayer, as a result of the unit not being properly winterized, as reflected in Invoice No. T33658 dated March 15, 2016 from Enns Brothers (found at Tab 43 of the Agreed Book of Documents); and
(e) $1,507.40 to replace glass on a cab door of a John Deere 326D skid steer unit, as reflected in invoice No. 1339904 dated March 22, 2016 from Brandt Tractor Ltd. (found at Tab 45 of the Agreed Book of Documents).

6. A&M Farm Ventures, an entity controlled by Tom and John Adriaansen, purchased the farm property identified as "Field 10" (Section 23-10-17 WPM) in the records of Elk Haven Farms and KSF at some point in early 2015.

7. The following payments were made from Elk Haven Farms Account No. 50004351 at the Bank of Montreal to R.D. Offutt Company on account of the Redemption Agreement (as reflected in the documentation at Tabs 11 and 14 of the Agreed Book of Documents):
(a) $367,000.00 on April 27, 2015;
(b) $800,000.00 on June 5, 2015; and
(c) $445,233.28 on July 6, 2015.

8. Shilo alleges that it incurred the following expenses in relation to work done to lands and equipment owned by KSF and/or KH in the Fall of 2015 to ready the lands for the next farming year:
(a) $37,495.50 for labour and seed to plant rye on certain parcels of land (as reflected in Invoice No. 100132 dated April 25, 2016 from Shilo found at Tab 47 of the Agreed Book of Documents);
(b) $36,976.80 for labour and materials to fertilize certain parcels of land (as reflected in Invoice No. 100139 dated April 29, 2016 from Shilo found at Tab 48 of the Agreed Book of Documents);
(c) $14,280.00 for labour to cultivate and level certain parcels of land (as reflected in Invoice No. 100140 dated May 3, 2016 from Shilo found at Tab 49 of the Agreed Book of Documents);
(d) $24,552.15 for labour and seed to plant grass/alfalfa on certain parcels of land (as reflected in Invoice No. 100142 dated May 4, 2016 from Shilo found at Tab 50 of the Agreed Book of Documents;
(e) $6,354.55 for parts to repair a 1998 Chev Truck 3500 (as reflected in Invoice No. 100106 dated March 3, 2016 from Shilo found at Tab 39 of the Agreed Book of Documents);
(f) $3,465.00 for labour to repair a Sprayer 4940 (as reflected in Invoice No. 100063 dated November 30, 2015 from Shilo found at Tab 32 of the Agreed Book of Documents); and,
(g) $378.00 for labour done on field 150 – wire work guidance (as reflected in Invoice No. 100074 dated December 9, 2015 from Shilo found at Tab 33 of the Agreed Book of Documents).

> 9. The Receiver has agreed to abandon its claim pursuant to the Farm Lease in respect of alleged damage and destruction to irrigation systems, as referenced at paragraphs 1(e) and (f), 16 and 17 of the Statement of Claim.

[5] Not all documents that may be considered relevant to this action were admitted by the agreement of the parties. In particular, the defendant disputes the admissibility of a number of documents on the basis of "settlement privilege". They were filed as Exhibits A through G inclusive during the course of the trial by the plaintiff.

[6] I advised the parties that I would consider their admissibility in the course of these reasons following my consideration of the arguments and law submitted by the parties after the conclusion of the evidence. I would note that there was no restriction placed on the parties in referring to these documents in the course of presenting their evidence and indeed, the parties' *viva voce* and other evidence regarding the purpose of these documents is relevant to my determination as to their admissibility. I will deal with this issue prior to setting out the position of the parties in respect of the three substantive categories of the claim being advanced by the plaintiff.

Settlement Privilege

[7] Exhibits A through G can be generally described as e-mails involving on the one hand Mr. Bruce Taylor, the lawyer representing KSF, KH and Mr. Keller personally and on the other, Mr. Michael Dow, the lawyer for RBC which, pursuant to an agreement with NBC, was the lead secured creditor in respect of the enforcement of security against the assets of KSF and KH. There is also one e-mail involving Mr. Taylor and a representative of Ernst & Young, Mr. Healey, who was produced as the plaintiff's main witness in this case.

[8] It is the Receiver's position that these documents are admissible on the basis that there is no dispute to their authenticity and their relevance to the issues at trial. It takes issue with the defendant's position that settlement privilege should be recognized in this case. It is the plaintiff's position that the conditions necessary to establish settlement privilege are not present in this case.

[9] There is no substantive disagreement between the parties as to what conditions must be present in order to establish settlement privilege. In my opinion, the principles of law relevant to the determination of whether settlement privilege exists in this case are clear and have been summarized in the following manner:

a) A litigious dispute must be in existence or within contemplation;

b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

c) The purpose of the communication must be to attempt to effect a settlement.

(Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant The Law of Evidence in Canada*, Fifth Edition (Toronto: LexisNexis Canada Inc., 2018)

[10] The Receiver's position is that the communications were not made in the course of efforts to negotiate the settlement of a dispute and do not contain any clear discussion of a settlement of the ongoing issues pertaining to the indebtedness owing to RBC and NBC. It argues that there is nothing in the communications which relate an offer of compromise from either side on the substantive issues in dispute. The Receiver

characterizes these e-mails as the communications of Mr. Taylor to provide the representatives of RBC and NBC with information relevant to the issue of how and when his clients might reduce or even ultimately satisfy their indebtedness.

[11] I agree with this characterization of these documents. In my review of these documents, I see nothing that would support the characterization of these documents as an attempt to settle the disputes that are the subject of this claim. Nor is there any evidence to suggest that they were prepared with the express or implied intention that they would not be disclosed to the court in the event that negotiations failed. Although I make no finding in this regard, it does not appear to me that there was a litigious dispute in existence or within contemplation at the time they were created.

[12] In the result, I hold that the doctrine of settlement privilege does not apply so as to render these documents inadmissible in this action. Accordingly, I will admit all of these documents as exhibits in this action. To the extent that it may be necessary to refer to them either individually or collectively in the course of these reasons, I will continue to refer to them as Exhibits A through G, rather than assigning a numerical designation to each one.

A. The claim for unpaid rent and the damage to equipment arising pursuant to the farm lease entered into between KSF and KH and Shilo on May 1, 2015 (the Farm Lease)

[13] There is no dispute that Shilo entered into the Farm lease with KSF on May 1, 2015. The total rental amount due from Shilo to KSF under the Farm Lease was $787,500.00 (inclusive of GST). In accordance with the terms of the Farm Lease, Shilo

made three payments towards the rent due under the Farm Lease, leaving an unpaid balance on account of rent of $260,495.56 (inclusive of GST).

[14] The plaintiff points out that the Farm Lease has an express provision which states: "All Rent shall be paid without any deduction or abatement on any account whatsoever." On this basis the plaintiff asserts that Shilo has expressly agreed that it would not be entitled to assert any kind of set-off against the rental payments due to KSF.

[15] The plaintiff argues that not only does the express language of the Farm Lease prohibit any set-off, there was no collateral agreement between KSF and Shilo whereby the existing rental arrears due from KSF to Shilo could be set-off against the rent due from Shilo to KSF.

[16] In support of that position, the plaintiff points to the evidence of Mr. Keller and Mr. Johnson at trial, that both parties remained hopeful that other arrangements would be worked out in due course, separate and apart from the Farm Lease, for payment of rental arrears owing by KSF to Shilo for the prior year when KSF rented land from Shilo. As pointed out in the agreed statement of facts, KSF was unable to pay the full amount due under that prior lease (the Shilo Farm Lease). A balance of $1,567,000 was owing to Shilo by KSF by the end of the 2014 crop year, which is one aspect of Shilo's set-off claim.

[17] The plaintiff also disputes Shilo's claim for set-off in the amount of $248,091.01 in respect of certain expenditures that it incurred relating to repairs to the irrigation system and equipment on land owned by KSF, which Shilo incurred in 2015 in order to produce its crop for the 2015 growing season.

[18] In addition, Shilo is advancing a set-off claim in respect of various invoices which it presented to the plaintiff after its appointment as Receiver. The plaintiff disagrees that it is responsible for the payment of those invoices. Those invoices relate to the expense of goods and services incurred by Shilo prior to the appointment of the Receiver and are particularized in paragraph 8 of the agreed statement of facts which has been previously reproduced.

[19] The plaintiff argues that there is no evidence which supports a conclusion that there would be any right of set-off against the rent due under the Farm Lease. In this respect, the plaintiff argues that the correspondence sent by Mr. Taylor to the plaintiff's representative, Mr. Healey, set out in Exhibit B supports its position that KSF anticipated receiving the full rental amount of $750,000 (exclusive of GST) from Shilo pursuant to the Farm Lease. The plaintiff argues that it is apparent that KSF did not contemplate a set-off of any kind would be asserted by Shilo against the rental payments due under the Farm Lease. Other correspondence similarly indicates that KSF anticipated receiving the full amount of the rental payment from Shilo under the Farm Lease, without any set-off.

[20] The plaintiff takes issue with Shilo's argument that KSF was in breach of an obligation based on a "strict understanding" to ensure that the irrigation system on the lands rented to Shilo for 2015 would be fully operational. The plaintiff says that there are no terms at all in the Farm Lease or otherwise dealing with the condition of the irrigation system on the land and that the land was being rented on an "as is" basis.

[21] The plaintiff disagrees that there is an implied term in leasing arrangements for potato farming land that the lessor has an obligation to ensure that the irrigation system

is operational at the commencement of the lease. The plaintiff points out that in the case of the Shilo Farm Lease, which dealt with the lease of land by KSF from Shilo in prior years, there was an express provision dealing with capital improvements to the irrigation system provided by Shilo on the land rented by KSF. This, the plaintiff argues, is indicative of the fact that the parties agreed that KSF would not be obligated to make the necessary repairs or improvements to the irrigation system following execution of the Farm Lease.

[22] The plaintiff further argues that in view of the relatively small amount of the repairs necessary to repair the irrigation system in comparison to the total annual revenue derived from Shilo's potato farming operations, it is reasonable to assume that Shilo was prepared to pay these costs when it concluded the Farm Lease on May 1, 2015. The plaintiff maintains that Shilo assumed that cost because it knew that it would have the benefit of the irrigation system for the 2015 crop production year and possibly further into the future, given that by this point Shilo was contemplating the possibility of acquiring the land that it was renting from KSF.

[23] The plaintiff also points out that it is telling that at no point before it tendered the rental payments to KSF in May of 2015, did Shilo assert any kind of agreement relating to a set-off of these irrigation system costs even though these costs had already been incurred.

[24] With respect to the expenses which Shilo has referenced in paragraph 8 of the agreed statement of facts, the plaintiff points out that not only is set-off specifically precluded by the Farm Lease, these expenses were all incurred after the plaintiff was appointed Receiver in October of 2015. This fact would preclude the possibility of any

collateral agreement in place between KSF and Shilo allowing for these amounts to be asserted as a set-off against the rents due under the Farm Lease.

[25] The other aspect of the plaintiff's claim under the Farm Lease relates to damage to certain items of the equipment rented by Shilo under section 5.4 of the Farm Lease. The $31,600.43 claimed by the plaintiff related to the repair of equipment owned by KSF after it was returned to the possession of the Receiver from Shilo. Mr. Healey testified on behalf of the plaintiff that these costs related to damage caused by Shilo during the term of the Farm Lease.

[26] In response to the plaintiff's arguments in respect of the rent owing under the Farm Lease, the defendant Shilo submits that it should be entitled to set off $1,914,540.86, comprised of what remains owing to it under the Shilo Lease, reimbursement for costs incurred for the Keller irrigation system, and reimbursement for costs incurred for or to the benefit of the plaintiff in the fall of 2015.

[27] In advancing this claim for set-off the defendant Shilo points out that discussions between Mr. Keller and Mr. Johnson respecting Shilo's right to set off for amounts owing under the Shilo lease all occurred prior to the receivership order while Mr. Keller had full control to bind KSF and KH and Elk Haven. It was Mr. Keller's testimony that he never expected Shilo to make any sort of payments to KSF or KH for the Elk Haven crop inputs because of how much money was owed to Shilo by his group of companies.

[28] The defendant states that Mr. Keller promised Shilo that the lands it would rent would be "under water" when the parties enter into the Farm Lease. The defendant also states that Shilo would not have paid for the irrigation repairs had it not been critical to

the crop and without the understanding that if not paid, it would set-off the costs against the final rent payment due on the Shilo Farm Lease.

[29] The defendant points out that the plaintiff was actively involved in overseeing the KSF and KH operations for approximately a year prior to the receivership order and knew about the claims. Yet, the defendant submits, the plaintiff remained silent on the issues related to the Elk Haven 2015 crop inputs or the repairs required to make the irrigation system operational when Mr. Keller and Mr. Johnson were making arrangements for Shilo to take over the Keller farming operations.

[30] The defendant argues that Shilo's ability to take over the Keller farming operations on extremely short notice in the spring of 2015 and the 2015 fall work done to preserve those lands for the following crop year and the repairs to the irrigation system added value to the Keller lands when sold. In short, it is the position of the defendant that it extended credit to KSF and KH by paying third party suppliers so that operations could continue, on the understanding that this credit would be repaid.

[31] It is the position of the defendant that he would never have signed the Farm Lease without an assurance of the payment of the outstanding rent owed to Shilo under the prior 2014 lease and that he advised Mr. Keller that he would exercise a right of set-off from the final payment due under the 2015 Farm Lease.

[32] In respect of the damage to the farm equipment which Shilo leased from the Keller group of companies, Shilo states that the plaintiff never advised Shilo of the alleged damage to the equipment nor did it give Shilo the opportunity to repair the equipment on its own. It states that there is no evidence as to when the damage to the equipment

would have occurred and states that it may have occurred either before Shilo took over the farming operations or while on its way to or at the auction site. The failure to discuss this issue with Shilo prior to repossessing the equipment and selling it at the auction leaves the court without any evidence that the damage occurred while in the possession of Shilo.

B. A claim asserted on behalf of Elk Haven, for crop inputs and work that was completed in the fall of 2014, after harvest, in respect of land that was subsequently farmed by Shilo in the 2015 crop production season

[33] The claim advanced by the plaintiff on behalf of the Elk Haven partnership relates to crop inputs and work that was completed on farmland in the fall of 2014, which land was subsequently farmed by Shilo in the 2015 crop season. The total amount of this claim is $839,226.49 plus interest.

[34] In respect of this claim, the plaintiff acknowledges that there is no written agreement in place pursuant to which Shilo agreed to pay Elk Haven for the value of the 2014 crop inputs. However, the plaintiff submits that such an agreement ought to be implied on the basis that Elk Haven clearly incurred the costs of the crop input and Shilo directly received the benefit of the same as the result of farming the land in 2015.

[35] The plaintiff points out that another farm operation, A&M Farm Ventures, paid the costs of the 2014 crop inputs in respect of a separate piece of land to Elk Haven in similar circumstances. The plaintiff submits that the conduct of A&M Farm Ventures is consistent with a general understanding of farmers, being that when crop inputs are applied in fall by one party, but another party then farms the land in a subsequent crop year, the latter party is obligated to reimburse the former party for those costs.

[36] The plaintiff argues, in the alternative, that if the court does not find an implied agreement of this nature, that it is entitled to recover this claim on the basis of the doctrine of unjust enrichment. It states that since the defendant was enriched, the plaintiff suffered a corresponding deprivation and that the enrichment and the deprivation occurred in the absence of a juristic reason, the plaintiff is entitled to recover on this basis. The plaintiff submits that the claim on account of the Elk Haven crop inputs presents a textbook example of a proper claim in unjust enrichment and therefore it ought to be allowed by the court.

[37] In response to the plaintiff's position that the "general understanding of farmers" for cost recovery in respect of crop inputs applied in one year by one farmer and farmed by another in the subsequent year, the defendant essentially argues that the example of A&M Farm Ventures in one case does not establish a general understanding of the nature advanced by the plaintiff. The defendant argues that there never was an expectation or obligation of Shilo to pay Elk Haven for those inputs.

[38] The defendant relies on the evidence of Mr. Johnson and Mr. Keller that Mr. Keller undertook to "take care" of Elk Haven insofar as those inputs were concerned, and thereby the situation falls within an established category of juristic reason for Shilo to retain the benefits of those crop inputs. Furthermore, it states that the plaintiff received a benefit from the work performed by Shilo in the fall of 2015 in that it increased the value of the land by the work performed and that the plaintiff would not have sold the lands for the amount it did but for the work performed by Shilo in the fall of 2015.

?

C. A claim arising pursuant to an Easement Agreement dated as of December 2007 between KSF, as grantor, and Shilo, as grantee (the "Easement Agreement")

[39] The final aspect of the plaintiff's claim relates to an easement agreement between KSF and Shilo entered into as of December 2007. Pursuant to the Easement Agreement, KSF permitted Shilo to locate a subterranean irrigation pipe and related equipment under certain lands owned by KSF, in order to service certain lands owned by Shilo.

[40] The consideration to be paid to KSF under the Easement Agreement was an initial payment of $10,000 plus $10,000 with further annual payments of $5,000 plus GST thereafter. The evidence is that after the initial payment was made, no subsequent annual payments were made. The total value of this claim is $42,000, plus applicable GST. The defendant's response to this claim is that it should also be dismissed by virtue of the defendant's claim for set-off.

Analysis and Decision

[41] In respect of claim A, namely the claim for unpaid rent and the damage to equipment arising pursuant to the farm lease entered into between KSF and KH and Shilo on May 1, 2015 (the Farm Lease), I find that the evidence does not support a collateral agreement between the defendant and Mr. Keller or the group of companies which he controlled.

[42] I find that in respect of the Farm Lease, the actions of Shilo on the one hand and Mr. Keller and the companies which he controlled on the other, do not establish that there was a collateral or other agreement that Shilo would be entitled to exercise a right of set-off in respect of the money owed to it under the Shilo Lease. I accept the arguments of

the plaintiff that the evidence does not support a right to the set-off being advanced by the defendant, and that the express wording of the agreement precludes a set-off of the nature being advanced by the defendant. I am not prepared to imply a collateral agreement to that effect based on the evidence here, especially in light of the express provisions of the Farm Lease.

[43] Furthermore, on the basis of the evidence here, I am not prepared to accept that there was an agreement that the irrigation system would be fully operational and that if it was not, the defendant was entitled to set-off the amount it expended on the capital improvement to the system to ensure that the land was "under water". The defendant and Mr. Keller were anxious that the land be farmed in the 2015 crop season, and in my opinion, the evidence establishes that the cost of getting the system operational was simply assumed by the defendant to ensure that the land could be farmed. As argued by the plaintiff, this cost was relatively small in relation to the entire expenditures involved in this farming initiative and it was not an issue that the parties decided to address in the Farm Lease despite having specifically done so in the course of their prior relationship. I find that it was a cost assumed by the defendant and that it was not the responsibility of the other party to the Farm Lease.

[44] Accordingly, I hold that the plaintiff has established its claim in respect of the unpaid lease payments owing by Shilo under the provisions of the Farm Lease.

[45] In respect of the second part of this claim, namely the damage to equipment arising pursuant to the Farm Lease, I find that the plaintiff has not proven its claim that it was the defendant that was responsible for the damage the equipment suffered. I

agree with the defendant's argument that there is no evidence as to when the damage to the equipment would have occurred and that it may have occurred either before Shilo took over the farming operations or while on its way to or at the auction site. In this case, the failure to discuss this issue with Shilo prior to the plaintiff taking position of the equipment and selling it at the auction leaves the court without evidence on a balance of probabilities that the damage occurred while in the possession of Shilo. The plaintiff could have examined the machinery together with the defendant prior to the equipment being taken to the auction. Its failure to do so in the circumstances of this case leaves me without a proper basis to determine that the plaintiff has proven this aspect of the claim and accordingly this portion of the claim is dismissed.

[46] In respect of claim B which the plaintiff asserts on behalf of Elk Haven, for crop inputs and work that was completed in the fall of 2014, the plaintiff admits that while there is no express provision on which it can rely, it asks the court to hold that there is a general understanding among farmers that when crop inputs are applied in fall by one party, but another party then farms the land in a subsequent crop year, the latter party is obligated to reimburse the former party for those costs.

[47] I am not prepared on the basis of the evidence in this case to apply a general agreement not found in the express terms of the Farm Lease and apply it to the circumstances of this case. On the evidence before me, I found in the context of claim A that the parties intended the written contract to govern their actions and determine their rights and obligations. I see no reason now to adopt a contrary position in respect of claim B. The fact that this general understanding might be inferred or implied and

enforced in respect of another rental agreement between other farmers, does not make it applicable here.

[48] The very unique circumstances here, arising out of the ongoing relationship between the defendant and Mr. Keller and his group of companies, and the very difficult situation those parties undertook to resolve in May of 2015, leaves it a matter of speculation as to what extent any agreement or understanding existed between them outside of the written agreement set out in the Farm Lease. On the evidence here, I am not in a position to determine to what extent the parties to the Farm Lease even considered that a general understanding, if it exists generally among farmers, was applicable to their specific situation when they hurriedly arrived at their agreement in or about May of 2015. The plaintiff, whose representative was overseeing its interests in this very dynamic and fluid context well in advance of the receivership, could have made the appropriate inquiries of its debtors in May of 2015, to determine the specific terms of this agreement, including any collateral or implied terms, and how this agreement might impact upon its security. Apparently, it chose not to.

[49] Given the ongoing and interconnected business relationship between the parties involved in the Shilo Lease and the subsequent Farm Lease, the only sound conclusion in my opinion is that there was no agreement that the defendant would be responsible for this expense. In my opinion the evidence does not establish on a balance of probabilities that this cost was to be borne by the defendant and accordingly, I am dismissing this aspect of the plaintiff's claim.

[50] Finally, in respect of claim C, in my opinion the defendant is liable for the payment of this claim arising pursuant to the Easement Agreement. The only substantive defence advanced by the defendant in respect of this claim is the defence of set-off. For the reasons provided in respect of claim A, I would similarly dismiss the argument of the defendant and find that the plaintiff is entitled to recover the amount being advanced in respect of this claim.

Conclusion

[51] In view of my findings, in respect of claim A, the plaintiff is entitled to recover the unpaid balance on account of rent of $260,495.56 (inclusive of GST), plus the applicable interest stipulated in the Farm Lease.

[52] In respect of claim C, the plaintiff is entitled to recover the amount of $42,000, plus applicable GST, along with the appropriate rate of interest as determined by ***The Court of Queen's Bench Act***.

[53] All other claims of the plaintiff are dismissed.

[54] The costs to be awarded in this case, should reflect the mixed results set out in this conclusion. If the parties cannot agree on costs they may be spoken to.

_______________________ J.

APPENDIX B

to the Fifth Report of the Receiver

dated April 14, 2022

Citation: Ernst & Young Inc v Shilo Farms Ltd,
2021 MBCA 58

Date: 20210607
Docket: AI20-30-09405

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

BETWEEN:

ERNST & YOUNG INC., in its capacity as Court-Appointed Receiver of KELLER & SONS FARMING LTD. and KELLER HOLDINGS LTD. and the partnership carrying on business under the firm name and style ELK HAVEN FARMS,	)	***R. A. McFadyen*** *for the Appellant (via videoconference)*
(Plaintiff) Appellant	)	***R. W. Schwartz*** *and* ***A. E. Verhaeghe*** *for the Respondent (via videoconference)*
- and -	)	*Appeal heard:* ***December 2, 2020***
SHILO FARMS LTD.	)	
(Defendant) Respondent	)	*Judgment delivered:* ***June 7, 2021***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2019 MBQB 173

PFUETZNER JA

[1] This appeal arises out of a dispute between the plaintiff, Ernst & Young Inc., in its capacity as the court-appointed receiver (the receiver) of both Keller & Sons Farming Ltd. (KSF) and Keller Holdings Ltd. (KH), and the defendant, Shilo Farms Ltd. (Shilo). KSF, KH and Shilo each owned neighbouring farmland and were involved in potato farming. At different

times, each leased land from the other, and the terms of those arrangements led to the claims brought by each of the parties after KSF and KH went into receivership.

[2] The receiver claimed that certain amounts were owing from Shilo to KSF and KH, as well as to Elk Haven Farms, the latter being a partnership between KSF and KH (Elk Haven), pursuant to the arrangements between the parties.

[3] Shilo counterclaimed, asserting that KSF owed it substantial funds for unpaid land rent and that Shilo was entitled to set off those amounts against anything that Shilo was ordered to pay.

[4] As will be explained, the trial judge allowed two of the receiver's primary claims (for unpaid rent and for unpaid easement payments), but dismissed a third claim for the reimbursement of the cost of crop inputs. The trial judge dismissed Shilo's claim for a set-off for rent owing to it.

[5] The receiver appeals the dismissal of its claim for reimbursement of the cost of crop inputs, saying that the trial judge failed to consider its unjust enrichment claim. Shilo's cross appeal disputes the trial judge's decision to allow the receiver's claims for unpaid rent and easement payments and to deny its claim for a set-off.

Background

[6] In order to provide the necessary context to the issues raised in this appeal, I will review the commercial relationship between the parties in some detail.

[7] Prior to entering into receivership in the fall of 2015, KSF, KH and Elk Haven (collectively, the Keller entities) ran a commercial potato farming operation on more than 6,000 acres of land in southwestern Manitoba. KSF and KH were controlled by Mark Keller. At the relevant times, Shilo also operated a commercial potato farming enterprise on more than 9,000 acres of neighbouring land. Shilo was controlled by Rodger Johnson (Johnson), who had hired Wayne Delong (Delong) as Shilo's general manager.

[8] In December of 2007, KSF and Shilo entered into an easement agreement under which KSF allowed Shilo to locate a subterranean irrigation pipe and hydro lines under KSF's land in order to service Shilo's land. The easement agreement provided for an initial payment of $10,000 and annual payments thereafter of $5,000 from Shilo to KSF. Only the initial payment was made under the easement agreement—no annual payments were made.

[9] Shilo began leasing its farmland to KSF in or about 2007 or 2008. In July of 2013, KSF and Shilo continued this arrangement and entered into a lease under which KSF leased Shilo's 9,000 acres of land for a term of three years (the Shilo lease). Under the Shilo lease, the rent for the 2014 crop year was $2,900,000, plus applicable taxes, payable in full no later than October 1, 2014. KSF defaulted, leaving $1,567,500 owing to Shilo by the end of the 2014 crop year.

[10] KSF and KH, in turn, leased some of their own land (and sublet some of the land KSF leased from Shilo) to Elk Haven, which carried out potato farming operations. At this time, Elk Haven was an equal partnership between KSF and R.D. Offutt Company (RDO), a third party.

[11] In the fall of 2014, Elk Haven applied crop inputs to the land it was

farming in preparation for the 2015 growing season. The receiver claims the inputs had a value of over $839,000 (the 2014 crop inputs).

[12] On April 1, 2015, Shilo terminated the Shilo lease for non-payment of rent.

[13] On April 6, 2015, Elk Haven redeemed RDO's 50 per cent partnership interest for half of the net book value of the partnership, being just over $1.6 million. The funds owing to RDO were paid in full by Elk Haven by July 6, 2015. Upon RDO leaving the Elk Haven partnership, KH became a partner.

[14] Elk Haven generated an invoice dated April 14, 2015 made out to Shilo for a portion of the 2014 crop inputs in the amount of approximately $688,000. The invoice was not delivered to Shilo until after the receiver was appointed.

[15] Due to KSF's ongoing financial difficulties, KSF and Shilo agreed that Shilo would take over the potato farming operations on their collective land. Accordingly, on May 1, 2015, they entered into a lease whereby KSF and KH leased all their land and equipment to Shilo for the 2015 farming season (the KSF lease). The effect of the termination of the Shilo lease and entering into the KSF lease was that Shilo farmed all of the land previously farmed by Elk Haven and to which Elk Haven had applied the 2014 crop inputs.

[16] The annual rent under the KSF lease was $750,000, plus GST, with half payable on signing and half payable on October 1, 2015. Importantly, the KSF lease contained, in article 1.2, a provision that "[a]ll [r]ent shall be

paid without any deduction or abatement on any account whatsoever."

[17] The land subject to the KSF lease had an irrigation system; however, it was not functioning in April of 2015 and needed repairs. KSF and KH were unable to pay for the repairs. Because of the importance of irrigation for potato crops, Shilo paid for the repairs. By May 6, 2015, Shilo had paid nearly $90,000 to fix the irrigation system, including an invoice in the amount of USD 50,530.55 that was paid by Shilo on May 1, 2015, the same date as the KSF lease.

[18] Shilo paid the first rental instalment in full to KSF under the KSF lease as follows: $225,000 on May 4, 2015 and $168,750 on May 8, 2015 (being a total of $375,000, plus GST of $18,750). Shilo made its final rent payment of $133,254.44 on October 1, 2015, leaving a balance of $260,495.56 unpaid.

[19] On October 8, 2015, the receiver was appointed by the Court in respect of KSF and KH.

<u>Trial Proceedings</u>

[20] The receiver filed a statement of claim against Shilo seeking unpaid rent of $260,495.56 under the KSF lease; the sum of $42,000 on account of annual payments under the easement agreement; and, on behalf of Elk Haven, the sum of $839,191.49 in respect of the 2014 crop inputs, as well as interest and costs.

[21] Shilo defended the claims on the following bases: that it had a right of legal or equitable set-off of the unpaid rent still owing to it by KSF against any amounts it may be ordered to pay to KSF or KH; that it paid for the

irrigation system repairs, which were the responsibility of KSF, and KSF agreed Shilo was entitled to set off those costs against the final rent payment under the KSF lease; that the easement payments were waived during the time that KSF was farming Shilo's land; and that Shilo never agreed to pay Elk Haven for the 2014 crop inputs and was not liable at law or in equity to Elk Haven.

[22] In its counterclaim, Shilo claimed rent owing under the Shilo lease and reasserted that it had a right of set-off against any amounts for which it may be found liable to the receiver or to Elk Haven.

Decision of the Trial Judge

[23] The trial judge allowed the receiver's claim against Shilo for unpaid rent under the KSF lease, finding that "the evidence [did] not support a collateral . . . or other agreement that Shilo would be entitled to exercise a right of set-off in respect of the money owed to it under the Shilo [l]ease" (at paras 41-42). Moreover, he found that "the express wording of the [KSF lease] preclude[d] a set-off of the nature being advanced by [Shilo]" (at para 42). The trial judge also found that "the evidence establishe[d] that the cost of getting the [irrigation] system operational was simply assumed by [Shilo] to ensure that the land could be farmed" (at para 43). Similarly, the trial judge found Shilo liable for the unpaid amounts under the easement agreement (see para 50).

[24] As to the receiver's final claim on behalf of Elk Haven for the 2014 crop inputs, the trial judge did not accede to the receiver's argument that he should order reimbursement to Elk Haven based on a "general understanding among farmers that when crop inputs are applied in fall by one party, but

another party then farms the land in a subsequent crop year, the latter party is obligated to reimburse the former party for those costs" (at para 46). Rather, he found that "the parties intended the written contract to govern their actions and determine their rights and obligations" (at para 47). He went on to conclude, "[g]iven the ongoing and interconnected business relationship between the parties involved in the Shilo [l]ease and the subsequent [KSF lease], the only sound conclusion in [his] opinion [was] that there was no agreement that [Shilo] would be responsible for [that] expense" (at para 49). While the trial judge was clearly aware of the receiver's argument that Elk Haven was entitled to recover the 2014 crop inputs on the basis of the doctrine of unjust enrichment (see para 36), he made no mention of that argument in his analysis or decision.

Issues on Appeal and Cross Appeal

[25] There are four issues raised by the parties: one on the appeal and three on the cross appeal.

[26] On the main appeal, the receiver says that the trial judge erred in dismissing the Elk Haven claim for the 2014 crop inputs without conducting any analysis of the unjust enrichment claim or the evidence supporting this claim. The receiver maintains that the trial judge's reasons are inadequate, but that this Court has all the evidence before it on the record required to adjudicate and grant this claim.

[27] Shilo's first issue on the cross appeal is whether the trial judge erred in finding that there was no agreement that the irrigation system on the KSF land would be operational before the start of the 2015 crop season and in failing to find that the cost of any repairs would be KSF's responsibility.

[28] Next, Shilo says that the trial judge erred in failing to conduct an analysis of the evidence showing that payments under the easement agreement were not owing between 2007 and 2014 while KSF was farming Shilo's land.

[29] Finally, Shilo submits that the trial judge erred in how he dealt with its claims for set-off. First, Shilo argues that he erred in failing to find a collateral agreement between the parties entitling Shilo to set off, against any amounts otherwise payable by it, the $1,567,500 owing to it under the Shilo lease. Next, Shilo maintains that the trial judge erred in finding that the evidence did not support a collateral agreement entitling it to set off the costs it incurred in repairing the irrigation system against rent payable by it under the KSF lease. Finally, Shilo asserts that the trial judge erred in failing to consider whether it could rely on the doctrine of equitable set-off in respect of any of the amounts it was ordered to pay to the receiver.

<u>Analysis</u>

Unjust Enrichment Claim for Crop Inputs

[30] The doctrine of unjust enrichment applies where a plaintiff can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the enrichment and corresponding deprivation occurred in the absence of a juristic reason (see *Moore v Sweet*, 2018 SCC 52 at para 37). This principled framework for assessing unjust enrichment claims developed in order to allow claims to succeed that previously would have failed for not falling into recognized categories of recovery (see paras 36-37).

[31] What the principled framework and the recognized categories of

recovery have in common is to prevent a defendant from retaining a benefit at a plaintiff's expense where it would be unjust for the defendant to retain it. Circumstances where retention by the defendant would be unjust have also been described as being "against all conscience"; "a benefit which justice does not permit one to retain" (at para 35); "the existence of some injustice in permitting the defendant to retain the benefit" (at para 36); and "circumstances where justice and fairness require one party to restore a benefit to another" (at para 38).

[32] While the parties do not agree on the value or amount of the benefit and corresponding deprivation, there is no real dispute that Shilo was enriched and Elk Haven was deprived when Elk Haven paid for the 2014 crop inputs on Shilo's land and on the KSF and KH land that was subsequently farmed by Shilo under the KSF lease. The primary issue of contention at both trial and on appeal was whether it was unjust for Shilo to retain the benefit.

[33] As previously mentioned, the unjust enrichment claim was put forward by Elk Haven as an alternative to its assertion that the trial judge ought to imply an agreement that Shilo would pay Elk Haven for the value of the 2014 crop inputs, consistent with the general practice of farmers. In respect of the primary claim, the trial judge found (at para 47):

> I am not prepared on the basis of the evidence in this case to apply a general agreement not found in the express terms of the [KSF] [l]ease and apply it to the circumstances of this case. On the evidence before me, I found in the context of [the claim for unpaid rent] that <u>the parties intended the written contract to govern their actions and determine their rights and obligations</u>. I see no reason now to adopt a contrary position . . ..
>
> [emphasis added]

[34] Shilo argues that the trial judge's conclusion here is essentially the juristic reason given to deny recovery under the unjust enrichment claim—that is, there was a written contract intended to govern the relationship between the parties and it was executed by Mark Keller, the directing mind of all of the Keller entities. While this argument is compelling, the difficulty is that the lack of reference in the trial judge's analysis to the unjust enrichment claim leaves it a matter of speculation as to whether this was his conclusion. Despite the parties' detailed written arguments addressing Elk Haven's unjust enrichment claim for the 2014 crop inputs and the trial judge's summary of the receiver's and Shilo's positions at paras 36 and 38 of his reasons, he conducted no analysis of the unjust enrichment claim.

[35] There is no question that there is a duty upon trial judges to provide adequate reasons in order to justify and explain the result, inform the losing party why he or she lost and permit effective appellate review (see *R v Oddleifson (JN)*, 2010 MBCA 44 at para 30; and *Dovbush v Mouzitchka*, 2016 ONCA 381 at paras 20-23). Equally uncontroversial are the propositions that judges are presumed to know the law and that their reasons must be read in the context of the issues raised and the arguments made at trial. However, because the trial judge's reasons do not allow for effective appellate review, no deference is owed to his effective dismissal of the unjust enrichment claim, although deference is owed to his factual findings, absent palpable and overriding error.

[36] Accordingly, I will consider the claim anew; however it can be disposed of briefly. I am persuaded by Shilo's argument that the juristic reason why Shilo should retain the benefit of the 2014 crop inputs is that Shilo, KSF and KH intended the KSF lease to govern their relationship going

forward. At the time the KSF lease was executed, the parties were aware that Elk Haven had made the 2014 crop input expenditures. However, Elk Haven had made no claim for reimbursement and the Elk Haven invoice for the 2014 crop inputs had not been provided to Shilo. It does not accord with the reasonable expectations of the parties, as expressed in the KSF lease in light of the surrounding circumstances, to find that Shilo should reimburse Elk Haven for the 2014 crop inputs.

[37] The receiver makes the point that Elk Haven was not a party to the KSF lease and could not have insisted on reimbursement of the 2014 crop inputs as part of that arrangement. This is true; however, the fact is that, by the time the KSF lease was negotiated, Elk Haven was in the process of redeeming RDO's interest so that it would become a partnership between only KSF and KH (both controlled by Mark Keller). Considering all of the circumstances, including that Elk Haven did not send the invoice for the 2014 crop inputs to Shilo and Johnson's evidence that he would not have signed the KSF lease if he thought Shilo would be responsible for the 2014 crop inputs, it is not unjust or against all conscience for Shilo to retain the benefit of the 2014 crop inputs.

[38] As a result, I would dismiss the claim for unjust enrichment and the main appeal.

Irrigation System Repairs

[39] I will address together Shilo's claims that there was an agreement that the irrigation system on the KSF land would be operational before the start of the 2015 crop season at KSF's expense and that a collateral agreement existed entitling Shilo to set off the costs it incurred in repairing the irrigation

system against rent payable under the KSF lease.

[40] Shilo submits that the trial judge ignored the uncontroverted evidence of Johnson and Mark Keller that they had an understanding that KSF would cover the costs to ensure that the irrigation system was operational when the parties entered into the KSF lease. Moreover, Shilo submits that the trial judge failed to give effect to the evidence of Mark Keller that he agreed to Shilo setting off the irrigation system expenses against the rent payable under the KSF lease, which had the effect of amending the terms of the KSF lease.

[41] As both of these issues involve questions of fact and mixed fact and law, they are reviewed for palpable and overriding error.

[42] A trier of fact is entitled to accept all, part or none of the evidence of any particular witness. While the testimony of Mark Keller and of Johnson both supported Shilo's position that KSF agreed to be responsible for the irrigation repairs and to allow Shilo to set off those expenses against rent payable under the KSF lease, it can be presumed that the trial judge rejected this evidence. Judges are not required to comment on every aspect of the evidence they have heard and specifically accept or reject it. Having said that, this evidence was highly relevant to a live issue at the trial and it would have been preferable for the trial judge to have specifically adverted to it.

[43] Nonetheless, I am not convinced that he made any palpable and overriding error in dismissing Shilo's claims as there was ample evidence to support his findings that there was no "agreement that the irrigation system would be fully operational and that if it was not, [Shilo] was entitled to set-off the amount it expended on the capital improvement to the system to ensure

that the land was 'under water'" and that "the cost of getting the system operational was simply assumed by [Shilo] to ensure that the land could be farmed" (at para 43).

[44] First, as found by the trial judge, the cost of the irrigation system repairs "was relatively small in relation to the entire expenditures involved in this farming initiative and it was not an issue that the parties decided to address in the [KSF] [l]ease despite having specifically done so in the course of their prior relationship" (*ibid*) under the Shilo lease. In addition, the evidence of Delong established that Shilo made a payment of more than USD 50,000 for irrigation repairs on May 1, 2015, the date the KSF lease was signed, which contained a specific term that "[a]ll [r]ent shall be paid without any deduction or abatement on any account whatsoever." Moreover, the first rent instalment was paid in full (in two tranches on May 4, 2015 and May 8, 2015) without any deduction for the expenditures of nearly $90,000 that Shilo had made by that time.

[45] This evidence all supports the trial judge's findings. A different judge may not have come to the same decision on the evidence and it would have been helpful for the trial judge to have specifically addressed Mark Keller and Johnson's evidence on these points. However, the trial judge was entitled, on the record, to decide as he did and I would dismiss this ground of appeal.

Easement Agreement

[46] Shilo maintains that the trial judge did not properly assess Johnson's evidence supporting the fact that the annual fee under the easement agreement was not payable during the years that the Keller entities farmed

Shilo's land. Shilo submits that there was nothing to refute this evidence. However, Johnson's limited evidence on this point is equivocal at best and consists only of the following question and answer in direct examination:

> . . .
>
> Q What was your arrangement with Mr. Keller in respect of payments due under that easement agreement?
>
> A Well, when he was renting the farm from us why would we pay him and him turn around and pay us back? He was renting the farm and he was giving the benefit of the pipeline so obviously we didn't pay rent when he was farming the farm from '07 'til whenever '14.
>
> . . .

[47] Mark Keller was called as a witness by Shilo at trial, yet gave no evidence in respect of the easement agreement.

[48] In my view, the trial judge made no palpable and overriding error in declining to draw the inference urged upon him by Shilo that there was an agreement between KSF and Shilo that the easement payments were waived while the Keller entities were farming Shilo's land.

Shilo's Claims for a Set-Off

[49] The last issue raised by Shilo is whether it has the right to set off any amounts owing to it by KSF or KH against any amounts that it has been ordered to pay to the receiver. As ordered by the trial judge, and confirmed on appeal for the reasons set out above, Shilo owes the receiver $260,495.56 in respect of rent under the KSF lease and $42,000 in respect of payments under the easement agreement, plus prejudgment and postjudgment interest

on both sums. As the trial judge found that Shilo had accepted responsibility to pay for the irrigation system repairs, the only amount owing to Shilo which it can set off against its liabilities is KSF's unpaid rent of $1,567,500 under the Shilo lease.

[50] Shilo argues that the trial judge erred in finding that Shilo could not exercise any rights of set-off. It maintains that the trial judge's reasons are inadequate, in that he did not address the doctrine of equitable set-off in any material way, and it is not possible to discern why he found that it did not apply. Shilo asserts that the provision in the KSF lease stating that all rent shall be paid without any deduction or abatement on any account whatsoever does not oust equitable set-off.

[51] As a preliminary matter, I am not convinced that the trial judge made any palpable and overriding error in finding that there was no collateral agreement entitling Shilo to set off the rent owing to it under the Shilo lease against any amounts otherwise payable by it.

[52] I will now address the question of whether the trial judge erred in his consideration of the doctrine of equitable set-off.

[53] With respect to the unpaid rent under the KSF lease, the trial judge found that there was no collateral agreement between the parties to set off amounts owing between them and that the express wording of article 1.2 of the KSF lease precluded a claim for set-off. The trial judge did not specifically address whether article 1.2 of the KSF lease ousts equitable set-off.

[54] In respect of the easement agreement, the entirety of the trial judge's

analysis states (at para 50):

> . . . The only substantive defence advanced by [Shilo] in respect of this claim is the defence of set-off. For the reasons provided in respect of [the claim for unpaid rent under the KSF lease], I would similarly dismiss the argument of [Shilo] and find that the [receiver] is entitled to recover the amount being advanced in respect of this claim.

[55] In essence, the trial judge adopted the same reasoning as he did for dismissing the set-off argument relating to the rent owing under the KSF lease. The trial judge's finding that there was no collateral agreement allowing for set-off in respect of the easement agreement is unassailable. However, the problem here is that, unlike the KSF lease, there is nothing in the express wording of the easement agreement that would otherwise preclude a claim for set-off.

[56] In addition, in respect of both the unpaid rent under the KSF lease and the unpaid easement payments, the trial judge did not consider whether the doctrine of equitable set-off applied. This doctrine was specifically argued by Shilo as a basis for relief in the alternative to a finding of a collateral agreement. Unfortunately, since the trial judge's reasons do not address this argument, one cannot determine, for purposes of appellate review, why it was rejected. As a result, no deference is owed to the trial judge's decision and I will consider whether equitable set-off is available in respect of the unpaid rent under the KSF lease and the easement agreement payments.

[57] As argued by Shilo before both the trial judge and on appeal, the leading case in Canada on equitable set-off is *Holt v Telford*, [1987] 2 SCR 193. In that case, the Supreme Court of Canada cited, with approval, the following passage from *Coba Industries Ltd v Millie's Holdings (Canada) Ltd*

(1985), 20 DLR (4th) 689 at 696-97 (BCCA), describing the requirements to establish equitable set-off (at p 212):

> . . .
>
> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: . . . (*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063).
>
> 3. <u>A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim</u>: . . . (*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066).
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani.*
>
> 5. Unliquidated claims are on the same footing as liquidated claims: (*Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)).
>
> . . .
>
> [emphasis added]

[58] Equitable set-off may also be set up against the receiver of a creditor (see *PIA Investments Inc v Deerhurst Ltd Partnership*, 2000 CarswellOnt 3019 at para 32 (CA)). This Court has previously noted that equitable set-off can apply where a right exists for a liability already incurred at the time of the assignment, but only to actions instituted by the trustee for the recovery of debts due to the bankrupt, as opposed to actions to liquidate assets of the

bankrupt's estate (see *Collins (Keith G) Ltd v McKenzie*, 2005 MBCA 35 at paras 31-32).

[59] It is the third element of the *Holt* test that is often at issue in claims for equitable set-off. The article by Robert Anderson, Thomas Gelbman & Benjamin Pullen, "Recent Developments in the Law of Set-off" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2009*, 2009 ANNREVINSOLV 1 (online: WL Can (date accessed 27 May 2021)) (the *Annual Review 2009* article) states (at pt 1.III.C):

> . . .
>
> A review of the recent jurisprudence reveals that the elements of the equitable set-off test are generally not at issue, with the exception of the third element. Indeed, very little consideration has been given to the other elements of the test. <u>There are generally two overriding concerns when a party asserts equitable set-off: (a) the close-connection or interconnectedness of the cross claims; and (b) whether it would be manifestly unjust not to allow set-off.</u>
>
> . . .

[emphasis added]

[60] The authors of the *Annual Review 2009* article are of the view that, "where only two parties are involved in a potential set-off, it may well be easier to meet the test for equitable set-off. In such cases, the Court will examine the relationship between the parties, as well as the connectedness of the transactions" (at pt 1.III.C.ii).

[61] It is accepted in Canadian jurisprudence that parties can contract out of equitable remedies, including the right of set-off. For a helpful summary of the applicable principles, see *Bernum Petroleum Ltd v Birch Lake Energy*

Inc, 2014 ABQB 652 at para 97.

[62] I will now turn to consider whether Shilo has made out a case for equitable set-off of the rent owed to it under the Shilo lease against either the unpaid rent under the KSF lease or the easement payments.

[63] The question of the unpaid rent under the KSF lease can be disposed of briefly. The trial judge found that the language of article 1.2 of the KSF lease precluded a claim for set-off. This finding was open to him and, as parties can contract out of equitable remedies, it applies equally to claims for legal set-off and equitable set-off. I would not accede to this argument.

[64] As for the easement payments, there is no similar provision in the easement agreement that could be interpreted as the parties contracting out of set-off rights. Is equitable set-off available on the facts of this case?

[65] The primary issues are whether the debts arise out of the same contract, or closely related contracts, and whether it would be manifestly unjust not to allow set-off. Here, the debts do not arise out of the same contract—the Shilo lease and the easement agreement are separate; however, they are connected. The easement agreement was entered into in 2007 to allow Shilo to place a subterranean irrigation pipe and hydro lines under certain KSF land to support farming on Shilo's land. Five years later, the Shilo lease was entered into as a successor agreement to previous similar arrangements under which KSF leased all of Shilo's land and equipment. I find that there is a close connection between the two contracts, both entered into by Shilo and KSF and designed to facilitate the farming of potato crops and sharing of land by Shilo and the Keller entities.

[66] In my view, it would be manifestly unjust to permit the receiver to collect the easement payments from Shilo without permitting Shilo to set off what is owed to it by KSF under the Shilo lease, particularly given the discrepancy between the amounts owed and the fact that Shilo may not recover its debt as an unsecured creditor under the receivership. Refusing to permit set-off would effectively result in enforcement of only one of the contracts between the parties and, considering the contracts were closely connected long-term agreements, this would be unfair. This result is consistent with the guidance provided in the article by Michelle Grant, Vicki Tickle & Lance Williams, "Is That My Receivable?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2016*, 2016 ANNREVINSOLV 8 (online: WL Can (date accessed 2021 May 27)) regarding the objective of set-off in the bankruptcy context: "The object of set-off is to avoid the perceived injustice to a person who has had mutual dealings with a bankrupt of having to pay in full what he owes to the bankrupt while having to rest content with a dividend on what the bankrupt owes him or her" (at pt 8.III.2).

[67] Finally, both the debt under the Shilo lease and the debt under the easement agreement accrued prior to the receivership so that equitable set-off is not thereby precluded.

[68] As a result, I would allow the cross appeal in connection with the easement agreement.

Conclusion

[69] For these reasons, I would dismiss the appeal and would allow the cross appeal in part: Shilo may set off against the amount ordered payable in respect of the easement agreement, as well as prejudgment interest and

postjudgment interest on that sum, the amount owing to Shilo under the Shilo lease.

[70] As Shilo successfully defended the appeal and was partially successful on its cross appeal, it shall have its costs in this Court under the tariff.

J. Pfeifer JA

I agree: JA

I agree: JA

APPENDIX C

to the Fifth Report of the Receiver

dated April 14, 2022

Innovation, Science and Economic Development Canada
Office of the Superintendent of Bankruptcy Canada

Innovation, Sciences et Développement économique Canada
Bureau du surintendant des faillites Canada

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April 30, 2018

Reference number: 744667

VIA EMAIL

Mr. Mark Keller
(markkeller@hotmail.ca)

Dear Mr. Keller:

Subject: Receivership of Keller & Sons Farming Ltd. #21-81475

The Office of the Superintendent of Bankruptcy (OSB) has reviewed your correspondence received March 14, 2018 and follow-up email of April 14, 2018 regarding the complaint filed against Joe Healey, Licensed Insolvency Trustee and Receiver of the above estate.

Be advised that the role of the OSB is to supervise the administration of estates and matters to which the Bankruptcy and Insolvency Act (BIA) applies. This includes ensuring that each party to an insolvency proceeding understands and performs their respective duties as outlined in the BIA.

Your letter and email described your concerns regarding your experience with the Receiver. As per our telephone conversations, I advised that the receivership is largely a court driven process. It was agreed that I would forward your comments to the Receiver. A copy of the Receiver's response dated April 4, 2018 was sent to you under separate cover on April 13, 2018. Our office did not identify or receive any evidence of non-compliance with the BIA.

The courts play an important role in providing direction and adjudicating disputes. You acknowledged that you had legal representation and had an opportunity to put all your concerns before the court. The OSB does not provide legal advice and does not have the authority to change an order of the court. As discussed, the court is the appropriate venue to seek redress for matters related to the receivership and/or the Receiver.

In accordance with Section 5(3)(f) of the BIA, the OSB has a duty to receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine. Therefore, a record of your complaint has been entered in our system; however, at the moment, we do not anticipate taking any further action in this matter.

Canada

If you require additional information about the insolvency system, we invite you to visit the OSB website at http://osb.ic.gc.ca. Thank you for bringing your concerns to our attention.

Sincerely,

"Sandy Bridgeman"

Senior Bankruptcy Analyst, Office of the Superintendent of Bankruptcy Canada
Innovation, Science and Economic Development Canada /Government of Canada
Sandy.Bridgeman@canada.ca (204) 230-4276

cc: Mr. Joe Healey, Licensed Insolvency Trustee, Receiver (joe.a.healey@ca.ey.com)

APPENDIX D

to the Fifth Report of the Receiver

dated April 14, 2022

In the Matter of the Receivership of Keller & Sons Farming Ltd.

Schedule of Professional Fees

Summary of Invoices issued by Ernst & Young Inc.

Invoice #	Date	Total Hours	Fees	Expenses	Total (excl. GST)	
CA0189975685	12-Nov-15	478.3	$ 118,729.00	$ 10,685.61	$ 129,414.61	
CA12C500000602	28-Jun-16	1,005.6	294,201.00	-	294,201.00	
CA12C500001078	30-Nov-16	194.6	52,369.50	-	52,369.50	
CA12C500001589	30-Jun-17	109.9	23,783.50	-	23,783.50	
CA12C500001815	30-Jun-17	54.2	7,875.00	-	7,875.00	
CA12C500002947	28-Jun-18	67.3	21,075.00	-	21,075.00	
CA12C500004343	01-Nov-19	37.1	15,317.50	-	15,317.50	
CA12C500003878	18-Jun-19	54.1	21,312.50	-	21,312.50	
CA12C500006913	30-Jun-21	30.1	9,527.50	-	9,527.50	
Total			**$ 564,190.50**	**$ 10,685.61**	**$ 574,876.11**	**A**

Summary of Invoices issued by Thompson Dorfman Sweatman LLP

Invoice #	Date	Total Hours	Fees	Expenses / PST	Total (excl. GST)	
486082	03-Nov-15	19.6	$ 6,214.50	$ 302.57	$ 6,517.07	
490281	21-Dec-15	27.2	8,568.00	763.69	9,331.69	
493284	02-Feb-16	27.1	7,805.50	772.50	8,578.00	
495074	03-Mar-16	26.4	9,863.50	971.69	10,835.19	
497268	30-Mar-16	28.1	6,056.50	564.59	6,621.09	
499173	29-Apr-16	95.0	35,707.50	3,953.25	39,660.75	
501530	30-May-16	47.6	16,618.00	1,533.68	18,151.68	
503953	29-Jul-16	54.5	19,990.50	2,814.75	22,805.25	
505699	26-Jul-16	11.3	3,672.50	401.05	4,073.55	
507818	30-Aug-16	31.6	6,990.00	758.77	7,748.77	
510639	29-Sep-16	3.0	835.00	305.05	1,140.05	
515017	30-Nov-16	6.3	2,107.00	232.01	2,339.01	
520214	30-Jan-17	8.3	2,724.50	272.96	2,997.46	
521995	27-Feb-17	2.2	737.00	66.96	803.96	
528864	31-May-17	4.6	1,541.00	320.10	1,861.10	
531198	06-Jul-17	6.6	2,211.00	290.88	2,501.88	
533206	28-Jul-17	10.1	3,383.50	284.68	3,668.18	
534999	01-Sep-17	2.4	804.00	75.32	879.32	
536809	28-Sep-17	14.8	4,738.00	539.29	5,277.29	
538930	01-Nov-17	18.2	4,370.00	385.32	4,755.32	
541157	05-Feb-18	3.2	1,072.00	97.61	1,169.61	
550541	03-Apr-18	12.4	4,002.50	488.20	4,490.70	
554552	30-May-18	9.7	3,637.50	368.96	4,006.46	
556699	29-Jun-18	2.4	900.00	107.50	1,007.50	
559932	31-Aug-18	18.7	7,012.50	662.75	7,675.25	
561535	27-Sep-18	3.4	1,275.00	143.40	1,418.40	
571141	19-Dec-18	0.6	225.00	20.50	245.50	
578815	29-Mar-19	3.0	1,200.00	97.50	1,297.50	
589648	30-Aug-19	4.0	1,600.00	124.76	1,724.76	
591569	30-Sep-19	51.6	21,500.00	1,925.04	23,425.04	
585334	28-Jun-19	8.5	3,400.00	300.00	3,700.00	
587444	31-Jul-19	4.9	1,920.00	177.90	2,097.90	
593908	31-Oct-19	13.7	5,480.00	440.52	5,920.52	
598699	18-Dec-19	4.3	1,720.00	124.40	1,844.40	
603526	31-Jan-20	6.7	2,680.00	192.10	2,872.10	
609437	29-Apr-20	11.3	4,802.50	526.18	5,328.68	
611287	29-May-20	10.0	4,250.00	865.60	5,115.60	
613344	30-Jun-20	10.8	4,590.00	437.29	5,027.29	
624587	08-Dec-20	18.1	7,692.50	547.48	8,239.98	
645380	05-Aug-21	1.7	765.00	62.25	827.25	
647742	31-Aug-21	26.0	1,900.00	137.75	2,037.75	
642618	30-Jun-21	3.0	1,350.00	103.50	1,453.50	
657721	17-Dec-21	1.2	540.00	90.72	630.72	
Total			**$ 228,452.00**	**$ 23,651.02**	**$ 252,103.02**	**B**

Total Professional Fees as reported on the Statement of Receipts and Disbursements	**$ 826,979.13**	**A + B**

APPENDIX E

to the Fifth Report of the Receiver

dated April 14, 2022

IN THE MATTER OF THE RECEIVERSHIP OF KELLER & SONS FARMING LTD.
AND KELLER HOLDINGS LTD.

STATEMENT OF RECEIPTS AND DISBURSEMENTS

	(Reporting Period) For the period May 29, 2017 to 10 April 2022	(CUMULATIVE) For the period October 8, 2015 to April 10, 2022
RECEIPTS		
Receiver's borrowing certificate proceeds	$ -	$ 750,000.00
Pre-receivership bank account proceeds	-	124,527.59
Sale of equipment	-	2,561,110.00
Sale of land and buildings	207.99	20,030,677.60
Litigation proceeds	455,011.26	455,011.26
Life insurance proceeds	-	124,833.78
Recovery of operational expenses from Shilo Farms Ltd.	-	19,034.09
Interest earned	14,993.47	51,861.96
Insurance and WCB refunds	-	113,874.64
Miscellaneous other receipts	51,788.26	85,933.22
Total receipts	$ 522,000.98	$ 24,316,864.14
DISBURSEMENTS		
Filing fees	$ -	$ 70.00
Future crop input purchases	-	316,545.35
Insurance	-	183,844.53
Appraisal fees	-	24,995.00
Auction commission and expenses	-	219,816.43
Professional fees (receiver and legal)	209,390.50	826,979.13
Repayment of Receiver's certificates and interest thereon	-	768,553.83
Utilities and telephone	-	36,632.98
Pre-receivership property tax arrears	-	166,811.49
Payroll and related source deductions	-	62,543.91
Site operational expenses and repairs	-	60,218.42
GST/HST/PST and miscellaneous	15,157.04	63,632.49
Total disbursements	$ 224,547.54	$ 2,730,643.56
Excess of receipts over disbursements before distributions	**$ 297,453.44**	**$ 21,586,220.58**
DISTRIBUTIONS		
Canada Revenue Agency (Deemed Trust Claim)	54,396.96	54,396.96
Distributions to secured creditors:		
Royal Bank of Canada	239,939.02	12,695,845.01
National Bank of Canada	143,331.17	8,224,025.18
Concentra Financial Service Association	-	25,812.30
	$ 437,667.15	$ 21,000,079.45
Excess of receipts over disbursements	**$ (140,213.71)**	**$ 586,141.13**
Comprised of:		
Receivership estate trust bank account		$ 542,316.09
Separate trust account - proceeds of certain equipment plus accrued interest		$ 43,825.04
		$ 586,141.13