Court File No. 09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the "Applicants")

FACTUM OF PETER J. GRANT SR.
(Re: Tax Refund Purchase and Sale Agreement)
Returnable October 5, 2009

October 2, 2009

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FACTUM OF PETER J. GRANT SR.
(Re: Tax Refund Purchase and Sale Agreement)
Returnable October 5, 2009

PART I – OVERVIEW

1. This factum is filed by Peter Grant Sr. ("Peter Sr.") in support of his motion for an order, declaration or directions in respect of his rights and entitlements under an agreement between Grant Forest Products Inc. ("GFPI" or "the Company") and Peter Sr. known as the Tax Refund Purchase and Sale Agreement (the "Agreement").

2. Peter Sr. is the founder of GFPI, and its Chairman and CEO. In March 2008, Peter Sr. fully paid some US$20 million to GFPI for the purchase of defined portions of GFPI's forthcoming 2008 and 2009 Tax Refunds, described as the "Sold 2008 and 2009 Refunds", which Sold Refunds amounted to approximately US$20 million. Peter Sr. did this to assist GFPI's cash-flow, at essentially no cost to the Company. GFPI was obliged to hold the Sold Refunds in trust for Peter Sr. upon receipt from the government, and then forthwith pay them over to Peter Sr.

3. The Sold 2008 Refund was indeed received in trust for Peter Sr. and paid over to him in late 2008. In January 2009 GFPI was obliged to deliver a transfer document to Peter Sr. in respect of the Sold 2009 Refund. It failed or refused to do so, apparently because certain Lien Lenders objected, even though they had earlier approved the Agreement and provided discharges in respect of the 2008 Sold Refund.

4. The issue on this motion is whether GFPI, having taken and used the money paid by Peter Sr. in March 2008 when he purchased the Sold 2009 Refund, and having undertaken the fiduciary duty to receive and hold the Sold 2009 Refund in trust for Peter Sr., should be required to perform its obligations and duties and deliver the transfer acknowledgement to Peter Sr. and pay over to him the Sold 2009 Refund when received into trust by the Company.

5. Peter Sr.'s position is that GFPI has trust/fiduciary and contractual obligations to provide Peter Sr. with a transfer of the Sold 2009 Refund and to receive and then deliver the Sold 2009 Refund to him. If necessary, equity can compel GFPI to fulfill its obligations.

6. To hold otherwise would permit GFPI to take and use the purchase price it received without delivering the purchased asset, in the face of a trust/fiduciary obligation to do so. The trustee would be permitted to convert to its own use the very trust asset it was to protect for the beneficiary.

7. It is Peter Sr.'s understanding that GFPI and the Monitor will take no position on this motion. The First Lien Lenders oppose, and assert that GFPI should be entitled to retain the US$10 million purchase price paid by Peter Sr. to purchase the Sold 2009 Refund, without any obligation to hold the Sold 2009 Refund in trust for Peter Sr. or to transfer it to him when received by the Company.

PART II – THE FACTS

BACKGROUND

8. The Grant family has been in the lumber business in Ontario for several generations, going back to the 1880s. Peter Sr. founded the predecessor to GFPI in 1980, and took the company into the oriented strand board ("OSB") market with the opening of the company's first OSB mill in Englehart, Ontario in 1981. OSB is an alternative to plywood and is commonly used in residential construction. The company grew to become one of the three largest OSB producers in North America.

Affidavit of Peter J. Grant, sworn September 8, 2009, ("Grant September 8 Affidavit"), para. 2

9. Peter Sr. (and a Grant family trust known as Twin Lakes Trust) are the ultimate shareholders of GFPI.

Grant September 8 Affidavit, para. 3

10. GFPI (in certain cases together with other applicants) own OSB mills in Englehart and Timmins, Ontario, hold a 50% interest in an OSB mill in Footner, Alberta, and indirectly own OSB mills in Allendale and Clarendon, South Carolina.

Second Report of the Monitor, July 21, 2009, para. 8

11. GFPI and the other applicants filed for and obtained protection under the *Companies' Creditors Arrangement Act* (Canada) by Initial Order of this Court dated June 25, 2009. Ernst & Young Inc. was appointed as Monitor. By Order dated July 24, 2009, the initial stay was extended to October 15, 2009.

Initial Order of Newbould J., dated June 25, 2009

Order of Pattillo J., dated July 24, 2009

PETER SR.'s RECENT EFFORTS TO ASSIST GFPI FINANCIALLY

12. As GFPI's financial performance began to come down from 2004 historic highs in the OSB market (and particularly after GFPI and affiliates incurred significant bank debt to construct the two new South Carolina OSB mills), Peter Sr. became directly involved in steps to assist GFPI's cash-flow.

Grant September 8 Affidavit, para. 5

13. In July 2004, Peter Sr. caused 1308406 Ontario Inc. ("1308406"), which is controlled by him, to loan $40 million on an unsecured basis to GFPI, and in October 2004 he caused 1308406 to loan GFPI a further $10 million, again on an unsecured basis. These amounts have not been repaid. On behalf of 1308406, Peter Sr. has signed postponement and subordination agreements (subordinating these loans to the First Lien Credit Agreement and Second Lien Credit Agreement).

Grant September 8 Affidavit, para. 6

14. In 2006 GFPI declared preferred dividends in the amount of $6 million in favour of Grant Forest Products Corp., which Peter Sr. controls. These dividends have not been paid by GFPI.

Grant September 8 Affidavit, para. 7

15. In order to provide further financial assistance to GFPI, in June 2008 Peter Sr. caused additional funds in the amount of $25 million to be advanced to GFPI. This amount is recorded in GFPI's accounts as a capital contribution.

Grant September 8 Affidavit, para. 8

16. Although Peter Sr. serves as Chairman and CEO of GFPI, he has not received a salary from GFPI for many months.

Grant September 8 Affidavit, para. 9

17. An Executive Retirement Plan established for Peter Sr.'s benefit by GFPI is underfunded to the extent that it would require a contribution of approximately $18 million for the Plan to provide Peter Sr. with the retirement income that he was to receive under that Plan at age 70. No contributions have been made to the funding of that Plan for many months.

Grant September 8 Affidavit, para. 10

TAX REFUND PURCHASE AND SALE AGREEMENT

18. As GFPI's financial performance declined in 2008, it was proposed that Peter Sr. might assist the company's cash-flow by purchasing a portion of certain Canadian and Ontario tax refunds which GFPI expected to receive in 2008 and 2009.

Grant September 8 Affidavit, para. 11

19. The concept was that Peter Sr. would pay US$20 million to GFPI in March 2008 to purchase a portion of GFPI's 2008 and 2009 tax refunds, with the purchased portions of the tax refunds amounting to approximately US$10 million in each of 2008 and 2009. This would assist the company with immediate cash-flow but ensure that Peter Sr. would ultimately receive the purchased portions when the 2008 and 2009 tax refunds were paid by the government.

Grant September 8 Affidavit, para. 12

20. The arrangement was such that *once GFPI received the 2008 and 2009 Tax Refunds from the government, it would be obliged to hold the portions of the refunds which Peter Sr. had*

purchased (approximately US $10 million each year) in trust for him and then pay them out to him or as he directed.

Grant September 8 Affidavit, para. 13

21. The arrangement was principally devised and structured by Mr. Lynch and Ross Walker, a solicitor and partner of Fraser Milner Casgrain, which firm prepared the Agreement referred to below.

Grant September 8 Affidavit, para. 14

22. The Board of Directors of GFPI approved the tax refund purchase arrangement at a directors meeting held on March 27, 2008. All of the independent directors of GFPI present at that directors meeting approving the transaction clearly understood and directed that as a condition of their approval Peter Sr.'s right to receive the Sold 2008 and 2009 Refunds stood ahead of any claims of the banking syndicate or other lenders. It was on that basis only that Peter. Sr. agreed to enter into the transaction.

LENDERS' DIRECT INVOLVEMENT IN AND APPROVAL OF THE TRANSACTION

23. The Lien Lending Agents in respect of the First and Second Lien Credit Agreements were fully aware of and approved the tax refund arrangement and the Agreement. In his responding affidavit, the First Lien Agent's witness asserted that "neither the Lenders nor their Agents were requested to approve the Agreement and they did not approve the Agreement or the proposed transactions." However, on cross-examination (and in documents produced pursuant to that cross), it plainly emerged that the Lien Lending Agents and their Canadian and U.S. solicitors were in fact intimately involved in the process of finalizing and approving the transaction and Agreement. The Lien Lending Agents or their solicitors were provided a

transaction structure and draft copies of the proposed Agreement, commented upon them, provided a "checklist" of terms that the Lien Lenders viewed as essential elements to be incorporated in the Agreement, and ultimately had both their own solicitors and GFPI's confirm in writing that the Agreement complied with the First and Second Lien Credit Agreements.

Grant September 8 Affidavit, para. 18

Affidavit of Ben Montgomery, sworn September 14, 2009 ("Montgomery Affidavit"), para 10

Documents produced in response to the Cross-Examination of Ben Montgomery, held September 25, 2009 ("Montgomery Cross-Examination")

24. Moreover, the First Lien Agent's witness, Montgomery, admitted on cross-examination that the Lien Lending Agents and lending syndicate believed (and believe) the Agreement fully complied with the Lien Credit Agreements, and never objected in any way to GFPI and Peter Sr. entering into the Agreement.

Montgomery Cross-Examination, p. 38, l. 10-12, p. 50, ll. 17-25, p. 52 ll. 1-3, p. 5, ll. 11-16

Reply Affidavit of Peter Grant, sworn September 18, 2009, ("Grant Reply Affidavit"), paras. 12-17

Grant September 8 Affidavit, para. 16

25. At the time of transaction (specifically on March 28, 2008), TD Bank (which served as both First and Second Lien Agent and a lead lender) prepared a detailed internal credit memo in respect of the tax refund purchase arrangement. The memo noted, among other things, that:

- [the transaction would be structured] "in a manner that does not require any consents from the lenders"
- "the capital will effectively be a monetization of future tax refunds ($10MM in F08 and $10MM in F09), and the shareholders [i.e., Peter Sr.] will look to pull their capital back out when the tax refunds come in"

- "the Agent (1st and 2nd lien) *will provide* the Purchaser [Peter Sr.] with a partial discharge of its security with respect to: (ii)(a) in March/08, and (ii)(b) in January/09" [emphasis added]
- "the Purchaser [Peter Sr.] *will receive* the proceeds of the monetized 2008 tax refunds in late 2008, and the proceeds of the monetized 2009 tax refunds in late 2009" [emphasis added]
- "...to the extent the Borrower [GFPI] receives the monetized tax refunds from CRA, the *Borrower will agree to hold in trust and segregate the proceeds of the monetized refunds for the Purchaser* [Peter Sr.]" [emphasis added]
- "TD as Agent (for both 1st and 2nd lien) *will provide* partial discharges of security (refer (ii) above) on the basis of an opinion from lenders' counsel that the structure does not conflict with the credit agreement" [emphasis added]

TD Bank Internal Credit Memo, March 28, 2008

26. The Lien Agent's witness conceded on cross-examination that his expectation at the time was that Peter Sr. would receive the proceeds of the monetized 2009 tax refund in late 2009.

Montgomery Cross-Examination, p. 47, ll. 2-13

27. The tax refund arrangement was divided into two parts (March 2008 and January 2009) solely to ensure compliance with the First and Second Lien Credit Agreements, which permitted sales of assets of up to $10 million in each calendar year. The First Lien Agent's witness acknowledged on cross-examination that this was simply a "mechanic" to fall within the asset disposition terms of the Lien Credit Agreements, and that this structure was fully known to the banks in advance, without objection:

> Q. "And the reason that the second tranche was on January 2nd [2009], the first business day of 2009, was simply to have the mechanic of putting it in the second calendar year.
>
> A. Yes.
>
> Q. Correct?
>
> A. Yes."

Montgomery Cross-Examination, p. 48, ll. 3-20

28. Indeed, the Lien Agent's own counsel in her March 24, 2008 checklist of essential items to include in the Agreement (sent to GFPI's counsel) noted: "[It is] critical that the 2009 sale be structured such that it could not be considered a disposition in 2008". Significantly, this was done to avoid the time-consuming task of seeking the consent of all lenders under the Lien Credit Agreements (to either approve or amend). It had nothing to do with Peter Sr. or GFPI.

Montgomery Cross-Examination, p. 31, ll. 16-24, p. 33, ll. 10-19

EVENTS SUBSEQUENT TO THE EXECUTION OF THE AGREEMENT

29. The Agreement was signed by Peter Sr. and GFPI effective March 31, 2008.

Grant September 8 Affidavit, para. 16

30. The "2008 Closing" as defined in the Agreement took place on March 31, 2008. At that time Peter Sr. paid to GFPI US$10 million to purchase the Sold 2008 Refund and at the same time paid a further US$10 million to purchase the Sold 2009 Refund, as defined under the Agreement. The latter amount is described as the "2009 Purchase Price Deposit" under the Agreement. GFPI had immediate use and benefit of the US$20 million in funds paid by Peter Sr. to purchase the Sold Refunds. In exchange, Peter Sr. received a transfer acknowledgment and partial discharges from the First and Second Lien Agents in respect of the Sold 2008 Refund.

Grant September 8 Affidavit, para. 17

Grant Reply Affidavit, para. 8

31. The Lien Lending Agents, according to their witness on cross-examination, considered that their (and the lending syndicate's) consent to the transaction was not required under the Lien Credit Agreements because the Agreement was fully compliant with the Lien Credit Agreements, based on opinions from both their own counsel and GFPI's counsel (which position

everyone accepts as accurate). The Lien Lending Agents each freely provided the 2008 partial discharges because they were requested of them by GFPI.

Montgomery Cross-Examination, p. 26, ll. 3-16, p. 32, l. 23, p. 33, l. 3 and p. 38, ll. 10-12

32. Later in 2008, after GFPI received its 2008 Tax Refund from the Canada Revenue Agency, Peter Sr. received from GFPI approximately US$10 million in respect of his purchase of the Sold 2008 Refund.

Grant September 8 Affidavit, para. 19

33. The "2009 Closing" was to occur on January 2, 2009, as specified in the Agreement. Peter Sr. was not obliged to provide anything at the 2009 Closing as he had already paid the US$10 million purchase price in March 2008, and exchange rate adjustments meant that a small additional amount was to be paid to him by way of an adjustment under the Agreement. GFPI was to deliver a transfer acknowledgment (the "2009 Transfer") and partial discharges of security from the First and Second Lien Agents (the "2009 Partial Discharges") in relation to the 2009 Closing.

Grant September 8 Affidavit, para. 20

34. GFPI delivered neither of these documents on January 2, 2009, nor at any time thereafter. Apparently, certain Lien Lenders indicated that they would not approve providing the 2009 Partial Discharges and the Lien Agent advised that the 2009 Partial Discharges would not be provided without the direct authority of the requisite number of First and Second Lien Lenders. GFPI thereafter took the position that it would not provide the 2009 Transfer (although the consent of the Lien Lenders is in no way a necessary condition under the Agreement, as they

acknowledge). GFPI made no written demand of the Lien Lenders to provide the 2009 Partial Discharges in respect of the Sold 2009 Refund. Peter Sr. did not agree with or consent to this.

Grant September 8 Affidavit, para. 21

Montgomery Cross-Examination, p. 63, l. 17, p. 64, l. 9

35. It appears that the Lien Lenders sought to pounce on the opportunity that they perceived as potentially arising from the "simple mechanic" of having the 2009 Transfer delivered in January 2009. On cross-examination in respect of the issue of not providing consent or discharges, the First Lien Agent's witness said:

> "I do know from Bill [O'Connor, a vice-president of TD Securities] that this - - that this would have been our position. ... That as - - you know, in order to - - **in order to continue to support the company and, you know, put a structure in place that would allow it to continue to operate, that the lenders would look for the 10 million to remain in the company - - in order to induce the lenders to continue to fund, or continue to forebear**, I guess, or continue to re - - to restructure the credit facilities to allow it to continue to operate" [emphasis added]

Montgomery Cross-Examination, p. 65, ll. 8-21

36. Whereas the Lien Agents fully considered that they were authorized to provide the 2008 discharges without consulting members of the lending syndicate, they appear to have suddenly asserted a different position in 2009 in respect of the Lien Agent's authority. The First Lien Agent's witness testified on cross-examination:

> Q. But the sentence that we just referred to says, "We [GFPI] were advised that the agent" - -
>
> A. Right.
>
> Q. - - "would not provide" - - and the agent at that time, both agents, was the TD Bank?
>
> A. Yes.

Q. **The agent would not provide discharges without the requisite direct - - the direct authority of the requisite number of First and Second Lien Lenders.** Did Mr. O'Connor tell you anything about that?

A. No.

Q. So you don't know whether that's accurate one way or the other?

...

A. **I think it's fair that Bill may have told him that that's TD's position.** Whether the agent specifically said that, I don't - - I have no idea.

Q. And indeed your view that you told me earlier in the context of the March 2008 events was that the consent of any number of members of the syndicate wasn't required; they weren't entitled to a vote?

A. Yes.

Q. And this document [Lynch's email] then goes on to say: "TD Bank also indicated that in its position as one of the First Lien Lenders it would not be supportive of the request"? [as read]

A. Right.

Montgomery Cross-Examination, pp. 65-67

37. The Lien Agent's witness went on further on his cross-examination to describe that in the context of a proposed refinancing of GFPI under contemplation in February-March 2009, *the Lien Agent (TD Bank) required* as a negative covenant that the Sold 2009 Refund *not* be transferred to Peter Sr., even though he had fully paid for it a year earlier. The Bank expressly chose not to discuss this with GFPI's representatives (Lynch and Hap Stephen) directly, but rather said "I was just going to stick it in the term sheet and see how they reacted".

Montgomery Cross-Examination, p. 70, ll. 7-10 and p. 74, ll. 9-18

38. GFPI continued to take the position that it would not deliver the 2009 Transfer without the consent of the Lien Lenders. The Company has acknowledged in affidavit material filed at the time of the initial application that it is in default to Peter Sr. under the Agreement.

Grant September 8 Affidavit, paras. 23-24

39. Peter Sr. has written to GFPI demanding the delivery of the 2009 Transfer and completion of the transaction in respect of the Sold 2009 Refund. Those steps have not occurred.

Grant September 8 Affidavit, para. 25

40. The approach that the Lien Agents and GFPI have taken is at odds with the purchase and sale transaction as approved by the directors in 2008, and is in breach of the trust obligations under the Agreement. Peter Sr. purchased an asset from GFPI. This was not a loan or capital contribution.

Grant September 8 Affidavit, para. 26

41. GFPI and the Monitor apparently take no position on this motion. The First Lien Lenders oppose the relief sought.

PART III - ARGUMENT

THE ISSUE

42. The issue on this motion is whether GFPI, having taken and used for its purposes the money paid by Peter Sr. to purchase the Sold 2009 Refund, and having undertaken the fiduciary duty as a trustee to receive and hold the Sold 2009 Refund in trust for Peter Sr., should now be required by this Court to perform its duties and obligations, and pay over the Sold 2009 Refund to Peter Sr.

OBLIGATION TO DELIVER THE 2009 TRANSFER

43. Under section 7.04(a) of the Agreement, GFPI was required to deliver to Peter Sr. at the 2009 Closing on January 2, 2009 the 2009 Transfer in respect of the Sold 2009 Refund. Peter Sr.

had fulfilled all of his obligations and was not obliged to do anything further under the Agreement. GFPI failed to deliver the 2009 Transfer (and the 2009 Partial Discharges) and has admitted that it is in breach of its obligation to do so.

Agreement, Section 7.04(a)

44. The explanation offered by GFPI for its failure to perform its obligation to deliver the 2009 Transfer on January 2, 2009 was that the Agent for either or both of the First and Second Lien Lenders had stated that it would not not provide the 2009 Partial Discharges referred to in sections 7.04(b) and (c) of the Agreement without the express authorization of the requisite number of First and Second Lien Lenders, which authorization was apparently unlikely to be given since two of the Lenders had expressed objections to the tax rebate sale transaction at the time of the proposed 2009 Closing. Indeed, the Lien Agent's witness conceded on cross that the TD Bank wanted the Company to retain the $10 million refund and not pay it out to Peter Sr.

Exhibit "E" to the Grant September 8 Affidavit

45. GFPI apparently decided that it would not even formally ask the First and Second Lien Agents for the 2009 Partial Discharges even though it was under an obligation to provide such discharges to Peter Sr. at the 2009 Closing on January 2, 2009.

Exhibit "E" to the Grant September 8 Affidavit

46. Under the terms of the Agreement, the obligation of GFPI to deliver the 2009 Transfer to Peter Sr. is independent of its obligation to deliver the 2009 Partial Discharges and is in no way conditional upon the 2009 Partial Discharges being provided by the First and Second Lien Agents.

Agreement, Section 7.04

47. According to section 5.02 of the Agreement, Peter Sr., as Purchaser, was not to acquire any right, title or interest in the Sold 2009 Refund until GFPI had delivered the 2009 Transfer to Peter Sr. at the 2009 Closing on January 2, 2009.

Agreement, Section 5.02

48. The First Lien Lenders take the position that because GFPI chose to breach its obligation to deliver the 2009 Transfer to Peter Sr. on January 2, 2009, GFPI remains the owner of the Sold 2009 Refund and can now keep and use the entire US$10 million amount (including, presumably to pay the First Lien Lenders).

49. The tax refund purchase and sale transaction was structured such that when GFPI received the relevant Tax Refunds, those funds would be held in trust for Peter Sr. and paid to him free and clear of any claims of GFPI's creditors. The First and Second Lien Lenders, through their duly appointed agents, were fully aware of the terms and structure of this transaction (indeed had input into the terms), and approved of it. The Lien Lenders through their agents delivered partial discharges in connection with the 2008 Closing on March 31, 2008. In these partial discharges (Exhibit "D" to the first Affidavit of Peter Sr.), it was confirmed that the sale of the Sold 2008 Refund was in compliance with the discharge provisions (section 10.04) of the relevant Credit Agreements.

Exhibit "D" to the Grant September 8 Affidavit

LIEN LENDERS HAVE NO SECURITY INTEREST IN THE SOLD TAX REFUNDS

50. Accordingly, the First and Second Lien Lenders ceased to have any security interest in these Tax Refunds. As the sale of the Sold 2008 Refund was integrally tied to the sale of the Sold 2009 Refund under the terms of the Agreement, there can be no basis on which the First

and Second Lien Lenders can properly assert that the sale of the 2009 Sold Refund, unlike the sale of the 2008 Sold Refund, was not in compliance with the discharge provisions of the Credit Agreements.

51. A secured party's security interest with respect to collateral does not continue where the secured party has expressly or impliedly authorized its debtor to deal with the collateral free of the security interest. This is recognized in section 25(1)(a) of the *Personal Property Security Act*:

> **25. (1)** Where collateral gives rise to proceeds, the security interest therein,
>
> **(a)** continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free and clear of the security interest;
>
> ***Personal Property Security Act*, R.S.O. 1990, c. P.10, subsection 25(1)**

52. The First and Second Lien Lenders authorized GFPI's sale of the 2008 Sold Refund and 2009 Sold Refund, presumably because they believed that Peter Sr.'s purchase price payment of US$20 million would benefit GFPI and its creditors, including themselves. Clearly, that was true as the purchase price provided immediate cash-flow to the Company in March 2008 at essentially no cost to the Company. The Lien Lenders should not now be heard to say that transactions of which they were aware and approved could somehow be blocked after the purchase price was fully paid; nor should they be permitted to attempt to "scoop" this asset which Peter Sr. bought and paid for long ago.

GFPI's TRUST OBLIGATIONS TO PETER SR.

53. GFPI's decision not to deliver the 2009 Transfer to Peter Sr. on January 2, 2009, as required, involves not only a breach of contract, but also a breach of GFPI's trust obligations.

GFPI expressly agreed to receive and hold the Sold 2009 Refund in trust for Peter Sr. Section 5.06 of the Agreement provides as follows:

> The Vendor shall hold in trust for Purchaser; keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2009 Refund received by the Vendor after completion of the 2009 Closing.
>
> **Agreement, Section 5.06**

54. There can be little doubt that a trust relationship was created between GFPI and Peter Sr. It presumably arose when the Agreement was signed, and at the latest arose when GFPI received the Sold 2008 Refund in the latter part of 2008. The creation of a trust requires satisfaction of the so-called "three certainties": (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of objects.

> Trust law requires that three "certainties" exist before a trust will be found. There must be certainty of intention to create a trust, certainty of subject matter in the sense that the subject matter of the trust is ascertained or ascertainable, and certainty of objects of the trust, namely the beneficiaries.
>
> ***Howitt v. Howden Group Canada Ltd..* [1999] O.J. No. 706, at para. 8 (Ont. C.A.);**
>
> **See also: *Henry v. Henry,* [1999] O.J. No. 4089, at para. 14 (Ont. C.A.)**

55. The parties to the Agreement certainly intended to create a trust because they expressly so provided in section 5.06. The subject matter of the trust was clearly described as any part of the Sold 2009 Refund received by GFPI after completion of the 2009 Closing. Finally, the object or beneficiary of the parties' trust was Peter Sr.

56. The 2009 Transfer was not delivered to Peter Sr. at the 2009 Closing because GFPI decided not to do so given that some of the Lien Lenders had expressed objections to the transaction (even though, through their Agents, they were aware of and had approved such transaction in March, 2008).

57. A trustee owes the beneficiary of the trust a duty of undivided loyalty. Above all else, this means that the trustee should not put its own interests ahead of those of the beneficiary. GFPI acted in disregard of this principle of trust law when it decided that it would not deliver the 2009 Transfer in the face of objections from the Lien Lenders, or some of them.

58. This Court, as a court of equity, should make such orders and give such relief as may be necessary to ensure that equity is done and that GFPI is not permitted to escape the performance of the obligations it undertook to Peter Sr., both in contract and as a trustee.

59. In the event that it is considered necessary for GFPI to deliver the 2009 Transfer to Peter Sr. in order to complete the trust arrangements agreed to by the parties, it is submitted that GFPI should be directed to deliver such 2009 Transfer.

EQUITY'S ROLE

60. Alternatively, the Court is asked to apply the equitable doctrine embodied in the maxim: "Equity looks on as done that which ought to have been done, or which has agreed or directed to be done" as the basis for granting Peter Sr. the relief that he would plainly have been entitled to if GFPI had performed its obligation to deliver the Transfer at the 2009 Closing, i.e., a declaration that, when received, the Sold 2009 Refund will be held in trust by GFPI and paid over to Peter Sr.

> ***Re Fox*, [1951] O.R. 378 (Ont. S.C.)**

61. In a number of cases, Ontario courts have, in applying this equitable principle, quoted as follows from Snell's Principles of Equity, 28th ed., at p. 41:

> Equity looks on that as done which ought to be done. This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing

were already done, though only in favour of parties entitled to enforce the contract specifically and not in favour of volunteers. Agreements for value are thus often treated as if they had been performed at the time they ought to have been performed, with the same consequences as if they had been completely performed.

Toronto-Dominion Bank v. Paconiel Investments Inc., et al. **(1992), 6 O.R. (3d) 547 (Gen. Div.);**

Bliss, Kirsch and Doyle, et al. **(1983), 44 O.R. (2d) 129 (H.C.)**

62. To allow GFPI to escape its obligations as a trustee on the alleged basis that Peter Sr.'s rights in the Sold 2009 Refund somehow do not crystallize until GFPI delivers the 2009 Transfer would be contrary to the principle that courts will not allow parties to take advantage of their own wrong or default.

National Trust Company Ltd. v. Barcelona Traction Light and Power Co., **[1950] O.R. 864 at para 27 (Ont. C.A.)**

Wood v. Guarantee Co. of North America **(1975), 10 O.R. (2d) 661 at para. 39 (Ont. H.C.)**

SUMMARY

63. GFPI undertook by contract, for valuable consideration, to serve as trustee for Peter Sr. in respect of the Sold 2008 and 2009 Refunds. It cannot be the case, nor would equity permit GFPI to breach that very contract (by its own admission) and as a result of that breach seek to keep for itself the very property in respect of which it was and is trustee, and then turn to the beneficiary and suggest that the beneficiary's only claim lies for beach of contract in an insolvency.

PART IV - RELIEF SOUGHT

64. Peter Sr. therefore respectfully requests that the Court make:

(1) An order, declaration or directions, as appropriate:

(a) that Peter Sr. has purchased and is entitled to receive from GFPI a transfer of the Sold 2009 Refund;

(b) that forthwith upon receipt by GFPI (or other applicants, affiliates or subsidiaries) of the 2009 Tax Refund, as defined under the Agreement, or any portion thereof, GFPI (or other applicants, affiliates or subsidiaries) shall pay over to Peter Sr., or as he may direct, the full amount of the 2009 Sold Refund, and pending which payment GFPI (or other applicants, affiliates or subsidiaries) shall hold the Sold 2009 Refund in a segregated trust account for Peter Sr.;

(c) that, if necessary, GFPI is obliged to provide to Peter Sr. any documents or items to give effect to the relief requested above, as the Court may direct;

(d) that the Sold 2009 Refund does not form part of the assets of GFPI available to other creditors of GFPI;

(2) If necessary, an interim order requiring that GFPI, or alternatively the Monitor, hold in a segregated trust account pending final disposition of this motion (including any appeals or leave to appeal applications from the order granted on this motion), the full amount of the Sold 2009 Refund from and upon receipt of the 2009 Tax Refund (or any portion thereof);

(3) An order for costs of this motion in favour of Peter Sr., as appropriate;

(4) Such further or other order as may appear just or appropriate to this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 2nd day of October, 2009.

Richard B. Swan
(Bennett Jones LLP)
Counsel for Peter J. Grant Sr.

SCHEDULE A

Schedule A
List of Authorities

1. *Howitt v. Howden Group Canada Ltd.*. [1999] O.J. No. 706 (Ont. C.A.)

2. *Henry v. Henry,* [1999] O.J. No. 4089 (Ont. C.A.)

3. *Re Fox,* [1951] O.R. 378 (Ont. S.C.)

4. *Toronto-Dominion Bank v. Paconiel Investments Inc., et al.* (1992), 6 O.R. (3d) 547 (Gen. Div.)

5. *Bliss, Kirsch and Doyle, et al.* (1983), 44 O.R. (2d) 129 (H.C.)

6. *National Trust Company Ltd. v. Barcelona Traction Light and Power Co.,* [1950] O.R. 864 (Ont. C.A.)

7. *Wood v. Guarantee Co. of North America* (1975), 10 O.R. (2d) 661 (Ont. H.C.)

SCHEDULE B

Schedule B
Relevant Provisions of Statutes, Regulations and By-laws

***Personal Property Security Act*, R.S.O. 1990, c. P.10, subsection 25(1)**

25. (1) Where collateral gives rise to proceeds, the security interest therein,

(a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free and clear of the security interest;

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1986, c. C-36, as amended;
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC. GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the "Applicants")

Court File No. 09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM
OF PETER J. GRANT SR.
(Re: Tax Refund Purchase and Sale Agreement)

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