CITATION: Enlightened Funding Corp. v. Velocity Asset and Credit Corporation, 2024 ONSC 4003
COURT FILE NO.: CV-23-00707330-00CL
DATE: 20240716

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED; AND SECTION 101 OF THE COURTS OF JUSTICE ACT**

ENLIGHTENED FUNDING CORPORATION

AND:

VELOCITY ASSET AND CREDIT CORPORATION AND 926749 ONTARIO LTD. O/A CLONSILLA AUTO SALES AND LEASING

BEFORE: **KIMMEL J.**

COUNSEL: *Frank Spizzirri*, for the Moving Party, Jaqstan Consulting Inc. o/a AutoLoans 4 You

Rebecca Kennedy, Deborah Palter and Derek Harland, for the Responding Party Deloitte Restructuring Inc., the Court Appointed Receiver of Velocity Asset and Credit Corporation and 926749 Ontario Ltd. o/a Clonsilla Auto Sales and Leasing

HEARD: June 25, 2024

ENDORSEMENT

The Motion and Positions of the Parties

[1] Jaqstan Consulting Inc. o/a AutoLoans 4 You ("AutoLoans") claims to have entered into an oral agreement with 926749 Ontario Ltd. o/a Clonsilla Auto Sales and Leasing ("Clonsilla") to purchase Four Vehicles (defined below) and to have executed purchase documents on December 4, 2023 that were backdated to November 30, 2023.

[2] AutoLoans seeks, among other related relief, a declaration that it acquired all of the right, title, and ownership and leasehold interest of Clonsilla in and to the Four Vehicles and the stream of lease payments under the leases associated with those vehicles.

[3] Deloitte Restructuring Inc. ("Deloitte") was appointed as receiver (the "Receiver") on October 26, 2023, over the property of Velocity Asset and Credit Corporation ("Velocity") and certain property of Clonsilla (the "Dealer" and, together with Velocity, the "Debtors"). The Receiver was appointed over the remainder of the Dealer's property (including the Four Vehicles)

on December 8, 2023, pursuant to an Amended and Restated Receivership Order (the "A&R Receivership Order").

[4] The Receiver opposes this motion. It has determined from its review of the books and records of the Debtors that Clonsilla and AutoLoans concluded a financing transaction in respect of the Four Vehicles. Deloitte bases this conclusion on debt instruments (described as Fixed Rate Installment Notes, the "FRINs") executed by Clonsilla on November 30, 2023, the advance of funds by AutoLoans to Clonsilla on December 1, 2023 and the conduct of the parties before and after the execution of these debt instruments as recorded in contemporaneous documents, including *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA") registrations in respect of these (and other) debt instruments, made on November 29, 2023 and confirmed on December 6, 2023.

[5] The Receiver is suspicious of the backdated purchase documents that were created without any contemporaneous paper trail that were never reconciled with the executed FRINs. The parties purported to apply the same funds advanced on December 1, 2023 after the FRINs were signed to satisfy the cash portion of the purchase price under the purchase documents subsequently signed on December 4, 2023.

[6] The Receiver contends, in the alternative, that if the ultimate transaction is determined to have been a purchase, the transfer of the Four Vehicles to AutoLoans would constitute a preference pursuant to s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "BIA") and should be set aside. This transaction occurred within days prior to the expansion of the Receiver's appointment to cover these Four Vehicles under the A&R Receivership Order. The transfer would have the effect of giving AutoLoans a preference over other creditors of the Dealer since part of the stated consideration for the purchase was the repayment of outstanding indebtedness under pre-existing loans from AutoLoans to Clonsilla.

Summary of Outcome

[7] For the reasons that follow, this motion by AutoLoans is dismissed.

[8] The FRINs were sent by AutoLoans to be signed on November 30, 2023, and they were signed and returned that day, after which funds were wire transferred by AutoLoans to Clonsilla on December 1, 2023. If AutoLoans and Clonsilla decided to change their deal to a purchase of the Four Vehicles on or after December 1, 2023, they have not met their burden of proving they did so in a manner that legally displaced or superceded the concluded financing arrangements under the FRINs.

[9] Further, the timing and nature of the purchase documents would give rise to a presumption of a preference under s. 95 of the BIA, which the evidence tendered by AutoLoans is not sufficient to rebut when considered in light of the totality of the evidence and the contemporaneous records.

The Undisputed Facts

[10] The Dealer and AutoLoans had an existing lending arrangement whereby AutoLoans provided financing for the Dealer's leasing business. AutoLoans was a creditor of the Dealer at the time of the transactions at issue. AutoLoans and its affiliates remain creditors of the Dealer.

[11] The relevant events that are corroborated by contemporaneous documents or not otherwise contested, many of which are summarized by the Receiver in its factum, are as follows:

a. On October 26, 2023, pursuant to an application brought by a secured creditor, Enlightened Funding Corporation ("Enlightened"), Deloitte was appointed as the Receiver over all property of Velocity and certain property of the Dealer (the "Receivership Order"). The Receivership Order did not apply to the Four Vehicles.

b. In late November 2023, the Dealer approached AutoLoans and its affiliates for a loan. The Dealer said it was looking for an operating financing of between $90,000 to $100,000 by Friday December 1, 2023, to fund payroll and December rent. AutoLoans was the only one of the affiliated entities that was approached that agreed to look at this financing opportunity.

c. At that time, Clonsilla and its former principal, Hugh Waddell ("Waddell"), owed AutoLoans and its affiliates over $800,000 for existing loans. This included outstanding interest on loans from AutoLoans in excess of $20,000.

d. On November 27, 2023, Waddell sent Jacquie Rabinowitz ("Jacquie", as she is referred to in the moving party's materials), one of the principals of AutoLoans, a list of leases for which the Dealer was seeking financing.

e. Between November 27 and 28, 2023, Jacquie and Waddell exchanged emails about the amount of financing being requested by the Dealer and the due diligence that AutoLoans needed to perform. This included searching for and registering financing statements under the PPSA to determine AutoLoans' lien priority position. Jacquie also needed to determine which corporate entity would advance the funds. In the context of these dealings, Jacquie confirmed via email that "we are going to be funding leases for [the Dealer] and then getting paid back monthly blended principle [sic] and interest".

f. The initial vehicles proposed were not acceptable to AutoLoans because of pre-existing lien registrations, among other reasons.

g. The following Four Vehicles were eventually offered (and accepted) instead:

    i. A 2014 Jeep Cherokee Sport (VIN last 6 digits – 322371);

    ii. A 2014 Hyundai Elantra (VIN last 6 digits – 489314);

    iii. A 2016 Nissan Sentra (VIN last 6 digits – 640284); and

    iv. A 2014 Jeep Cherokee Trailhawk (VIN last 6 digits – 187045).

h. On November 29, 2023, AutoLoans registered PPSA financing statements against the Dealer as a debtor in respect of the Four Vehicles.

i. On November 29, 2023, at 4:49 p.m., Jacquie sent an email to Waddell and Maryanne Jacobs ("Jacobs"), an employee of the Dealer, attaching the loan payment amortization schedule, which set out the principal and interest payments to be made under the FRINs that Jacquie prepared and sent to the Dealer the next day.

j. AutoLoans wished to control any stream of payment in respect of the Four Vehicles because of prior concerns about having to chase payments. Jacquie asked the Dealer by email on November 29, 2023 to make arrangements for the lessees to make direct payment of their lease remittances into AutoLoans' account.

k. On November 30, 2023, at 10:50 a.m., Jacobs directed the lessees of the Four Vehicles to send their lease payments directly to AutoLoans on the instruction of Waddell.

l. On November 30, 2023, at 12:36 p.m., Jacquie sent Waddell a draft FRIN for review. In this email (with the subject line: Chattel Mortgage Clonsilla), she stated that this would remain a draft until she completed and sent the FRINs to Waddell for signature because she was working on how to address the monthly lease payments being remitted directly to AutoLoans.

m. On November 30, 2023, at 12:44 p.m., Jacquie sent her draft FRIN to her accountant, Mr. Warren Goldberg ("Goldberg") for review. Her email notes that she created a workbook to track the payments [principal & interest] coming in and that HST would need to be returned to the Dealer to be submitted monthly. She asked Goldberg for advice on the HST issue.

n. On November 30, 2023, at 12:48 p.m., Goldberg advised Jacquie he did not have time to respond to her request and would look at it in the next day or two.

o. On November 30, 2023, at 2:55 p.m., Jacquie sent fully completed execution versions of the FRINs for the Four Vehicles that she had prepared to Waddell in four separate emails and asked Waddell to sign and return the FRINs.

p. On November 30, 2023, at 4:16 p.m., Waddell signed a FRIN for each of the Four Vehicles (the "Executed FRINs") and returned them via email to Jacquie.

q. On December 1, 2023, at 1:19 p.m. the sum of $67,749 was advanced by AutoLoans to the Dealer.

r. On December 6, 2023, Jacquie sent Waddell an invoice for the PPSA registrations made the previous week against the Dealer in connection with the registration of the Executed FRINs, and for PPSA registrations in respect of some other vehicles for which financing had been provided by AutoLoans. In this email, Jacquie noted that these registrations could be renewed in a year.

s. Title and registration to the Four Vehicles were never transferred to AutoLoans.

t. The A&R Receivership Order was made on December 8, 2023, which expanded the Receiver's power and authority in respect of the Dealer to include, among other things, the Four Vehicles.

u. On December 8, 2023 Waddell was terminated by the Receiver and escorted out of the Clonsilla offices that day.

[12] The above facts form part of the findings of the court on this motion.

The Contentious Facts and Credibility Challenges

[13] AutoLoans has filed affidavits from seven individuals, including from Jacquie and Waddell, to support its assertion that, despite the financing arrangements and the execution and delivery of the FRINs by Waddell, the Four Vehicles were sold to AutoLoans prior to the A&R Receivership Order and do not form part of the Property of the Debtors.

[14] AutoLoans claims that the decision to change from a financing to a purchase transaction was based on the advice it received on December 1, 2023 from its accountant, Goldberg, although some of the affiants suggest that the deal had changed from a financing transaction to a purchase transaction even before that. The consideration for this purchase was the same as the consideration for the financing transaction: $90,543.01. The cash component of $67,749.92 was paid on December 1, 2024 and the balance of $22,793.09 was to set off against a portion of the outstanding interest arrears payable by the Dealer to AutoLoans on pre-existing loans. This is reflected in the purchase documents relating to the Four Vehicles dated November 30, 2023 that AutoLoans says were signed on December 4, 2023 (described in more detail below).

[15] The following is a summary of the evidence of the affiants who testified about the alleged purchase transaction. The Receiver urges the court to disregard the evidence as not credible or unreliable, for, among other reasons, those noted in italics after each summary:

a. Jacobs took the files for the Four Vehicles and placed them in green folders on November 30, 2023. She says this was done because she understood that they were to be purchased by, and transferred to, AutoLoans. *However, these folders and the documents contained in them (including the title and registration documents for each of the Four Vehicles) were not given to AutoLoans at the time the purchase agreement is alleged to have been signed, or at all, and remained in the possession of the Dealer.*

b. Jacquie testified that she sent "drafts" of the FRINs to Waddell that were always subject to her speaking to her accountant. Waddell testified that he signed the "drafts" that Jacquie had sent him as of November 30, 2023 because he needed to receive the funds the following day and was hopeful that the funds would be advanced if he signed these documents. *Neither of them mentioned in their testimony that, after sending the draft FRINs to Waddell at 12:36 p.m. on November 30, 2023 and after Goldberg had told Jacquie he was too busy to look at the material she had sent him, starting at 2:55 p.m. that same day Jacquie went ahead and sent four separate emails to Waddell with the subject line "chattel [mortgage] for signature" with the instruction "please sign and scan back". These are the*

FRINs that Waddell signed and returned to Jacquie at 4:16 p.m. on November 30, 2023. There is nothing in these later emails to suggest that what Waddell was asked to, and did, sign were only draft FRINs, nor any evidence as to why he would be asked to sign drafts.

c. Goldberg got back to Jacquie on December 1, 2023 and advised her that: "…the best way to structure the transaction would be for her to purchase the vehicles and corresponding leases, and have the monthly payments directed to AutoLoans together with the applicable HST, with AutoLoans then remitting the HST to the CRA as AutoLoans was an HST registrant." Goldberg testified that he was asked by Jacquie to look at draft notes that Jacquie had sent to Waddell (the original email that Jacquie sent to Waddell with the draft FRIN was forwarded to Goldberg). Goldberg also testified that he was asked to confirm that the draft notes that Waddell had signed did not meet AutoLoans' requirements, which Goldberg did confirm. *However, Goldberg only testified about draft notes. Neither he nor Jacquie testified that he was told about the email that Jacquie later sent to Waddell with the "chattel [mortgage] for signature" that instructed Waddell to sign and return the four completed FRINs she later provided to him. The other testimony about the FRINs also all refers to them, even after they had been signed, as "drafts". Jacquie and Stan (her husband) both express surprise in their affidavits that Waddell signed the draft FRINs. They do not acknowledge or make any attempt to explain the emails Jacquie later sent to Waddell with the execution copies of the FRINs.*

d. Jacquie testified that on Friday December 1, 2023, after she spoke to Goldberg, it was decided that the Four Vehicles had to be purchased outright with proper purchase documents and she says that Waddell agreed to the purchase that same day. Waddell testified to the same effect, that they reached an oral agreement on December 1, 2023, before the funds were sent by AutoLoans to the Dealer later that day, that the Four Vehicles would be purchased. The evidence of the affiants is that the purchase documents were drafted over the weekend and signed on Monday December 4, 2023. *No emails, calendar appointments or phone records have been located or produced to corroborate if and when this discussion took place or that an oral agreement for AutoLoans to purchase the Four Vehicles was reached on December 1, 2023. Based on the Receiver's review of the books and records of the Debtors, there are no emails or documents evidencing the negotiation or time of execution of any purchase agreements in respect of the Four Vehicles, or the termination or unwinding of the FRINs, nor has AutoLoans provided any contemporaneous documentary evidence of any of this. The purchase documents later produced by AutoLoans are dated November 30, 2023, not December 1, 2023, even though Jacquie and Waddell say their oral agreement was made on December 1, 2023.*.

e. AutoLoans claims that it advanced the funds on December 1, 2023 based on an oral and undocumented agreement and a relationship of mutual trust with Clonsilla. The witnesses who testified for AutoLoans and who were cross-examined by the Receiver, Jacquie and Paul Shapiro ("Shapiro", who was Jacquie's father and also

her lawyer), deny any knowledge of the receivership prior to December 4, 2023 when the purchase documents are said to have been signed. They deny that the change from a loan to a purchase transaction was influenced by any concerns about the solvency or potential receivership of the Dealer. *However, there is evidence in emails sent later in the day on December 1, 2023 (after the FRINs had been executed and delivered to AutoLoans) about concerns regarding a possible receivership and regarding questions asked of, but not answered by, Waddell:*

i. *On December 1, 2023, at 5:08 p.m., after the funds had been advanced to the Dealer, Jacquie sent an email to, among others, Waddell and Shapiro indicating that she discovered Clonsilla had bought back certain vehicles at an auction with a trustee as seller and that there was a potential receivership proceeding involving Enlightened and Velocity. She asked Waddell: "are you sure there is nothing else you want to disclose to us?"*

ii. *On December 1, 2023, at 10:36 p.m., Shapiro sent an email to, among others, Jacquie and Waddell, asking Waddell to explain to him what was going on with Enlightened. Shapiro asked: "What I don't understand is how the accountants were able to sell cars that were in Clonsilla's fleet. Did [Enlightened] take them back or did Hugh take them back and give to Longo ... What is the story with this Hugh?"*

f. Over the weekend, Shapiro drafted purchase documents in respect of the Four Vehicles. *Neither Jacquie nor Shapiro have testified about whether Shapiro was made aware that execution copies of the FRINs had been previously sent to, and signed by, the Dealer and returned to AutoLoans on November 30, 2023.*

g. On December 4, 2023, Shapiro says he took the original execution copies of the purchase documents (an umbrella agreement dated November 30, 2023 documenting the purchase of the Four Vehicles by AutoLoans and a separate purchase agreement dated November 30, 2023 for each vehicle, collectively referred to as the "purchase documents") and witnessed them being signed by Waddell on behalf of the Dealer (in Peterborough) and later witnessed them being signed by Jacquie on behalf of AutoLoans at a different location. The Alleged Purchase Agreements were backdated to November 30, 2023. *No evidence was provided by any of the affiants about why no drafts of these purchase agreements were sent by email to the parties to review before they signed them, or why the final execution copies were not sent to the parties for their records after they were signed. No evidence was provided as to why no copies of these executed purchase agreements were maintained in the books and records of the Debtors or how the original executed copies ended up in the possession of AutoLoans. No evidence was provided for why the title and registration documents that had been set aside in separate folders by Jacobs were not given to AutoLoans when the purchase documents were signed, or at any time after that prior to the December 8, 2023 A&R Receivership Order. Following a discussion with Jacquie on December 19, 2023 after the Receiver discovered that the lessees of the Four Vehicles were remitting their lease payments directly to AutoLoans and after looking into this*

> *further, the Receiver located the Executed FRINs in the books and records of the Dealer. No other transaction documents (purchase or financing) were found in the Dealer's books and records with respect to the Four Vehicles. The Receiver first received copies of the purchase documents on January 4, 2024 that were sent by letter dated January 3, 2024 from counsel for AutoLoans. Copies of the FRINs were also sent with that letter.*

[16] After reviewing the email correspondence, the books and records of the Debtors, and the various documentation provided by Jacquie and counsel for AutoLoans, the Receiver concluded that the Dealer and AutoLoans had entered into valid financing arrangements under the Executed FRINs that created unsecured debt obligations of the Dealer to AutoLoans. The Receiver concluded the purchase documents were not valid or enforceable and did not constitute a purchase of the Four Vehicles by AutoLoans.

[17] AutoLoans is critical of the Receiver for not having interviewed any of the parties involved in the negotiation, drafting, execution and implementation of the purchase documents before reaching its conclusion that there was no valid purchase transaction. The Receiver also did not challenge (through cross-examination) the evidence of any of the affiants put forward by AutoLoans on this motion pertaining to the purchase documents (summarized above).

The Issues to be Decided

[18] The Receiver identifies the issues to be decided on this motion to be,

a. whether the Executed FRINs or the purchase documents govern the Four Vehicles; and

b. if the purchase documents are valid and binding agreements evidencing a transfer of the Four Vehicles to AutoLoans, whether such transfer should be set aside as a preference pursuant to s. 95 of the BIA.

[19] AutoLoans identifies these as issues to be decided but also asks the court to determine whether the Receiver had a duty to conduct a complete, fair and proper investigation before reaching the conclusion that AutoLoans did not validly purchase the Four Vehicles prior to the A&R Receivership Order, and to determine whether the Receiver fulfilled its duty to do so in this case.

Analysis

[20] The issues will be addressed in a different order than outlined above as the issue regarding the duty of the Receiver to investigate is tied to the first issue regarding the nature of the transaction involving the Four Vehicles.

Was the Transaction Involving the Four Vehicles a Financing or Purchase?

[21] This is at first instance a question of fact.

[22] AutoLoans contends that, in the face of the unchallenged (by cross-examination) testimony of seven affiants who say (or support the narrative) that the final and governing transaction was a purchase by AutoLoans of the Four Vehicles, the Receiver has the evidentiary burden to rebut this evidence and cannot do so without any direct evidence.

[23] The Receiver argues that the testimony of these affiants, uncorroborated by contemporaneous objective documentary evidence, is not credible, is unreliable and should not be accepted at face value (for the additional reasons described, in italics, earlier in this endorsement).

[24] The Receiver urges the court to disregard the contentious evidence about the alleged purchase by AutoLoans of the Four Vehicles and to decide this question based on the uncontested facts and corroborating documents, which on their own unequivocally support the conclusion that this was a financing transaction.

[25] The suggested inference by the Receiver is that the purchase documents were signed after December 8, 2023 and backdated. At the very least, according to AutoLoans' own evidence, the purchase documents were not signed until at the earliest December 4, 2023, after the FRINs had already been signed, and then the purchase documents were backdated to November 30, 2023. It is also acknowledged that title and registration to the Four Vehicles were never transferred to AutoLoans and the files containing the ownership and related documents were never given to AutoLoans.

[26] Giving AutoLoans the benefit of the doubt, and based on their own evidence while also taking into account the contemporaneous records, the most generous view of the evidence leads me to find that:

a. Following a period of negotiation, final versions of the FRINs were sent by AutoLoans to the Dealer and were signed by the Dealer and returned to AutoLoans on November 30, 2023.

b. PPSA registrations against the Dealer corresponding with the FRINs for the Four Vehicles were put in place on November 29, 2023, in anticipation of a financing transaction, and were later confirmed on December 6, 2023. Funds were advanced on December 1, 2023. The financing transaction was concluded on December 1, 2023.

c. AutoLoans went back to the Dealer on December 1, 2023 after the FRINs had been executed and asked to change the transaction from a financing to a purchase, based on advice from its accountant. The parties were both prepared to pivot from a financing to a purchase transaction and agreed that they would do so. The lawyer for AutoLoans was instructed to prepare the purchase documentation over the weekend.

d. Purchase documents backdated to November 30, 2023 were eventually signed. They provide for the same consideration as had already been exchanged under the executed FRINs for the financing transaction.

e. There was disconnect between the new purchase deal and the financing transaction that had already been concluded. Whether it was known to or understood by the affiants at the time or not, the purchase transaction could not be legally implemented based on the same consideration already provided for the financing transaction which had already been implemented the week before. The financing transaction was never terminated, unwound or rescinded.

f. It has not been established on a balance of probabilities that the professionals (Goldberg and Shapiro) who were advising AutoLoans on the purchase transaction were aware that anything other than "drafts" of the FRINs had ever been sent to Waddell. No advice was provided by those professionals about the termination, unwinding or rescission of the financing transaction.

g. AutoLoans confirmed on December 6, 2023 that the PPSA registrations against the Dealer corresponding with the FRINs for the Four Vehicles (and other vehicles subject to loans) had been made and could be renewed a year later, consistent with the continued validity and subsistence of the financing transaction even after the purchase documents were signed.

h. Title and registration were never transferred and the ownership documents for the Four Vehicles were never handed over to AutoLoans, consistent with the continued validity and subsistence of the financing transaction even after the purchase documents were signed.

[27] Aside from the purchase documents themselves (that were signed after the financing documents), AutoLoans suggests that the terms of the FRINS are inconsistent with these findings. The FRINs only expressly provide for direct remittances of loan payments by the lessees to the financing party (as opposed to the Dealer) in the event of a default by the Dealer for more than 60 days, at which point receivables are to be assigned to AutoLoans and vehicle ownerships are to be surrendered forthwith. No default having occurred under the FRINs, AutoLoans says it is inconsistent for the lessees to have been instructed on November 29, 2023 to remit their lease payments to AutoLoans and that those instructions were consistent only with a sale of the Four Vehicles to AutoLoans. AutoLoans says that this is also consistent with the Dealer's practice of only directing lessees to make payments directly to financing parties when vehicles are sold.

[28] However, there is nothing in the FRINs or the prior practice of the Dealer that prevented a direction being given to lessees regarding their remittances in circumstances that did not involve a default. That is what occurred here, to address Jacquie's stated concern that AutoLoans remain in control of the lease payment stream and not be forced to chase payments. Nor does the fact that Goldberg later advised that a financing was not the preferred or recommended approach negate the fact that, at the time the instructions were given to the lessees, a financing transaction was what was being contemplated. Having considered all of the evidence surrounding the lease payments, I make the following findings:

a. The instructions given by the Dealer to the lessees to remit payments directly to AutoLoans were in furtherance of the loan repayment amortization schedule, as

originally instructed by Jacquie on November 29, 2023; not because of a transfer of title to the Four Vehicles.

b. After the A&R Receivership Order was made on December 8, 2023, the lease payments should have been remitted to the Receiver (or the Dealer). They were and remain the Property of the Debtors.

[29] The facts establish the elements of contract formation in respect of the FRINs: offer and acceptance with the intention of creating a legal relationship that was supported by consideration. The documentary evidence and conduct of the parties indicates an objectively manifested intention to enter into a binding financing transaction on November 30, 2023 that was consummated on December 1, 2023 when funds were advanced. See *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, at paras 35 and 37. Conversely, there was no new consideration provided in respect of the purchase documents signed afterwards while the FRINs remained valid and in full force and effect.

[30] The above findings are made without having to make a finding that any of the seven affiants is lying. A person's subjective understanding or assumption about why things were being done in a particular way (for example, the evidence of Jacobs, Stan and Gerald Shapiro), the oral agreement of lay persons (Jacquie and Waddell) that ignored steps already taken and documents already signed, and the advice of professionals (Goldberg and Shapiro) that did not reflect the legal consequences of steps already taken and documents already signed by lay persons, cannot be given weight in this fact-finding exercise.

[31] I prefer not to make findings of credibility if not required, particularly based on a written record alone (even though that is open to the court to do in appropriate circumstances). I will only address briefly the various arguments that were made by the Receiver about the credibility of some of the evidence that was proffered on behalf of AutoLoans, particularly the evidence of Jacquie.

[32] The point that I find most troubling in Jacquie's testimony is her express assertion in her affidavit that she told Waddell that the FRINs she had sent to him (on November 30, 2023 at 12:36 p.m.) were just drafts but, "[d]espite the forgoing advice that the note I sent to him was only draft, Hugh signed four (4) sent them back to me, one for each of the Four Vehicles". She neglects to mention her subsequent emails to Waddell, starting at 2:55 p.m. on November 30, 2023, in which she sent the FRINs to Waddell and specifically did ask him to sign them and send them back. This omission is misleading when considered in light of her affirmative testimony that is clearly designed to downplay the significance of the FRINs having been executed by Waddell, suggesting they were only drafts and expressing surprise that he signed them.

[33] Other points of discrepancy in Jacquie's testimony include that,

a. she says the PPSA registrations on November 29, 2023 were just precautionary, but makes no reference to the December 6, 2023 confirmation of those (and other) PPSA registrations and her suggestion in that later email that they could be renewed in a year; and

b. she testifies that: "I never personally directed a single lessee to make payments to AutoLoans and not the Receiver. The only emails with respect to directions to pay

> AutoLoans came from [the Dealer] on November 30, 2023." But Jacquie did specifically direct lessees to make payments to AutoLoans on at least December 4, 2023, December 5, 2023, December 7, 2023, December 8, 2023, December 9, 2023, and December 13, 2023. Her counsel suggested that those emails were only about making payments to AutoLoans and that, because they did not tell the lessees not to make payments to the Receiver, her statement with the conjunctive "and" is technically not incorrect.

[34] These evidentiary discrepancies are troubling, but I have concluded that it is not necessary for me to go as far as to find that Jacquie, or any of the other six affiants, is lying. Their narrative and beliefs or understandings can, for the most part, be reconciled, and found to be consistent with, the court's findings (above) that the antecedent financing transaction was not legally displaced by a subsequent purchase transaction. The Receiver can and has met its burden on this motion through the contemporaneous records, uncontested facts and with reference to AutoLoans' own evidence.

[35] I find that the FRINs were and remain the operative legal documents governing the transaction between AutoLoans and the Dealer in respect of the Four Vehicles, which was a financing transaction. The result of this is that the Four Vehicles are part of the Property of the Debtors.

Did the Receiver Owe and Breach Any Duties in the Conduct of its Investigation of the Transaction?

[36] This issue was very much a focus of the submissions of AutoLoans, but the consequence of the alleged breach of this duty appears from the submissions of the moving party to be relevant to the argument (rejected above by the court) that the Receiver is unable to meet its onus on this motion to rebut the unchallenged evidence of the affiants that the Four Vehicles were purchased by AutoLoans.

[37] The court has found that the Receiver has met its evidentiary burden, and did not need to resort to independent direct evidence collected through interviews of the affiants to do so. The Receiver's onus was met based on the testimony of the affiants, the gaps in their testimony, the contemporaneous documents regarding the financing transaction and the absence of contemporaneous documents and evidence to corroborate the timing and effectiveness of the purchase documents that were admittedly backdated.

[38] The other consequence that might flow from the Receiver's failure to fairly and properly investigate and interview persons with direct knowledge could go to the question of costs. However, that would only have come into play if the moving party had been successful in persuading the court that there was a purchase transaction that overrode or superceded the financing transaction. It was not successful in doing so.

[39] Since none of the potential consequences that might flow from the alleged breach of the Receiver's duty to conduct a complete, fair and proper investigation arise in this case, I am not going to attempt to define this alleged duty. This could have broader implications for other cases and the record on this motion does not support a deep dive into this question. I might have sought

further submissions and evidence on this point, including possibly expert evidence, if it had to be decided. It does not.

[40] The Receiver argues, in any event, that it discharged any duty it had to fully, fairly and properly investigate the purchase transaction that AutoLoans claimed to have concluded with the Dealer by gathering and reviewing all of the documentary evidence, including that which was provided by counsel for AutoLoans on January 4, 2024. I will briefly recap what the Receiver has said in response to the allegations that it breached this duty, as it provides some context for this motion and is consistent with what the parties eventually agreed regarding costs (detailed at the end of this endorsement).

[41] The context of the receivership provides some insight into why the Receiver was reluctant to engage in witness interviews when it considered the evidence it had from the documentary records to be compelling. There were earlier findings of the court regarding the conduct of Waddell and the Dealer made in the court's reasons for granting the Receivership Order and the order dated May 3, 2024 that granted Deloitte the power to assign the Debtors into bankruptcy (the "Bankruptcy Order").

[42] For example, the court previously found that Waddell knowingly unplated cars he sold to innocent purchasers where he had not made the required payments to his floor plan financiers, and he admitted to knowingly transferring cars to third parties and discharging security interests without payments to the secured creditors. He was found to have transferred a property he owned in Florida to his wife after the A&R Receivership Order was made.

[43] Further, the Receiver initially could not locate any trace of the funds advanced by AutoLoans to the Dealer on December 1, 2023 because they were sent to an undisclosed bank account.

[44] Some of this history with Waddell and the Dealer may have contributed to the Receiver's general distrust of what Waddell (in conjunction with others) said about the backdated purchase documents after they were discovered in January 2024.

[45] AutoLoans may be an innocent victim that was unknowingly swept up into the Dealer's efforts to avoid the expansion of the receivership and its consequences when AutoLoans was rushed into providing funding and documenting a financing transaction to support that funding on or before December 1, 2023. That does not need to be determined for purposes of this motion. What matters for purposes of this motion is that the steps taken afterwards were not sufficient to unwind or displace the concluded financing transaction.

If There Was a Purchase, Was It a Preference Within the Meaning of s. 95 of the BIA?

[46] Given my findings on the first issue, the alternative preference issue raised by the Receiver for the first time in its responding factum on this motion, technically does not need to be decided. In the interests of completeness, I will nonetheless consider this last issue.

[47] The test for a preference under s. 95(1)(a) of the BIA is: (i) The transferor was insolvent at the time of the transfers; (ii) The transfers occurred between three months prior to the date of the initial bankruptcy event and the date of bankruptcy; and (iii) The transfers had the effect of giving

a creditor a preference over other creditors at the time. Section 95(2) of the BIA provides that "if the transfer ... in Paragraph 1(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made ... with a view to giving the creditor the preference".

[48] The May 5, 2024 endorsement (made in connection with the Bankruptcy Order) determined that the Debtors' were insolvent as of the date of the original Receivership Order. Pursuant to the Bankruptcy Order, the "date of the initial bankruptcy event" of the Dealer has been deemed to be October 6, 2023. The date of the Bankruptcy Order was May 3, 2024. The purchase transaction would have been within the specified time frame. This establishes the first two requirements under the s. 95 test.

[49] The terms of the purchase documents did have the effect of giving a preference to AutoLoans since the result was that AutoLoans received the Four Vehicles for a purchase price that involved a partial repayment (set off) of outstanding interest on prior loans to the Dealer, and AutoLoans also had recourse to the Four Vehicles for the funds advanced. That had the effect of benefitting AutoLoans to the prejudice of other creditors of the Dealer in a transaction that occurred during the preference window specified under s. 95 of the BIA . A transfer of property to an unsecured creditor (here, AutoLoans) that removes assets from the estate of the Debtor (here, the Four Vehicles) during the relevant period and that has the effect of giving a preference to one creditor (here, a partial repayment of prior outstanding indebtedness through a set off against the purchase price) and is presumed to be a preference under s. 95 of the BIA. See *Truestar Investments Ltd. v. Baer*, 2018 ONSC 3158, 60 C.B.R. (6th) 70, at para. 64.

[50] The presumption created by s. 95(2) is not an absolute or conclusive presumption; it is capable of being rebutted. See *Salter & Arnold Ltd. v. Dominion Bank* (1926), 7 C.B.R. 639 (S.C.C.), as also referenced to in 2023 Houlden, Morawetz & Sarra, *Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2023), at §5:509.

[51] AutoLoans argues that the presumption of a preference is rebutted by the business purpose of the purchase transaction which was, according to Waddell, to obtain funds to meet payroll and rent coming due on December 1, 2023. The purchase transaction came about because Clonsilla was seeking near term funding for operations, namely rent and payroll that were payable that week. AutoLoans emphasizes that the creditor only needs to show that the payment (in this case, the purchase price) was made by the debtor in the *bona fide* expectation that it would enable the debtor to continue in business and/or extricate itself from its financial difficulties. See *Eastern Trust Co. v. Bank of Nova Scotia* (1956), 36 C.B.R. 77 (N.S. S.C.).

[52] However, there is no evidence about the *bona fides* of any expectation that Waddell held that the transaction with AutoLoans would have enabled Clonsilla to continue in business and/or extricate itself from its financial difficulties. Further, the evidence of a *bona fide* business purpose cannot be considered in isolation where, as here, the purchase documents were backdated to re-do a loan transaction as a purchase transaction after the creditor (AutoLoans) started asking questions about the receivership. This casts doubt on the legitimacy of the alleged business purpose of this purchase transaction (as distinct from the stated business purpose of the originally requested financing). The evidence about the alleged legitimate business purpose of the financing transaction is insufficient to rebut the presumption of a s. 95 BIA preference.

[53] Email communication between AutoLoans and the Dealer suggest AutoLoans discovered receivership proceedings involving Enlightened and became aware of a potential receivership involving the Dealer. AutoLoans started to ask questions about the receivership, while it was at the same time re-papering and back dating the transaction in a way that would reflect a purchase of the Four Vehicles, rather than a loan transaction.

[54] AutoLoans also relies on the Receiver's failure to interview the witnesses and properly investigate the purchase transaction in an effort to dilute the effectiveness of the presumption of a preference. However, the Receiver did not need to do more where the moving party's own evidence was insufficient to rebut the presumption.

[55] If I had found that the purchase documents were executed on December 4, 2023, as the affiants attest, and were legally effective in superceding the FRINs and associated financing transactions, I would have nevertheless set aside the purchase transaction as a preference under s. 95 of the BIA.

Costs

[56] The parties were asked at the hearing to exchange costs outlines and try to reach an agreement on costs. They advised by email dated June 28, 2024 that they had agreed that each party shall bear their own costs and that there be no costs ordered in respect of this motion, regardless of the outcome.

Final Disposition

[57] AutoLoans motion is dismissed, with no order as to costs. Each party shall bear their own costs of this motion.

Kimmel J.

Date: July 16, 2024