

CANADA / JUDGMENT

My Mortgage Auction Corp. (Re)

2025 BCSC 1520

COURT

Supreme Court of British Columbia

DECIDED

6 August 2025

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2025 BCSC 1520 My Mortgage Auction Corp. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

(In Bankruptcy and Insolvency)

Citation:

My Mortgage Auction Corp. (Re),

2025 BCSC 1520

Date: 20250806

Docket: B230305

Registry: Vancouver

In the Matter of the Bankruptcy of

My Mortgage Auction Corp.

and Gregory Joseph Martel

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Adjournment and Clawback Applications)

In Chambers

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Place and Date of Hearing:

Vancouver, B.C.

May 12-15, 2025

Place and Date of Judgment with Written Reasons to Follows:

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June 6, 2025

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Vancouver, BC

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OVERVIEW

- [1] PricewaterhouseCoopers Inc. ("PwC" or the "Receiver" or the "Trustee") applies, in its capacity as trustee of the consolidated estates of My Mortgage Auction Corp. ("MMAC") and Gregory Martel (collectively, the "Martel Group" or the "Estate"), for relief in respect of claims by and against the Estate.

- [2] Since May 2023, after becoming Receiver of MMAC's assets and continuing after its appointment as Trustee, PwC undertook a significant review of the Martel Group's documentation, all while attempting to understand the Martel Group's financial activities and affairs. After completing that review, the Trustee concluded that, from 2018-May 2023, Mr. Martel was a fraudster who, through MMAC, perpetrated a Ponzi scheme on hundreds of investors (the "Scheme").
- [3] The consequences, both financial and personal, arising from the collapse of the Scheme have been significant. The collapse has wreaked havoc and ruin on the lives of many of the investors. Investors paid MMAC over \$300 million over the relevant timeframe. To date, the Trustee has received claims from at least 930 investors totalling more than \$316 million. PwC's recovery of the Martel Group's assets to date has been minimal and is not expected to improve.
- [4] As with any Ponzi scheme, in the aftermath, individual investors have had significantly different outcomes. Some have lost some or the entire amount invested. Some have recovered their entire principal investment from prior payments by MMAC. Some have received their principal investment and a profit on that investment from payments by MMAC. Some have received payments from MMAC in the period leading up to MMAC's bankruptcy. These various categories of investors have been described on this application as "Losers" / "Net Losers", "Winners" / "Net Winners" and "Preference Recipients" respectively, terms which I will use in these Reasons.
- [5] In LLS America LLC (Trustee of) v. Dill, 2018 BCCA 86 ("LLS America"), the Court addressed issues that arose in the aftermath of another Ponzi scheme. The Court observed:
- [11] As authors Phelps and Rhodes observe, once a Ponzi scheme fails, "the long and difficult process of retracing the Ponzi perpetrator's steps begins, as does the even more difficult process of balancing the competing claims and interests of all involved".
- [6] The Trustee's application before the Court is described as the first step--essentially, the "difficult process"--toward reconciling the various investor interests and outcomes. The Trustee's application is its proposal as to how to properly balance those interests.
- [7] In summary, the Trustee seeks to recover, for the benefit of the Estate, amounts paid to investors in the Scheme more than the principal amount they invested (the "Excess Funds"). In addition, the Trustee seeks to recover payments made to investors within three months of MMAC's bankruptcy as preferences pursuant to s. 95(1)(a) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA].

- [8] Before embarking on this application, I dismissed an adjournment application by certain Net Winners, for reasons set out in this judgment. Their arguments were essentially repeated in the context of the merits of the Trustee's application. In the result, I was satisfied that it is appropriate to grant the relief sought by the Trustee at this time to bring certainty to the process and to advance the just, speedy and inexpensive determination of the issues on their merits.
- [9] I emphasize at the outset that there is no allegation that any of the MMAC investors were participants in the Scheme or even had knowledge that Mr. Martel was perpetrating this fraud. No investor here is a "winner" in the true sense - each is a victim. Yet, there is a substantial disparity in terms of the outcomes faced by the investors - with some investors reaping "profits" from the Scheme, often only by blind luck in terms of the timing of the Scheme's collapse, and only by reason of Mr. Martel raising that money by perpetrating the fraud on later investors.
- [10] For the reasons below, I find that the Trustee's approach is sound, both procedurally and substantively. The relief sought is appropriate, both on legal and equitable grounds. I find that the Trustee's approach properly and fairly balances the interests of the investors in this very difficult situation and will allow for a just and fair outcome to all investors.

THE (PONZI) SCHEME

- [11] The facts, as currently known to the Trustee, are set out in the Affidavit #2 of Neil Bunker, Senior Vice-President of PwC, sworn February 20, 2025. In his Affidavit, Mr. Bunker attaches many of PwC's eight reports prepared throughout 2023 in its capacity as either Receiver or Trustee.
- [12] Many investors have also provided affidavits as to their personal circumstances.
- a) MMAC's Business and Activities
- [13] In September 2017, MMAC was incorporated as a BC company, and it was later registered as a mortgage broker with the BC Financial Services Authority. MMAC appears to have operated from at least 2018 to early May 2023, when the receivership began.
- [14] Mr. Martel was also a registered mortgage broker and the sole owner and director of MMAC.
- [15] MMAC did business under the trade name "Shop Your Own Mortgage" ("SYOM"). SYOM operated through a website--which represented that it was an independent mortgage marketplace focused on sourcing mortgages for consumers looking to purchase residential properties. The website focused on consumers in both Canada and the US.
- [16] In addition, Mr. Martel controlled or owned several other entities, including Martel Investments Ltd., Martel Capital Inc., Shop Your Own Corp. and Shair Your Car Inc. (the "Related Entities").

- [17] MMAC's actual principal business activities were not mentioned on SYOM's website. In fact, MMAC's business included soliciting funds for the purported purpose of funding bridge loans for real estate developers needing short-term financing (the "Bridge Loans"). Investors had access to a portal on SYOM's website, which provided investors with copies of their investment agreements and appeared to describe the use of the underlying Bridge Loan for each purported investment.
- [18] The Trustee has provided samples of what appears to be the standard documentation used by MMAC to record these "Bridge Loans" and which documents were executed by investors and MMAC/Mr. Martel:
- a) A "My Mortgage Auction Commitment", that instructed MMAC to act on an investor's behalf to make a "capital investment" of a dollar amount. Specifically:
 - i. The "Use of Proceeds" indicated that the funds are for use as a bridge loan, which was to be loaned out by MMAC at a certain loan value level and the investor's "interest" was to be secured by a first or second mortgage against the property. However, the mortgage was not to be registered unless funds were delayed past the due date;
 - ii. The loan terms were typically short, being a few weeks or a minimal number of months; and
 - iii. The interest rates were within commercial reason on their face; however, when calculated for the very short loan terms, the actual annual interest rates were so high that they seemingly well exceeded the annual criminal interest rate;
 - b) A "Risk Acknowledgement", that was signed by investors confirmed that there was risk associated with the investment; and
 - c) An "Investment Agreement", that confirmed the deal terms, including that Mr. Martel guaranteed repayment to the investor by MMAC. The document confirmed the default interest rate of 21.99% per annum.
- [19] Mr. Martel confirmed to the Receiver that he was solely responsible for the management and underwriting of the "Bridge Loans". Mr. Martel was also responsible for authorizing any disbursement of funds from MMAC.
- [20] The Scheme began to collapse in late 2022/early 2023, when MMAC stopped making payment to its vendors and ceased distributing funds to investors who had requested repayment.
- [21] In early May 2023, PwC was appointed Receiver of MMAC by this Court. Almost immediately after its appointment, PwC expressed concerns in its reports about a lack of information regarding the alleged Bridge Loans and their recovery. From the beginning, PwC had real concerns that assets had dissipated and that steps had not been taken by MMAC to secure the Bridge Loans against the relevant loan recipients.

- [22] Ultimately, PwC's suspicions were confirmed when it was unable to locate any information to substantiate that any of the Bridge Loans existed. The Receiver concluded that, in the years that MMAC was in operation, Mr. Martel (as the controlling mind of MMAC) orchestrated the fraudulent Scheme.
- b) Receiver / Trustee's Efforts and Investigations
- [23] I have been the supervising judge in both the receivership and the bankruptcies proceedings since they began in May 2023. The proceedings have been extensive.
- [24] Unquestionably, since then, PwC, both directly and through its counsel, have undertaken significant and substantial efforts on behalf of the Estate to determine what has occurred (or not) and to recover what assets remained, to address claims against MMAC. They have done so without having any guarantee of recovery for the substantial costs incurred in doing so.
- [25] I will review these efforts briefly because they are relevant to many concerns, if not complaints, against PwC raised by some investors on this application (including Net Winners, Net Losers and Preference Recipients).
- [26] I have concluded that the concerns/complaints directed at PwC are ill-conceived and unjustified. By any measure, PwC's investigation has been thorough and, while the information garnered from that process has not been entirely complete or accurate, and the news has not been positive for the investors, that result is not for lack of effort by PwC.
- [27] Just prior to and after the Receiver's appointment (May 2023), the Receiver had to address numerous lawsuits that were commenced against MMAC:
- a) From February 2023-mid-June 2023, at least 14 lawsuits were started in BC alone by investors seeking repayment of their investments with MMAC. One of those lawsuits (SCBC Court File No. S-233210) resulted in the receivership appointment. Another one resulted in court orders restraining MMAC and Mr. Martel from disposing of, dealing with, or diminishing their assets on certain conditions and requiring that they provide disclosure of assets; and
- b) In June 2023, a person filed a court action in Nevada, claiming that Mr. Martel granted him an option to purchase Mr. Martel's Las Vegas property. Also, other court actions were filed in Nevada by investors of MMAC.
- [28] Throughout the proceedings, PwC has sought and obtained numerous court orders to allow and facilitate its investigation while seeking, unsuccessfully, Mr. Martel's cooperation. Those steps included:
- a) On May 4, 2023, an order was granted which authorized PwC, as Receiver, to take possession of, and exercise control over, MMAC's property (the "Receivership Order"). The Receivership Order also compelled MMAC and its directors and officers (including Mr. Martel) and other persons to provide access and cooperation to the Receiver;

- b) On May 9, 2023, I granted an Investigatory Powers Order at the request of the Receiver, which added certain of the Related Entities as defendants in the receivership proceeding. Again, the order required Mr. Martel and the Related Entities to forthwith provide access to information and offer cooperation to the Receiver regarding their business or affairs as it related to the Receiver's investigation of MMAC's financial dealings and assets. That order also prohibited the Related Entities from disposing of, dealing with, or diminishing the value of their assets wherever they were located;
- c) On May 9, 2023, MMAC's counsel was granted a short adjournment of the hearing to reconsider the Receivership Order. The Receivership Order imposed certain conditions, including that MMAC and Mr. Martel comply with the previous order with respect to disclosure of their assets by providing asset lists, verified by affidavits. MMAC and Mr. Martel did not comply with this condition when Mr. Martel only provided a partial list which was not verified by affidavit;
- d) By the next hearing date (May 17, 2023), MMAC and Mr. Martel had still failed to make the required disclosure. The Court authorized the Receiver to assign MMAC into bankruptcy; directed Mr. Martel to provide certain information regarding MMAC to the Receiver and directed Google LLC to provide exclusive administrative authority over all MMAC email and other databases hosted by it. Also, the Court amended an earlier order to expand the list of the Related Entities in respect of disclosure and added further financial institutions, who were all required to provide information;
- e) On June 6, 2023, MMAC was assigned into bankruptcy;
- f) By July 24, 2023 (the date of the Receiver's Fifth Report), the Receiver had only recovered \$302,266, which had essentially already been spent for Estate expenses. On July 26, 2023, I granted an order authorizing the Receiver to borrow up to \$400,000 from MMAC investors, which loans were to be repaid from the sale proceeds of Mr. Martel's Las Vegas property. On August 23, 2023, after minimal take-up by the investors, the Receiver accepted a modified funding offer by certain persons which, on September 11, 2023, I approved to allow the Receiver to borrow \$600,000;
- g) In late August 2023, Mr. Martel purported to sell his Las Vegas property to someone. PwC got wind of this transaction in early September 2023. Given the ongoing risk to the Las Vegas property, PwC engaged US counsel who successfully obtained a US Bankruptcy Court order on September 22, 2023, restricting disposition of that property. On October 20, 2023, PwC obtained a US Bankruptcy Court order granting full Chapter 15 Recognition for the Canadian court proceedings as foreign main proceedings; and
- h) On November 9, 2023, the Trustee executed a settlement with respect to the Las Vegas property. The Trustee was later authorized to sell the property and the sale closed on February 26, 2024.

- [29] On August 31, 2023, Mr. Martel was adjudged bankrupt by this Court. In PwC's s. 170 report (as Mr. Martel's trustee), PwC listed \$293 million in unsecured loans, based on Mr. Martel's guarantee of the non-existent Bridge Loans. Given the Trustee's conclusion as to Mr. Martel's operation of the Scheme, the Trustee filed a report opposing any discharge of Mr. Martel from his bankruptcy. In June 2024, the discharge hearing was adjourned generally. Mr. Martel has not sought to reschedule the matter.
- [30] The Receiver/Trustee has attempted to locate Mr. Martel. PwC learned that, sometime before receivership began, Mr. Martel left Canada. He resided in Thailand until approximately August 2023, when he was deported and then travelled to Dubai, UAE. At no time has Mr. Martel appeared in person at any of the court hearings held in BC. He has refused to confirm his whereabouts to the Receiver and Trustee.
- [31] Both before and after his departure from Canada, Mr. Martel failed and refused to cooperate with the Receiver and Trustee in several ways, despite the many court orders and his statutory requirements (under the BIA). In addition, at times, Mr. Martel actively sought to impede PwC's efforts. Examples include:
- a) Mr. Martel did not turn over MMAC's books and records or disclose the nature and existence of MMAC's assets, despite repeated requests and court orders;
 - b) Mr. Martel did not assist the Receiver in obtaining access to sites requiring two-factor authentication. At the time those sites were still diverting access authorization to a cell phone associated with Mr. Martel;
 - c) Mr. Martel advised the Receiver that there was an account at Scotia Capital Inc. containing \$16-18 million of investor funds. The Receiver later determined that such an account and funds did not exist;
 - d) Mr. Martel rented his Victoria, BC residence to a tenant from April-September 2023. The Trustee learned from the tenant that about \$32,000 was paid to Mr. Martel's former administrative assistant in respect of the tenancy. Mr. Martel concealed these rental payments in the one-year period before the date of initial bankruptcy event;
 - e) Only two days before his bankruptcy (August 29, 2023), Mr. Martel disposed of his Las Vegas property, which was long after an application was filed to adjudge him bankrupt;
 - f) Contrary to the BIA requirements, Mr. Martel has not disclosed or produced his property to the Trustee. The Trustee strongly suspects that such additional assets exist, which Mr. Martel has used to fund his living expenses since his departure from Canada;
 - g) Mr. Martel's limited cooperation has only decreased over time. The Receiver has had no direct contact with Mr. Martel since it prepared the Receiver's Fourth Report on June 7, 2023. Instead, Mr. Martel chose to communicate with the Receiver via his then legal counsel;

- h) In July 2023, Mr. Martel raised concerns about his disclosure and what he apparently perceived as his jeopardy in respect of potential criminal proceedings. He then brought an application to seal certain of the Receiver's reports and the information provided by him, which application was dismissed; and
 - i) On September 11, 2023, I found Mr. Martel guilty of contempt of court and issued a warrant for his apprehension. On September 22, 2023, the US Bankruptcy Court issued an order recognizing and enforcing the order of contempt. The US Order directed the United States Marshals Service to immediately take Mr. Martel into custody and detain him in custody until such time as the Court entered a further written order.
- [32] On September 11, 2023, I granted an order in this proceeding procedurally and substantively consolidating the Estate.
- [33] In summary, throughout this process, Mr. Martel has refused to assist PwC or meet the obligations imposed on him by this Court or the BIA. He has also actively hindered PwC's attempts to recover funds for the benefit of the Estate and has evaded a warrant for his arrest.
- [34] Most notably, despite repeated requests and court orders, Mr. Martel has never provided information to PwC to support the existence and amount of the alleged Bridge Loans which were recorded in MMAC's financial statements.
- c) The Trustee's Findings / Reports
- [35] The results of the Trustee's efforts have been substantially compiled into two documents, being a Funds Flow Analysis and an Investor Database.
- i) The Funds Flow Analysis
- [36] The Trustee identified and obtained statements related to 33 bank and credit card accounts that were owned by MMAC, the Related Entities and Mr. Martel for the period from MMAC's incorporation to its date of bankruptcy. Using these statements, and in many instances the underlying supporting documents (for example, cheques, wire transfer receipts, deposit slips, etc.), the Trustee compiled and categorized over 65,000 transactions to determine the sources and uses of the funds for the Martel Group and the Related Entities.
- [37] Based on the Funds Flow Analysis, the Trustee prepared a summary of the sources and uses of funds for the Martel Group and the Related Entities. Mr. Bunker sets out PwC's key observations as including:
- a) investors contributed \$301 million, primarily into MMAC, and only \$210 million of these funds were returned to the investors;
 - b) approximately 95% of the investor contributions were made in Canadian dollars to MMAC, with the remaining contributions being provided primarily to Shop Your Own Corp. ("SYOC") (a California corporation and related entity of MMAC);

- c) no monies were advanced to fund Bridge Loans and that MMAC operated a Ponzi scheme;
- d) \$4.9 million was earned from mortgage brokerage activities, rental activities, and the CarShair application business;
- e) \$33.8 million was spent on business operating expenses, which included costs incurred to develop and operate the CarShair business based in California;
- f) \$27.1 million was lost trading stock options and in other short-term investing activities;
- g) \$18.4 million was spent on credit card related payments and interest charges;
- h) \$5.5 million was spent on personal expenses such as luxury goods and services, meals, and events;
- i) \$4.3 million was spent on travel primarily by Mr. Martel between his residences in Victoria, BC, and California where his CarShair application business was located;
- j) \$3.7 million was spent acquiring and operating vehicles which were used in the business, for personal use, and also listed on the CarShair application in an effort to earn short-term rental revenue; and
- k) \$1.2 million was spent to acquire real estate owned by Mr. Martel.

[38] PwC's most significant conclusion above is c) - namely, that no monies were advanced to fund Bridge Loans. PwC also concluded that MMAC was operated as a Ponzi scheme, since the only known source of funds used by MMAC arose from the funds received by investors-- and that these funds were used primarily to repay other investors, with some monies being used for Mr. Martel's alternative ventures and to fund his lifestyle.

[39] I agree with PwC that the only reasonable inference that arises from the known facts is that Mr. Martel misrepresented the intended use of funds being sought from investors.

[40] The Trustee also easily concluded that, as is unavoidable in the case of Ponzi schemes, MMAC was hopelessly insolvent long before the Scheme collapsed in late 2022/early 2023. Among other things:

- a) by the end of September 2022, the value of MMAC's assets was almost nil, as compared to liabilities in excess of \$226.4 million; and
- b) by the end of February 2023, \$1.7 million was due to be paid out to investors based on maturity dates contained in investor agreements and \$60.6 million was overdue. In addition, at that time, MMAC was not meeting its liabilities generally as they became due.

ii) The Investor Database

- [41] The Investor Database contains aggregated data for each investor who invested in MMAC during its five years of operations. The Database includes: a) a record of all cash transactions between the investor and MMAC or one of the Related Entities; b) copies of each investment contract executed by the investor and MMAC; and c) a record of the T5 returns filed by MMAC with Canada Revenue Agency ("CRA") for each investor for the five years ending December 31, 2022.
- [42] Approximately 1,700 investors have been identified. The Trustee has classified each investor as either:
- a) A "Winner" or "Net Winner", being an investor who received Excess Funds (i.e., over and above their original principal investment amount); or
 - b) A "Loser" or "Net Loser", being an investor who received no repayment from MMAC or who received less than the original principal investment amount.
- [43] The financial consequences of the collapse of the Scheme have been significant. Nearly \$81 million in net losses were incurred by the investors as a whole:
- a) 480 Net Winners received Excess Funds of about \$68.2 million; and
 - b) 1,229 Net Losers experienced losses of about \$149 million.
- [44] The Preference Recipients are 81 investors who received payments from MMAC in the three months before the bankruptcy (March 6, 2023-June 6, 2023) totalling over \$3.1 million.
- d) Minimal Recovery
- [45] To date, despite the Trustee's substantial efforts on behalf of the Estate, recovery remains extremely limited. All funds recovered (principally, the sale of the Las Vegas property and a settlement of one preference payment claim) have been used to fund the administration of the receivership and bankruptcies.
- [46] The Receiver and Trustee continue to conserve recovered funds for the purpose of disbursements, rather than bill for the significant amount of professional time spent since the commencement of the proceedings to date. Essentially, the Receiver and Trustee are financing the ongoing administration of the Estate by deferring collection of their fees.
- [47] As of the Receiver's Sixth Report (dated September 6, 2023), the Receiver and Trustee calculated that they had incurred over \$1 million in fees based on their typical billing rate. Since that time, the Trustee and Receiver have incurred additional professional costs administering the Estate which have gone unpaid, including in furtherance of the Trustee's efforts to complete the Funds Flow Analysis. As a result, the Trustee and Receiver now estimate that they have incurred a total of \$4 million in fees based on their typical billing rate, \$3.1 million of which is unpaid.

- [48] Based on its work completed to this time, the Trustee amended MMAC's financial statements for the five years ended September 30, 2022, and prepared financial statements for the stub period to June 6, 2023 (MMAC's date of bankruptcy). The Trustee has filed amended tax returns with CRA based on the amended financial statements. As a result, corporate tax refunds of up to \$3 million are expected to be recovered.
- [49] In addition, the Trustee is in the process of preparing US personal tax returns for Mr. Martel for 2023 and 2024 which will be filed to facilitate the release of the proceeds from the sale of the Las Vegas property, currently held in escrow.
- [50] Aside from the above, the Trustee does not anticipate any substantial recovery for the Estate short of seeking a return of the Excess Funds and Preference Payments. The Trustee believes that the ability to claw back those amounts in a timely and cost-effective manner will have a direct and substantial impact on whether and in what amount the Trustee will ultimately be able to make a distribution to MMAC's investors.
- e) Was the Scheme a Ponzi Scheme?
- [51] Before turning to the procedural issues and specific causes of action advanced by the Trustee, the first question to be answered is whether the Trustee has established, on a balance of probabilities, that the Martel Group was not only operating as a fraud, but operating the fraud as a Ponzi scheme.
- [52] The great majority of investors who responded to this application (both Net Winners and Net Losers), whether by counsel or in person, did not contest the Trustee's characterization of MMAC's business as a Ponzi scheme.
- [53] Many of the Net Winners were represented on this application by counsel from MLT Aikins LLP ("Aikins"). Aikins agreed that Mr. Martel has perpetrated a fraud, but counsel would only concede that it "appeared" to be a Ponzi scheme.
- [54] Another set of investors who were Net Winners (Julie, Justin and Johanna Armstrong and Island Freedom Financial Inc.) asserted that their original transactions in 2017 were legitimate based on their due diligence and their understanding. However, they have not produced any evidence that the relevant Bridge Loans referred to in their documentation existed, only referring to Mr. Martel's reference to certain names and addresses. No evidence was introduced to support the legitimacy of these investors' transactions.
- [55] I agree with the Trustee's counsel that Aikins' refusal to concede that MMAC's business was operated as a Ponzi scheme no doubt arises because it leads to case law that does not assist its clients, the Net Winners.
- [56] I conclude that the evidence overwhelmingly supports that Mr. Martel's activities conducted through MMAC was a Ponzi scheme.

[57] This Court in *Boale, Wood & Company Ltd. v. Whitmore*, 2017 BCSC 1917 [Whitmore] at para. 45--as adopted in *LLS America* at para. 11--referred to the following definition from the United States Securities and Exchange Commission as to what constitutes a Ponzi scheme:

an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.

[58] I accept the Trustee's submissions that the Scheme perpetrated by MMAC and Mr. Martel bears all the hallmarks of a Ponzi scheme, as follows.

A. There was no legitimate investment activity.

[59] As I described generally above, the Receiver/Trustee spent two years trying to obtain any information or documentation to support that the Bridge Loans existed or exist, without success.

[60] The Receiver held discussions with over 10 former employees, all of whom indicated they were not involved in sourcing or underwriting the Bridge Loans; rather, they said that the Bridge Loans were managed solely by Mr. Martel. Mr. Martel confirmed to the Receiver that this was true.

[61] Yet, Mr. Martel utterly failed to provide any evidence of the existence of the Bridge Loans when PwC asked him to do so on multiple occasions. In addition, the Receiver was unable to locate any documents in the Martel Group's possession to support the existence of any Bridge Loans or any banking record to suggest that the Bridge Loan had been funded.

[62] For example, the Receiver obtained a spreadsheet (from the Martel Group's software program which MMAC used to conduct a large portion of its operations). This list contained individual borrower names but no contact details for each borrower. When the names on this list were discussed with Mr. Martel, he indicated that "code names" were used to protect the borrower's privacy. When the Receiver served 15 corporations identified on the list with a notice directing repayment to the Receiver, at least five of those corporations indicated that they had never borrowed money from MMAC or Mr. Martel. When asked, Mr. Martel was unable to provide the name of a single borrower who had obtained a Bridge Loan from MMAC.

[63] The inescapable conclusion is that no Bridge Loans were ever put in place and funded.

B. Investors were promised an investment generating high returns with little risk.

[64] The materials filed in response to this application are replete with the promises made by Mr. Martel to the investors, lured by the added promise of very high returns.

[65] The documentation signed by investors supported the legitimacy of the transactions and the intended Bridge Loans, including specific reference to lending values and security such as a first or second mortgage. Mr. Martel gave various assurances to the investors, including that loans were made to "solid clients" and that "protections" had been put in place for the investment. Mr. Martel also personally guaranteed each investment.

[66] The short-term nature of the investments also falsely suggested a minimization of risk, while investors garnered very high returns.

C. Focus on attracting new money, including through close connections.

[67] Mr. Martel was assisted in the Scheme by the early investors who were no doubt very satisfied with their extremely favourable returns.

[68] Mr. Martel encouraged MMAC's employees to reach out to family and friends to see if they were interested in investing, which some of them did. Also, by all accounts, the very satisfied first investors became a key part of Mr. Martel's sales strategy in that they then successfully promoted the investments to their family and friends, as many investors stated to the Court on this application.

D. Significant funds flowed through Mr. Martel's accounts.

[69] The Receiver/Trustee has identified substantial amounts flowing through MMAC's accounts. For example, from November 4, 2022-May 3, 2023, \$58 million was deposited and \$58 million was disbursed from MMAC's bank account.

[70] The funds received from investors were not used to fund Bridge Loans; rather, they were used primarily to repay other investors, while some moneys were used for alternative ventures and funding Mr. Martel's lifestyle. For example:

- a) MMAC's financial statements as of September 30, 2022, reflected loans payable to investors of \$226.4 million. As of October 2023, 904 claims had been received totaling \$312.8 million in respect of these loans;
- b) multiple investors, due to be repaid more than \$60 million as of February 28, 2023, were never repaid. Only \$17.8 million in disbursements were made by MMAC between March 1, 2023 and the date of the receivership, of which approximately \$14.2 million related to repayments to investors;
- c) millions of dollars in shareholder advances were used to fund various personal expenses of Mr. Martel, including private jets, luxury apartment rentals, event tickets, vehicle purchases and home escrow payments. No supporting documents to justify these expenses were found. In the fiscal year ending September 30, 2022, \$3.2 million alone was disbursed; and
- d) millions of dollars were also advanced regularly to the Related Entities, that Mr. Martel controlled.

[71] I accept the Trustee's submissions and find as a fact that the evidence presented on this application overwhelmingly establishes that the Scheme perpetrated by Mr. Martel through MMAC was a Ponzi scheme.

THE RELIEF SOUGHT

[72] The relief sought by the Trustee proposes a two-phase process.

[73] In Phase I, the Trustee seeks declarations against the Net Winners and Preference Recipients:

- a) Net Winners: that payments made in respect of contracts with MMAC to [the Trustee's attached list of Net Winners] more than those persons' principal investments (the "Excess Funds") constitute:
 - (1) fraudulent conveyances in accordance with the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA];
 - (2) unjust enrichments in favour of such persons; and/or
 - (3) money had and received,

any of which results in such payments being void and of no effect against the Trustee; and

- b) Preference Recipients: that payments made by MMAC from March 6, 2023-June 6, 2023 to [the Trustee's attached list of Preference Recipients] (each a "Preference Payment", collectively the "Preference Payments") constitutes fraudulent preferences in accordance with s. 95(1)(a) of the BIA and are void as against the Trustee.

[74] As I alluded to at the outset, I use the terms "Net Winners" and "Preference Recipients" only by reference to the Trustee's preliminary determination, based on its review of MMAC's records to the extent that those records were available. As I will discuss below, there is little doubt that some of the Trustee's preliminary determinations may be in error and that some of the amounts claimed may be less (or more) than what the Trustee has presently determined.

[75] Nevertheless, any deficiencies in the Trustee's initial determinations are intended to be addressed in Phase II. In Phase II, the Trustee proposes a process to determine whether, and in what amount, if any, the Net Winners received Excess Funds and the Preference Recipients received Preference Payments. The proposed process entails:

- a) recipients of the Preference Payments and Excess Funds (each a "Recipient") would be provided a "Clawback" calculation by the Trustee (the "Clawback Calculation") detailing the Excess Funds and/or Preference Payment(s) received by that Recipient;
- b) each Recipient would have an opportunity to dispute their Clawback Calculation with the Trustee, and failing that, apply to this Court for direction to resolve the issue; and

- c) the Trustee would ultimately be able to obtain, file, and enter a money judgment against each Recipient with the Court, subject to the Recipient disputing their Clawback Calculation and, if so, the resolution of the issues by the Court.

WHY THIS PROCESS?--AND WHY NOW?

[76] Procedural issues were raised by many investors at the outset of this application and during the application itself, concerning "why this process?"--and "why now?"

- a) Procedure Leading to the May 2025 Hearing Dates

[77] On February 20, 2025, the Trustee's application was filed.

[78] The Trustee was authorized to effect service of this application on the 561 Net Winners and Preference Recipients substitutionally, either by delivery to an address, by email or by posting on the Trustee's website. It appears that the investors are generally well-aware of these proceedings such that no notice or service issues arise.

[79] By March 11, 2025 (the originally scheduled hearing date), some investors had retained counsel or were acting on their own behalf. Many had filed application responses and affidavits. On that date, at the request of some investors, the matter was adjourned. One of the reasons for the adjournment arose from some of Aikins' clients, who indicated that they intended to seek an order appointing their counsel as representative counsel.

[80] I granted the adjournment but put the matter over to specific hearing dates (May 12-16, 2025). I also set specific deadlines for service and hearing of the application to appoint representative counsel well in advance of the hearing dates, to ensure that the May 2025 hearing dates would hold.

[81] The representative counsel application did not materialize.

[82] On May 12, 2025, the first day of the hearing, the participating investors responded to the Trustee's application in a variety of ways:

- a) Some investors had retained counsel who had filed responses and affidavits. Many investors filed responses and affidavits on their own behalf and on behalf of related persons. Some investors made submissions to the Court without filing any materials. Many investors objected to the procedure and the substantive relief sought. Some investors agreed to repay the amounts claimed by the Trustee; and
- b) The most substantive response came from various investors who were Aikins' clients (described by the Trustee as Net Winners). On the day before the application was to be heard, a subset of those clients (7) filed an application to adjourn the matter, which I denied. On the application itself, Aikins made submissions on behalf of all its clients (22) to oppose any relief being granted, joined to some degree by other individual investors, either with or without counsel.

[83] At this stage, I will address the procedural issues raised on this application. In doing so, I will address the adjournment application brought by some of Aikins' clients who are Net Winners.

b) Why a Summary Application?

[84] Aikins argues that a summary application is inappropriate and that individual actions should be commenced by the Trustee against each Net Winner.

i) The BIA Process

[85] The short answer to this question is that this is a bankruptcy proceeding and that a summary procedure is expressly authorized by the BIA and the Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [BIA Rules].

[86] The Trustee's motion is brought pursuant to ss. 98(1) and (2) of the BIA which allows the Trustee to recover property of the bankrupt or property acquired under a voidable transaction:

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

[87] Pursuant to Rule 11 of the BIA Rules, in bankruptcy proceedings "every application to the court must be made by motion unless the court orders otherwise".

[88] Accordingly, the Trustee has properly brought the matter before the Court by motion (or application), as required in proceedings under the BIA, rather than commencing separate actions against each investor.

[89] Having said that, I accept that the court may exercise its discretion toward determining that a summary procedure is not appropriate in the circumstances. The court may direct that the matter proceeds as a trial of the issue with pleadings and the usual trial procedures. Hybrid trial procedures may also be considered as a viable means to decide the issues.

[90] In *National Telecommunications Inc. (Re)*, 2017 ONSC 1475 [National Telecom], in the context of a proceeding to recover a transfer under value under the BIA, Justice Myers discussed the intersection of Rule 11 and the modern approach to adjudicating claims articulated in *Hryniak v. Mauldin*, 2014 SCC 7:

[37] I am not to be taken as finding that Hryniak applies to a decision by the court under s. 96 of the BIA. Rather, I am cognizant that Rule 11 of the [BIA Rules] provides that while the general rule is that applications are to be brought as motions, the judge has discretion to order a trial where appropriate. In my view, Hryniak provides an analogous circumstance where the court is directed to consider whether the use of a summary process will yield a fair result that serves the goals of timeliness, affordability, and proportionality and is therefore in the interest of justice. The goals identified in Hryniak are equally the goals of the bankruptcy process.

ii) The Supreme Court Civil Rules

[91] The BIA Rules also contemplate that the Court may resort to its ordinary procedure (the Supreme Court Civil Rules [SCCR]) to the extent that the procedure is not inconsistent with the BIA or the BIA Rules: Rule 3.

[92] I agree with the Trustee that its application is akin to a summary trial under SCCR R. 9-7. The Trustee seeks a summary determination, not on the basis that no triable issue exists (i.e., summary judgment), but on a substantive basis and based on affidavit evidence.

[93] To that extent, I have approached both the adjournment application and the merits of the Trustee's application in a manner consistent with R. 9-7, while also staying true to the statutory goals and objectives of the BIA. This is particularly so in respect of the requested adjournment (R. 9-7(11)) and with a view to determining whether I can find the facts necessary to decide the issues of fact and law, and whether, in any event, it is just to determine the issues on this application (R. 9-7(15)).

[94] I have considered the object of the SCCR expressed in R. 1-3 in seeking to achieve a just, speedy and inexpensive determination of the issues on their merits as far as it practical and in a proportionate manner. The statutory objectives of the BIA include these goals, as was noted above in National Telecom.

c) Was the Adjournment Sought Appropriate?

[95] I denied Aikins' application to adjourn the Trustee's application, substantially for the reasons set forth in the Trustee's application response filed May 12, 2025.

[96] In doing so, I considered and applied the factors discussed in Navarro v. Doig River First Nation, 2015 BCSC 2173 at paras. 18-22.

[97] My denial of the adjournment was arrived at after considering not only the interests of Aikins' clients (or any other Net Winner and the Preference Recipients), but also the interests of all 1,700 investors. One significant point that emerged from the hearing was that many investors, including even some Net Winners, wanted the Trustee's proposal addressed as expeditiously as possible.

[98] A summary of my reasons in denying the adjournment is as follows:

- a) Due Process: Aikins argues that the summary process was "hastily scheduled" without regard for due process. I reject this characterization. By the start of the hearing, almost two months has elapsed from the filing of the Trustee's application. All the investors, including Aikins' clients, had more than sufficient time to decide how to address the matter and many of them did so substantively. If nothing else, the timeliness (or lack thereof) of this adjournment application causes concern, in that it was served only late in the day on Thursday before this hearing, along with substantive materials (regarding both the adjournment and the merits of the application);
- b) Court Procedures: Aikins argued that all the investors would be denied the right to "normal court procedures". This is incorrect. The investors had an opportunity to obtain documentation and conduct any examinations. The Trustee responded promptly to any document request, including providing documents supporting the Funds Flow Analysis for each investor and investor statements (this would be in addition to the documentation that each investor would have in their own possession or control). No requests for examination of the Trustee were made. As I have explained above, this motion/application is the normal court procedure and it remains open to the investors to argue that it is inappropriate to decide the matter on the merits or to advance any defences that may be available to them, on the application itself. They ultimately failed to do so, as I will discuss below;
- c) Calculation Issues: Aikins argued (as did other investors) that the Trustee's calculations were incorrect and that the investors did not have an opportunity to dispute the calculations, either by disputing that they are "Net Winners" or that the amount of their "net winnings" is less than what was calculated by the Trustee. This is true, however, the process to address the proper calculation of the claims against the investors is intended to occur in Phase II, not Phase I (i.e. this application);
- d) The Forensic Accountant: Aikins argues that they retained P. MacAulay & Associates Inc., a forensic accountant firm to review the Trustee's documents, including the Funds Flow Analysis. However, this retainer was only obtained late in the day (April 28, 2025). In fact, both Aikins (and the accountant in his letter of May 7, 2025) acknowledge that they have the information and documents upon which the Trustee relies. The accountant's letter produced by Aikins is vague about what exactly is intended to arise by this retainer, although there is an inference that this accountant would "review" or "reconcile" the Trustee's information as properly compiled in the Investor Database and Funds Flow Analysis for not only Aikins' clients, but the entire investor group. I do not see anything relevant arising from this accountant's review of the Trustee's analysis, save perhaps as it relates to the Calculation Issue, which again arises in Phase II. In my view, Aikins' ill-timed retainer of this accountant was nothing more than a manufactured reason to support an adjournment;

- e) **Genuine Issues for Trial:** Aikins argues that there are "genuine" legal and factual issues raised in the application. For example, counsel referred to potential limitation issues and hardship issues. However, if such issues exist, either procedurally or substantively, they can be considered and addressed on the merits of the application. The fact that they purportedly exist is not a reason for delay;
 - f) **Reason for the Adjournment:** Aikins requested that the matter be adjourned generally. Essentially, Aikins' clients sought to pre-empt any hearing of the application arguing that it is "ill-conceived" and should not proceed at all. They did not argue that they needed time to complete steps to prepare for the application and outline those steps and a proposed timeline; rather, their arguments went to the merits. In my view, the overall intention of these Net Winners was to delay the matter indefinitely and increase the Trustee's cost burden in pursuing them, all in the hope that their jeopardy would dissipate over time; and
 - g) **Prejudice:** In my view, no issues of prejudice arise for Aikins' clients, while the entire investor group stands to suffer significant prejudice if there is further delay and increased costs in resolving these issues.
- d) **Investor Objections**
- [99] It is helpful at this time to summarize the main objections raised by the investors and put them into context, not only from a procedural point of view in relation to this application, but also as they relate to the issues more broadly.
- [100] Firstly, the major issue raised by many of the investors is what I will describe as the "Calculation Issue", as I referenced above.
- [101] Many of the investors criticize the Trustee, stating that many of their transactions were not considered or were pegged at different values. Many of them deny that they are "Net Winners" at all. Nevertheless, as set out in detail above, the Trustee has been hampered in gaining access to MMAC's records to fully understand all of the transactions, particularly in regards to the Bridge Loans. Again, the Trustee has done all this work without the cooperation of Mr. Martel.
- [102] The Trustee is well-aware of the limitations of its analysis, as set out in the Funds Flow Analysis. Many of the investors have responded, quite understandably, with their own records, which the Trustee did not have but, to the extent provided, is now reviewing. No doubt some changes are in order and will be made in the calculation process in due course.
- [103] However, this "Calculation Issue" is intended to be more fully addressed in Phase II, as proposed in the Trustee's application. The application proposes a robust process to determine the claims against the Net Winners and Preference Recipients, which includes a provision that the ultimate amount owing, if any, will be determined by the Court failing agreement. The relief sought on this application creates a form of claims process that preserves the right to make such arguments. Persons identified as having received Preference Payments or Excess Funds can dispute the Trustee's calculations of the quantum

of the Preference Payment and Excess Funds. If a Recipient establishes that the quantum of a Preference Payment and/or the Excess Funds is not accurate, that Recipient will only be liable for the corrected amount. If a Recipient establishes that he or she is a "Net Loser" rather than a "Net Winner", that Recipient will not be liable for any amount (in fact, that investor would share in any distributions alongside the "Net Losers"). For these reasons, no Recipient is prejudiced by the process established by the proposed order.

- [104] Secondly, many investors refer to transactions that have not yet been addressed by the Trustee, being investments made by them in MMAC's predecessor company (Dominion Lending Centres Zilla Mortgage Corp.). To address that issue, the order sought by the Trustee expressly refers to those transactions as being included within the Phase II process.
- [105] Thirdly, many investors raise what I will describe as the "Consolidation Issue". As in most if not all Ponzi schemes, the initial returns are touted and recommended by the first investors to friends and family members. Many investors advised the Court that they had brought their spouses, children and friends into the Scheme to invest and share in the high returns. Some of these other investors are Net Losers. Some investors take the position that their personal "winnings" should be set off against the losses suffered by these related parties, such that, as a group, they are in fact "Net Losers". Essentially, they argue that the family members who are "Net Losers" should be considered in the overall calculation of the "winnings" which the Trustee seeks to recover.
- [106] The Trustee acknowledges that this Consolidation Issue exists but proposes that it be addressed within Phase II. The Trustee argues that only through that process will the Trustee have a better appreciation of what transactions are proposed to be "consolidated" and why. If a live issue remains through that process, the matter can be brought before the Court for determination.
- e) What Alternatives are Available and Appropriate to Determine the Issues?
- [107] As it did in the adjournment application, Aikins argues that the determinations now sought by the Trustee in Phase I are procedurally inappropriate in that:
- a) The Trustee should be required to commence separate actions against each Net Winner in a separate proceeding, rather than decide the liability aspect as part of Phase I on this application;
 - b) The Trustee should be required to provide a transaction-by-transaction analysis for each of the investors, rather than the summary position based on all transactions for that investor toward characterizing that person as a "Net Winner"; and
 - c) No liability of any Net Winner should be established under Phase I prior to the Trustee being required to negotiate with each investor and, failing agreement, any such liability should be later determined by the Court.

- [108] Aikins summarized their clients' position, asking why it was necessary for the Trustee to determine the liability of the Net Winners now as part of Phase I and before Phase II.
- [109] I accept the Trustee's submission that this application stands as the most practical, effective and efficient means of the balancing process in this proceeding, as discussed in LLS America. I also readily conclude that the lengthy and involved process suggested by the Net Winners represented by Aikins is largely intended to delay the inevitable and exhaust what little financial resources remain in the Estate, all in the hope that the Net Winners will escape from any determination of liability.
- [110] Turning to the individual action argument, I concede that it was open to the Trustee to commence separate actions against all Net Winners and Preference Recipients. Aikins refers to some examples of such an approach: Whitmore; the Golden Oaks litigation (citation found later in these reasons) and an Ontario Superior Court Action regarding the bankruptcy of Douglas Grozelle (Court No. 32-3126798).
- [111] Yet, as I have stated above, the BIA contemplates a summary proceeding, at least in the first instance, while still allowing the Court to consider whether the issues can be fairly decided in that fashion. There is nothing to support that a Trustee must proceed by filing individual actions.
- [112] Insolvency proceedings typically involve their own statutory imperatives in terms of achieving a just outcome in the face of loss and chaos in what are usually unique circumstances (as here).
- [113] The overarching statutory goals of efficiency and expediency are encapsulated within the "single proceeding model" in Canadian insolvency laws. In this way, a collective process maximizes recovery for creditors and avoids inefficiencies and the inevitable negative results of chaos: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [Peace River] at paras. 54-55, 60-63. As stated by the Court in *Peace River* at para. 55, the single proceeding model is:

intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights. In other words, the single proceeding model protects the clear 'public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse'

- [114] In *Tron Construction (Re)*, 2022 SKKB 203 at para. 52, the Court exercised its jurisdiction under s. 183(1) of the BIA--with reference to the single proceeding model--to impose a claims process for determining liens against certain lands, rather than having those claims adjudicated in other civil proceedings in the usual fashion.
- [115] While the single proceedings model is typically used "as a shield" to protect debtors from having to defend claims in multiple proceedings or jurisdictions, the underlying principles animating the model also allow for its use "as a 'sword'" to enable receivers (or trustees) to pursue claims against third parties, to promote efficiency and maximize returns for

creditors: Mundo Media Ltd. (Re), 2022 ONCA 607 at paras. 24 and 52, citing Essar Steel Algoma Inc. (Re), 2016 ONSC 595 at para. 31 and Montréal, Maine & Atlantic Canada Co., 2013 QCCS 5194 at para. 29.

- [116] The Court in Peace River also recognized that procedural flexibility is a hallmark of insolvency law: Peace River at para. 64. The Court noted that, consistent with that flexibility, the court and the parties can tailor proceedings to fit a particular case and design a process as is appropriate toward the goals in a particular matter: para. 66.
- [117] In another insolvency proceeding under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, [CCAA], I endorsed the above approach--to resolve claims both by and against the debtor--as being consistent with the goals to adjudicate matters in "in an efficient manner and in a manner that is fair to all stakeholders": Alderbridge Way GP Ltd. (Re), 2023 BCSC 1718 at paras. 46-57. There is no reason to adopt any lesser goal here in respect of BIA matters.
- [118] Some of the application respondents suggest that the investors should be dealt with individually on a case-by-case basis through separate proceedings. I disagree that this suggested approach is a viable or even necessary means to resolve the Trustee's claim in these circumstances.
- [119] Firstly, the Net Winners objecting to the procedure cited no authority to support their argument that this procedure was inappropriate or unavailable for any reason.
- [120] To the contrary, as the Trustee points out, the summary relief it seeks--via this motion--is not novel, even in relation to Ponzi schemes.
- [121] In Titan Investments Limited Partnership (Re), 2005 ABQB 637 [Titan Investments], the procedure involved an application to the court for relief to address the fallout of a Ponzi scheme orchestrated by David Comte. Mr. Comte has used investment funds paid by investors to Titan to finance his personal lifestyle, rather than using them to purchase futures and equity vehicles in the market as intended. Near the end of the scheme, Mr. Comte had paid out full or partial redemptions to some 87 of Titan's investors. Over 40 investors received no redemptions from Titan or received redemptions that were not sufficient to cover their initial investment.
- [122] Titan's court-appointed receiver, and certain of Titan's unpaid investors, brought an application in the receivership proceeding for an order similar to what the Trustee seeks here--namely, seeking declarations that payments by Titan to the "winners" of a Ponzi scheme were void as fraudulent preferences; directing the "winners" to repay the full amount of the payments to the receiver; and failing which the applicants would be entitled to judgment against those "winners" who had not paid.

- [123] At para. 48 of Titan Investments, the Court granted the relief sought. No party objected to the procedure employed, and no party contended that each "winner" had to be sued separately.
- [124] Secondly, the procedure employed by the Trustee is consistent with the single proceedings model, which has been repeatedly endorsed in Canadian insolvency proceedings.
- [125] This procedure is an efficient and expedient means to resolve what can only be described as issues that are common issues as between all Net Winners and Preference Recipients. It is undeniable that, if the Trustee is required to undertake separate actions against all 561 investors, the cost of doing so would be exorbitant. The relief sought on this application is intended to provide a mechanism to permit the Trustee to pursue claims in a cost-effective manner.
- [126] Thirdly, I conclude that the procedure is a fair one. This is so in the sense of allowing the affected investors to raise any legal or factual defences or issues pertaining firstly to liability (i.e., Phase I, this application). If liability is found, the affected investors are also afforded a robust process to determine the amount of any "winnings" or preference received, including by court order if necessary.
- [127] As I will discuss below, the Net Winners and Preference Recipients have failed to advance any factual or legal defence to meet this application by the Trustee in Phase I, despite having months to do so.
- [128] Fourthly, I accept the Trustee's submissions that, if it is required to proceed against each Net Winner and Preference Recipient separately, the process is simply unworkable and, given the lack of funds in the Estate, not feasible. Such a scenario, even if it could be undertaken, would inevitably be characterized by delay and costs, all to the detriment of the Estate and the potential distributions to the Net Losers.
- [129] To endorse such an approach would result in years, if not decades, of litigation with minimal recovery at the end of it all for the Net Losers. As I commented above, I agree with the Trustee that objections raised to this collective procedure are a litigation strategy by certain Net Winners to delay and frustrate the recovery of funds for the Net Losers and avoid them having to repay any of the profits they received from the Scheme.
- [130] It is not difficult to imagine these potentially costly and time-consuming procedures, as suggested by some Net Winners, as one need only consider the actual circumstances in two other cases involving Ponzi schemes.
- [131] Proceedings took place in this Court to pursue the Tan family, who ran a Ponzi scheme from 1997-2016 through which they solicited investments for a non-existent enterprise in exchange for promissory notes that were not honoured. Two of the three fraudsters were declared bankrupt, and their estates were consolidated. The trustee pursued 19 separate actions against the net winners it had identified, whose winnings collectively exceeded \$7.5 million. At the same time, two separate class actions were pursued by investors against the

Tans and HSBC Bank Canada, respectively, each of which was settled: *Jastram Properties Ltd. v. Tan*, 2019 BCSC 475; *Jastram Properties Ltd. v. Tan*, 2020 BCSC 1610; *Jastram Properties Ltd. v. HSBC Bank Canada*, 2024 BCSC 1833. Years later, the settlement funds from the class action against the Tans were in trust, and a settlement administration plan was brought before the Court for approval. By then, the trustee had determined that, given the expected litigation costs, it was not "in a position to pursue the [individual] claims without funding": *Jastram Properties Ltd. v. Tan*, 2021 BCSC 2432 at paras. 29-35. Justice Gomery, then of this court, refused the funding based on the objections of some class members, who preferred to take their share of the settlement fund rather than wait for a future and uncertain recovery through those individual actions.

- [132] The Golden Oaks litigation (cited below) was similarly marked by delay and significant cost when the trustee attempted to recover judgments against the net winners. In mid-2013, the Ponzi scheme collapsed and the bankruptcy occurred. The trustee commenced over 80 separate actions. Only 17 actions were consolidated for a summary trial which took place in late 2018. Reasons were issued nine months later. That decision was appealed and cross appealed on a number of grounds, some of which were successful based on reasons issued in July 2022. The Supreme Court of Canada affirmed the Court of Appeal for Ontario's decision in October 2024, about 10 years after the Ponzi scheme's collapse. It is unclear from the various decisions whether any of the remaining 71 claims commenced by the trustee in 2015 were resolved. See *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108; *var'd Golden Oaks Enterprises Inc. (Trustee of) v. Scott*, 2022 ONCA 509; *aff'd Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32 [Golden Oaks SCC].
- [133] In contrast, in *Titan Investments*, judgments and writs of enforcement were issued against many of the net winners in that Ponzi scheme between mid and late October 2005, less than a year after the order was made appointing a receiver on October 29, 2004.
- [134] Similarly, in *Samji (Re)*, 2013 BCSC 2101, the trustee began steps to recover the "false profits" received by some investors in that Ponzi scheme about six months after the bankruptcy. The trustee executed a settlement agreement with certain net winners, rather than pursuing costly litigation against all of them. Justice Gerow approved the settlement under the BIA over the objections of four net losers. Apparently, other net winners also wished to settle. The comments of Justice Gerow are instructive in the context of the objections raised on this application:
- a) She found that the settlement would avoid the trustee commencing further litigation against every net winner, which be lengthy and involve exorbitant costs: (paras. 29, 32 and 37); and
 - b) The trustee's approach was "sound and in keeping with the objectives of the BIA", being to deal with matters expeditiously and efficiently so as to maximize recovery: (paras. 33-36).
- [135] In summary, the relief sought by the Trustee is precisely the sort of pragmatic approach the BIA calls for. It is appropriate in these circumstances, where:

- a) more than 1,200 Net Losers have suffered millions of dollars in losses because of the Scheme;
 - b) there are over 500 Net Winners and Preference Recipients, and
 - c) there are limited funds remaining with which to pursue the Net Winners and Preference Recipients individually. It is evident that the Estate cannot support the Trustee pursuing each Recipient individually. Simply put, the Estate is without funds and the ongoing efforts are only possible from the Trustee deferring collection of more than \$3 million in fees.
- [136] To be blunt, the procedure proposed by the Trustee and the relief sought on this application is the only realistic and viable option available to the Trustee to recover the Excess Funds and Preference Amounts.
- [137] Finally, I reject the arguments of certain Net Winners that there should be no determination of liability of any Net Winner under Phase I prior to the Trustee being required to negotiate with each one of them and that, failing agreement, any such liability should be later determined by the Court.
- [138] In doing so, I acknowledge that some Net Winners argue in part that they are essentially "Net Losers" and that they will, via Phase I, be unfairly determined to be a "Net Winner" when in fact they are not (this arises from both the Calculation Issue and the Consolidation Issue discussed above).
- [139] The Phase I procedure proposed by the Trustee--determining liability before moving to the Phase II issues to confirm an amount--is similar to relief often granted by this Court to allow a determination of liability before turning, if necessary, to a damage assessment. Such an approach is expressly contemplated under the SCCR for both trials and summary trials: R. 9-7(2) and R. 12-5(67).
- [140] It makes little sense that the Trustee should be required to expend countless hours and expense addressing all of the Net Winners, only to be possibly (or likely) met with a denial of liability by that Net Winner, if any amount is determined to be owing, to be followed by court proceedings to address the issue.
- [141] In the present circumstances, it must be emphasized that the Estate holds limited funds. Again, such an approach involving expense and delay could only be seen as a litigation tactic to avoid any recovery. As the Trustee proposes, if liability is established via Phase I against a Net Winner, only upon a determination arising out of Phase II would a judgment result which could then be acted upon. As such, if a Net Winner is in fact a Net Loser, then no further action would be taken against that investor.
- [142] In my view, the Trustee's approach is a reasonable one that gives certainty to the Estate that later efforts under Phase II will have real meaning if and only if the person is determined as a "Net Winner".

[143] All of the investors have been given a fulsome opportunity to participate and raise defences to the relief sought. No investor has been prejudiced in terms of their ability to respond substantively in respect of the liability issues. For the reasons discussed below, no viable defences emerged at all in the face of the overwhelming evidence presented by the Trustee and the application of the case law.

[144] In summary, after hearing the evidence and submissions on the merits of the Trustee's application, I am more than satisfied that the summary procedure proposed is appropriate. The two-Phase process proposed by the Trustee is a fair and reasonable way to proceed for all of the investors concerned, including the Net Winners and the Preference Recipients.

ISSUES

[145] The Phase I issues before the Court on this application are as follows:

- a) are the payments or dispositions of Excess Funds by MMAC to Net Winners void as against the Trustee, by reason of:
 - i. the FCA?
 - ii. The unjust enrichment of those investors? and
 - iii. That they constitute money had and received.
- b) are the Preference Payments void as against the Trustee pursuant to s. 95(1)(a) of the BIA?; and
- c) Assuming that the above declarations or findings are supported by the facts and the law, what is the appropriate remedy in the circumstances of these insolvency proceedings?

[146] As the applicant, the Trustee bears the burden of establishing all of the above.

[147] At this stage, I will add that some Recipients alleged in their response materials that the monies paid to MMAC were to be held in trust and the Excess Funds represented a return of those trust funds. No investor advanced such arguments at the hearing. In any event, the facts on this application clearly demonstrate that no trust relationship arose between the investors and MMAC.

LAW AND ANALYSIS

[148] Before turning to the specific causes of action advanced by the Trustee, it is helpful to frame that discussion by reference to the public policy principles that arise in respect of Ponzi schemes and the balancing exercise that was referred to by the court in LLS America at para. 11.

- [149] The BC Court of Appeal has expressly acknowledged that there is nothing unconscionable about clawback proceedings being instituted in the aftermath of a Ponzi scheme and that such clawback proceedings serve a valid public purpose. In LLS America, albeit in the context of court order enforcement of a foreign judgment, the Court referenced the goal of relief sought in the aftermath of a Ponzi scheme (in that case, a "consolidation order"):
- [14] It bears emphasizing that the final goal of a "consolidation" order is not to eliminate recovery by investors altogether, but to distribute the wrongly-obtained gains (and, unless good faith is shown, the original amount invested) to all creditors of the scheme. Simply put, the lucky early investors ("net winners") are obliged to share with the unlucky later investors ("net losers") in the scheme.
- [150] In coming to this conclusion, the Court in LLS America at para. 14 referred to the large body of case law developed around the US Bankruptcy Code, 11 USC concerning Ponzi schemes, which centers on the bankruptcy courts exercising "their equitable jurisdiction to bring together all the entities (whether insolvent or not) that have participated in gathering funds from "investors", consolidate those funds in one pool, and apply equitable subordination to permit all creditors to share the monies equitably".
- [151] To similar effect, the Court in LLS America referred to the reasons of the US court being considered at para. 26 (December 30, 2013) that:

The goal of avoiding a debtor's fraudulent transactions is not to punish those who received funds from the debtor. Instead, fraudulent transfers are avoided to benefit a debtor's creditors by bringing property back into the debtor's estate for distribution to creditors.

- [152] Finally, as is relevant to the many Net Winners who argue they will suffer hardship if required to repay the Excess Funds, the Court in LLS America stated:
- [75] In my opinion, it would not shock the conscience of most Canadians to discover that an investor in a Ponzi scheme who has reaped hundreds of thousands of dollars in interest or commissions would be required to disgorge his earnings and (having failed to show good faith) even the principal amount of his "investment", and to share in a pool with later "investors" who have lost their entire investments. No Canadian case was cited to us in which this 'claw-back' feature was found to be morally repugnant.

[Emphasis in original.]

- [153] While the Trustee's approach here is guided by the same principles and objectives as were described in LLS America, it is not premised on the doctrines of consolidation or equitable subordination. Further, the Trustee does not seek to recoup monies from the Recipients received from MMAC on account of their original investment amount in the Scheme (unlike the approach in LLS America but consistent with the approach in Titan Investments). Again, the Trustee seeks to recover only the Excess Funds, being amounts (the "false profits") received by the Net Winners, and not the original investment amount that they also received from MMAC.

[154] The Trustee's application is premised on the right of a bankruptcy trustee to pursue recovery of assets used in a fraudulent scheme by a bankrupt and, in doing so, avail itself of all rights and remedies available at law (whether by statute, common law or in equity) by bringing actions against third parties: Whitmore at paras. 93-95.

a) The BIA Preferences

[155] The BIA expressly provides a mechanism for a trustee in bankruptcy to recover certain preference payments that take place within a short period preceding the bankruptcy. Preferences occur when a debtor with insufficient assets to satisfy all its creditors pays one creditor preferentially over other creditors. Such payments are unfair because they undermine the scheme of distribution that would otherwise prevail in bankruptcy: Golden Oaks SCC at para. 125.

[156] Section 95(1)(a) of the BIA sets out a three-part test to establish a preference payment made to an arms length person:

- a) the transferor must be insolvent at the time of the transfers;
- b) the transfer must have occurred between three months prior to the date of the initial bankruptcy event and the date of bankruptcy; and
- c) the transfer must have had been made to a creditor with a view to giving that creditor a preference over other creditors.

i) Was MMAC Insolvent?

[157] Section 2 of the BIA defines "insolvent person" as follows:

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under [the BIA] amount to one thousand dollars, and:

- a) who, for any reason, is unable to meet his obligations as they generally become due;
- b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[158] In my view, there is no doubt that MMAC was insolvent in the three months preceding the bankruptcy (on June 6, 2023).

- [159] More specifically, the Trustee has determined that, by the end of September 2022, the value of MMAC's assets was almost nil, as compared to liabilities in excess of \$226.4 million. Nothing changed in the months leading up to MMAC's bankruptcy. From January-June 2023, MMAC's outflows exceeded its inflows by \$346,790.
- [160] Mr. Bunker's Affidavit #2 also establishes that MMAC was not meeting its liabilities generally as they became due when the Preference Payments were made--given the Ponzi scheme, and as a matter of fact. For example, as of February 28, 2023, \$1.7 million was due to be paid out to investors and \$60.6 million was overdue. The receivership was put in place in May 2023. From February 28, 2023--June 7, 2023, 14 separate lawsuits were filed in Canada by investors in MMAC claiming repayment of amounts due to various investors.
- [161] I conclude, without hesitation, that MMAC was insolvent, within any of the BIA definitions, when each of the Preference Payments was made.
- [162] While a BIA s. 95 analysis requires only a finding of insolvency within the three-month period, it is also convenient at this stage to address the issue of MMAC's insolvency more broadly, particularly given the position of some of the Recipients.
- [163] Certain Recipients assert that the Trustee must, as a precondition to establishing any liability, prove that the MMAC was insolvent at the time that it made each one of the approximately 65,000 transactions reviewed by the Trustee. They say that the Trustee has not put forward evidence to support such a transaction-by-transaction analysis and, as such, has not proved its case under the BIA (or in relation to the FCA issues discussed below).
- [164] In response, the Trustee argues that MMAC was insolvent from the outset, given Mr. Martel's Ponzi scheme, which I agree has been established.
- [165] There is substantial case authority to support the Trustee's position that Ponzi schemes, like the one Mr. Martel orchestrated, are insolvent from the moment that the first investment contract is entered into. In support, the Trustee refers to case authorities from the US and Canada.
- [166] This legal principle was affirmed in various US courts, who appear to have had early experience addressing issues with respect to Ponzi schemes: see for example, *Merrill v. Abbott* (In re Independent Clearing House Co.), 77 B.R. 843 at 860-861, 871 (D. Utah 1987) [Merrill]; *Martino v. Edison Worldwide Capital* (In re Randy), 189 B.R. 425 at 441 (Bankr. N.D. Ill. 1995); and *Scholes v. Lehmann*, 56 F.3d 750 at 762 (7th Cir. 1995).
- [167] The legal principle--that the perpetrators of Ponzi schemes are insolvent from the outset--has been adopted by courts across Canada, particularly in BC:

- a) In *Titan Investments* (issued 2005) at para. 16, the Court referred to the above US authorities and acknowledged that there was no Canadian authority on the point. However, the Court found the American approach to be reasonable in stating that there were never sufficient funds in the partnership to enable Titan to pay out its partners and the scheme would have collapsed at any time if sufficient redemptions were demanded;
 - b) In *Zayed v. Cook*, [2009] O.J. No. 5513, 2009 CanLII 72038 (S.C.J.), the Ontario Court referred to an anticipated distribution by the receiver to the investors. In doing so, Justice Cumming stated "It is in the nature of a [P]onzi scheme that the fraudster is massively insolvent because he has made promises to investors that cannot possibly be honoured" (para. 10);
 - c) In *Den Haag Capital, LLC v. Correia*, 2010 ONSC 5339 [Haag Capital] at paras. 9, 19 and 63-65. Justice Pepall, as she then was, referred to both US authorities and *Titan Investments* and *Zayed*. She similarly found that a company operating as a Ponzi scheme is considered to be insolvent from inception;
 - d) In *Whitmore* (issued 2017) at para. 49, Justice G.C. Weatherill referred to and adopted the reasoning in *Titan Investments* on this point; and
 - e) In *LLS America* (issued 2018) at para. 13, the Court acknowledged *Whitmore* as a recent example of a case in which the FCA was applied in a Ponzi scheme. The Court acknowledged that *Whitmore* adopted the reasoning in *Titan Investments* that a Ponzi scheme is insolvent from its commencement, referring also to *Haag Capital* and *Terry v. Bryson*, 2014 BCSC 522 at para. 3 (rev'd on other grounds, 2014 BCCA 433).
- [168] In short, there is ample persuasive authority from this Court, confirmed by the BC Court of Appeal, to support the proposition that MMAC was insolvent from the outset of its operations, given its lack of legitimate business activity and that it never had sufficient funds to enable all of their investors to be paid out. Further, based on the principle from *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (BC SC) and the binding nature of the Court of Appeal's adoption of this principle in *LLS America*, I am not in a position to come to any other conclusion.
- [169] For the above reason, there is no merit to the submission of some Net Winners that the Trustee must establish MMAC's insolvency on a transaction-by-transaction basis.
- [170] I conclude that the Trustee has established the insolvency of the Martel Group from the outset of the Scheme. The approximately \$300 million provided by investors to fund Bridge Loans were not used for this purpose. There were no Bridge Loans. The Recipients did not receive the Preference Payments and/or Excess Funds as a return for their investment; there was no investment. Rather, the only reason the Recipients received the Preference Payments and/or Excess Funds from MMAC was that Mr. Martel continued to perpetrate the fraud on later investors. MMAC had no other means with which to make these payments.

ii) Were Preference Payments Made Within the Three Months?

[171] I also find that the Preference Payments were made within the three-month period required by s. 95(1)(a) of the BIA.

[172] For a payment to be considered a preference, it must occur "during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy". Section 2 of the BIA defines both "date of initial bankruptcy event" and "date of the bankruptcy" for the purposes of the BIA:

"date of the initial bankruptcy event" means, the earliest of the day on which any one of the following is made, filed or commenced, as the case may be: (a) an assignment is made by or in respect of a person; or (e) the application in respect of which a bankruptcy order is made ...

"date of the bankruptcy" in respect of a person, means the date of: (i) the granting of a bankruptcy order against the person; (ii) the filing of an assignment in respect of the person, or; (iii) the event that causes an assignment by the person to be deemed.

[173] The relevant date is June 6, 2023 (the date of MMAC's bankruptcy) which is both the "date of the initial bankruptcy event" and the "date of bankruptcy". I find that all of the Preference Payments were made between March 6 and June 6, 2023, as set out in Exhibit "P" to Mr. Bunker's Affidavit #2, such that the Preference Payments were made during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of bankruptcy.

iii) Were Preference Payments Made with a View to Giving Those Recipients a Preference?

[174] I also find that the Preference Payments were made with a view to giving those Recipients a preference. A presumption to that effect arises under s. 95(2) of the BIA:

If the transfer, charge, payment, obligation or judicial proceeding has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference". A payment will have the effect of giving a creditor a preference

[175] In order to rebut that presumption, the creditor receiving the preference must show, on a balance of probabilities, that the "dominant intent" at the time of the challenged transaction was not to prefer that creditor. When proving intent, it is the intention of the insolvent debtor which governs, and that demonstrated intent must be objectively reasonable in order for the payment to avoid being set aside. Evidence of "pressure" cannot be used to rebut the presumption (such evidence is inadmissible). See *ATB Financial v. Devlin Construction Ltd.*, 2020 ABQB 574 at para. 6.

[176] Here, the Preference Payments had the effect of giving the Preference Recipients a preference.

- [177] A large number of investors who lost money in the Scheme have provided the Trustee with provable claims in bankruptcy. As above, as of February 2023, \$60.6 million was overdue to investors. The total disbursements made by MMAC from March 1, 2023 to the start of the receivership were \$17.8 million. Of these payments, approximately \$14.2 million relates to repayments to investors and the remaining \$3.6 million relates to other expenses and disbursements, including advances to related corporations. The inescapable conclusion is that, when the Preference Payments were made, many investors due to be repaid were not paid.
- [178] In the above circumstances, the Preference Payments are presumed to have been made with a view to giving the creditors who received them a preference.
- [179] No Preference Recipient has even attempted to rebut that presumption. They have not provided any evidence that MMAC/Mr. Martel's dominant intent, at the time MMAC made the Preference Payments, was not to prefer the Recipients that received them.
- [180] In addition, there is no inference arising from the Trustee's evidence that could be said to refute the proposition that MMAC/Mr. Martel's dominant intent was to prefer the Preference Recipients. To the contrary, the direct evidence and the inferences from the entire body of evidence is that MMAC/Mr. Martel very much intended to prefer the Preference Recipients. Although the specific reasons of Mr. Martel are not known, the very fact that Mr. Martel was operating a Ponzi scheme gives rise to the inference that he made those payments in an attempt to "keep the balls in the air" as long as he could by satisfying the demands of certain investors (the Preference Recipients) who, for some reason, demanded his attention (and funds) more than other investors.
- [181] As the Trustee notes, the very nature of a Ponzi scheme is that certain creditors (earlier investors) are preferred by using the funds of later investors to pay those initial investors. As the Court in Whitmore put it at para. 50, an intention to defraud creditors may be inferred from the fact that a debtor is operating a Ponzi scheme and no other reasonable inference is possible.
- [182] I find that the payments to the Preference Recipients had the effect of giving them a preference and that the statutory presumption in s. 95(1) has not been rebutted. Accordingly, I find that the Preference Payments were made with a view to giving a preference.
- iv) Were Preference Recipients "Creditors"?
- [183] I find that the Preference Recipients were creditors at the time that MMAC made the payments to them.
- [184] Various definitions in s. 2 of the BIA address this point:
- "Creditor" means a person having a claim provable as a claim under [the BIA].

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under [the BIA] by a creditor.

[185] Section 121(1) sets out what amounts to a "claim provable":

All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable under this Act.

[186] I find that all of the Preference Recipients meet the definition of a "creditor" in s. 2 of the BIA. At the time the Preference Payments were made to the Preference Recipients, each of them had a provable claim under the BIA, since MMAC owed each of them the agreed upon amounts under their respective investment agreements.

[187] In conclusion, I find that the Trustee has established all of the elements of the test to establish that the Preference Recipients received payments from MMAC and that those payments constitute a preference pursuant to s. 95(1)(a) of the BIA. As such, those payments are void and required to be repaid to the Estate.

b) The Fraudulent Conveyances

[188] The Trustee contends that the payments to the Net Winners of the Excess Funds constitute fraudulent conveyances pursuant to the FCA.

[189] The FCA provides:

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies

(a) a disposition of property, by writing or otherwise,

(b) a bond,

(c) a proceeding, or

(d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[190] In 0848052 B.C. Ltd. v. 0782484 B.C. Ltd., 2023 BCCA 95, Justice Voith described the elements of a fraudulent conveyance as follows:

[57] ... The elements of a fraudulent conveyance are that i) "a disposition of property" be ii) made with the "intent to delay, hinder or defraud creditors and others" and iii) that the transaction has that effect. In relation to the second element, this Court has held "[t]he only intent now necessary to avoid a transaction under the modern version of the [Fraudulent Conveyance Act] is the intent to "put one's assets out of the reach of one's creditors' (per RBC v. Clarke).

No further dishonest or moral blameworthy intent is required": Abakhan [& Associates Inc. v. Braydon Investments Ltd., 2009 BCCA 521] at para. 73; Mawdsley v. Meshen, 2012 BCCA 91 (leave to appeal to SCC ref'd, 34798 (27 April 2012) at paras. 69-70.

- [191] The statute must be applied in a manner consistent with modern commerce and common sense: Whitmore at para. 70. In addition, this Court and the Court of Appeal have confirmed that the FCA must be construed liberally, consistent with its remedial nature to protecting creditors: Abakhan & Associates Inc. v. Braydon Investments Ltd., 2009 BCCA 521 [Abakhan] at paras. 62, 67 and 70; Zhu v. Zhang, 2021 BCSC 2524 at para. 117(a).
- [192] Whitmore involved a consideration of the principles that inform the FCA analysis, which can be equally applied to these circumstances (see paras. 48-80).
- [193] Firstly, I find that the transfers of the Excess Funds to Net Winners constituted dispositions of property.
- [194] Payment of the Excess Funds to the Recipients "[p]lainly" constitutes dispositions of property for the purposes of a fraudulent conveyance claim under the FCA, in the same way that the \$384,000 paid to the defendant in Whitmore in excess of his principal investment was found by this Court to constitute a disposition of property: Whitmore at para. 53.
- [195] Secondly, I find that payment of the Excess Funds was made with the intent to delay, hinder or defraud MMAC's creditors and others.
- [196] As stated in Abakhan at para. 73, the only intent necessary to avoid a transaction under the FCA is the intent to put one's assets out of reach of one's creditors. No further dishonest or moral blameworthy intent is required, although the circumstances here clearly give rise to a finding that Mr. Martel was acting dishonestly in respect of the operation of the Scheme.
- [197] In Whitmore at para. 50, Weatherill J. stated that an intention to defraud creditors may be inferred from the fact that a debtor is operating a Ponzi scheme, as no other reasonable inference is possible.
- [198] Some of the Recipients argue that the Trustee must, as another precondition to establishing any liability, prove its claims of fraudulent intent under the FCA on a transaction-by-transaction basis. In other words, they argue that the FCA (and equally applicable to the unjust enrichment and money had and received claims) require a recipient-by-recipient, and transaction-by-transaction, review of the Martel Group's financial dealings to establish liability. They argue that the Trustee has not put forward the relevant transaction-by-transaction analysis.
- [199] This "transaction-by-transaction" argument appears to be based on the wording of s. 2 of the FCA, which provides:

This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud". [Emphasis added].

[200] As such, some Recipients argue that the nature of the inquiry under the FCA requires the Trustee to prove the elements of a fraudulent transfer with respect to each transfer (in this case, approximately 65,000 separate transfers).

[201] In my view, there is no merit to this argument. These Recipients cite no authority to support this interpretation of the FCA. Whitmore at para. 50 stands as authority for the opposite conclusion, citing Merrill at 860-861, as follows:

One can infer an intent to defraud future [investors] from the mere fact that a debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payment to present investors, which, by definition, are meant to attract new investors. [The perpetrator] must know all along, from the very nature of his activities, that investors at the end of the line will lose their money

the question of intent to defraud is not debatable given the fact that the debtor was carrying on a Ponzi scheme

[202] The above reasoning accords with common sense and commercial reality. I agree with the Trustee that the overall inference is that the Martel Group, by operating the Scheme, intended to defraud its creditors. The whole purpose of MMAC's Scheme was to mislead current and prospective investors as to the existence of the Bridge Loans that MMAC never put into place. In order to keep the Scheme afloat, Mr. Martel had to make some payments to the investors--both to confirm the "profits" and to keep those investors satisfied so that they would in turn assist in the marketing to others. It defies common sense to suggest that any transaction made in furtherance of the Scheme was intended to do anything other than delay, hinder, or defraud creditors.

[203] Aside from the above analysis given that this was a Ponzi scheme, the necessary fraudulent intent can be inferred from the circumstances where "badges of fraud" exist: Whitmore at para. 51; IE CA 3 Holdings Ltd. v. NYDIG ABL LLC, 2024 BCCA 244 at para. 57. The same badges of fraud identified in Whitmore at para. 52 equally arise here and similarly support the inference that MMAC/Mr. Martel intended to defraud MMAC's creditors (i.e. the investors) throughout the entire time that the Scheme was operated.

[204] In my view, the evidence overwhelmingly supports a finding of the requisite intent based on a consideration of the entirety of the evidence, in that payments of Excess Funds were made with the intent to delay, hinder, and defraud creditors of MMAC and others. There is nothing to suggest otherwise, let alone rebut the presumption of intent that clearly arises here.

[205] Thirdly, and finally, I find that the payment of the Excess Funds had the actual effect of delaying, hindering and defeating MMAC's creditors.

[206] The Trustee's investigations have revealed that the Excess Funds were sourced entirely from funds invested by other investors with the clear objective of defrauding them of these later investments (unless the fraud was perpetrated further on others). The inference is overwhelming and uncontroverted that Mr. Martel, in his capacity as sole director of MMAC, knew or ought to have known that each transfer of Excess Funds to a Recipient had the effect of further defrauding investors. When the music stopped, a large number of investors in MMAC had not recouped their principal investment.

[207] As was noted at Whitmore, the Court must consider the potential defence to a claim under the FCA under s. 2 which provides:

This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[208] I adopt this Court's reasoning in Whitmore as being equally applicable here to negate any application of the s. 2 defence on the part of the Net Winners with respect to the Excess Funds. No defences arise with respect to "good consideration", "good faith" or "lawful transfer". Specifically:

- a) A perpetrator of a Ponzi scheme does not receive "good consideration" or "value" for payments made to investors in excess of their principal investment. Such payments are merely used to perpetrate and continue the fraud and are not profits from a legitimate enterprise: Whitmore at paras. 59, 70-71; Haag Capital at para. 36;
- b) Since no "good consideration" was exchanged, the only fraudulent intent required is that of MMAC, which has been established: Whitmore at para. 71;
- c) I acknowledge that many of the Net Winners argue that their investments were made "in good faith". However, even accepting that as true for the purpose of this application, it is of no relevance, since the only relevant intention is that of the transferor, being MMAC, who was of course not acting "in good faith". In the context of a Ponzi scheme, no issues of "good faith" can arise to shield an investor in a Ponzi scheme from having to return sums received in excess of his or her investment; and
- d) The Excess Funds were not "lawfully transferred" to the Net Winners. As stated in Whitmore at para. 73, "[b]y any measure the Excess was not 'lawfully transferred' to the defendant. Rather, it was transferred to him or her as part of the unlawful Scheme being perpetrated". Similarly, the Excess funds were paid to the Net Winners as part of MMAC and Mr. Martel's fraudulent and unlawful scheme.

[209] As they did in respect of intent, some investors argue that the Trustee must provide evidence of a lack of good consideration under the FCA on a recipient-by-recipient, and transaction-by-transaction, basis. As with the previous argument, this argument is without merit and contrary to the above authorities.

[210] In *Haag Capital*, the Court acknowledged that

[36] the courts have held that a debtor does not receive reasonably equivalent value for payments made to its investors which represent distributions in excess of the principal investment". The "good faith and for value" defence is not available to shield an investor in a Ponzi scheme from having to return sums received in excess of his or her investment, because as a matter of law, one does not provide 'value' in exchange for 'profit' in a Ponzi scheme"

[211] Similarly, in *Whitmore*, the Court applied *Haag Capital* and also referred to *Donell v. Kowell*, 533 F. 3d 762 (9th Cir 2008) at 777-779 before stating at para. 70:

I agree with the observations of the United States Court of Appeals in *Donell* and of the Ontario Superior Court of Justice in *Den Haag Capital* that the perpetrator of a Ponzi scheme does not receive "reasonably equivalent value" or "good consideration" for payments made to investors that are in excess of the investors' capital investment. That is because there is no provision of "value" in exchange for "profit" in a Ponzi scheme. Likewise, the recipient of the fictitious profits provides no consideration. While innocent investors in such schemes invest with the expectation of profit as consideration for them having invested in a legitimate business enterprise, what they receive beyond the money they invest, if anything, is not consideration for their investment but rather the principal invested by others in the scheme.

[212] Therefore, logically, all payments of Excess Funds by MMAC lacked "good consideration".

[213] In conclusion, I find that the Trustee has established that the payment of the Excess Funds to the Net Winners are fraudulent conveyances, contrary to the FCA. As such, these payments are void and must be repaid by the Net Winners to the Trustee.

c) Unjust Enrichment

[214] Unjust enrichment is another remedy that is often employed to address the outcomes of Ponzi schemes. Although my finding of liability with respect to the Net Winners under the FCA is sufficient to dispose of the matter in respect of the Net Winners, I will also consider this alternate source of liability.

[215] A claim for unjust enrichment requires (i) an enrichment of the recipient, (ii) a corresponding deprivation of the claimant, and (iii) the absence of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

- [216] Consistent with the reasoning in *Whitmore* at paras. 98-99, I find that the first two elements of the test are met. Clearly, the Net Winners have been enriched by reason of having received the Excess Funds. In addition, the Estate has suffered a corresponding deprivation in that those funds would have otherwise been available to address the claims of all of MMAC's creditors.
- [217] There are two steps in the juristic reason analysis. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. Established categories that can constitute juristic reasons include contract; a disposition of law (such as where a valid statute denies recovery), a donative intent, and other valid common law, equitable, or statutory obligations. If an established category applies, the analysis ends. See *Garland* at para. 44; *Moore v. Sweet*, 2018 SCC 52 at para. 57.
- [218] If there is no juristic reason from an established category, the plaintiff will have made out a *prima facie* case under the juristic reason component of the analysis: *Garland* at para. 44. That *prima facie* case is rebuttable where a defendant shows that there is another reason to deny recovery, such as moral and public policy considerations: *Garland* at para. 45; *Moore* at para. 58. In determining whether the defendant has rebutted the presumption of enrichment, the court will have regard to the reasonable expectation of the parties and public policy: *Garland* at para. 46; *Moore* at para. 58.
- [219] None of the Net Winners have addressed the unjust enrichment analysis in detail in asserting that an established category applies or that they have rebutted the presumption of enrichment that arises here.
- [220] Nevertheless, the analysis in *Whitmore* again provides guidance on these issues in the context of a Ponzi scheme. In that case, the defendant argued that the "Excess" was paid to him pursuant to a legitimate lending agreement (i.e. an established category) and that this lending agreement constituted a juristic reason for his enrichment: *Whitmore* at para. 101.
- [221] *Weatherill J.* rejected that argument, finding that the transactions were not loan agreements, but rather investments, and no juristic reason arose since the agreement was founded on fraud and illegality:
- [102] I have found that the transactions between the defendant and Samji were not loan transactions but rather were investments made by the defendant in what turned out to be a fictitious Ponzi scheme. No legitimate creditor-debtor relationship existed. The fees the defendant received were not genuine returns on his investment, but rather were fraudulent payments to him by Samji from monies invested by others. In my view, no consideration passed from the defendant to Samji and no legitimate contract existed in respect of the Excess.
- [103] However, even if an enforceable agreement between the Samji Group and the defendant can be found to have existed in the circumstances, a proposition with which I do not agree given that the relationship was founded on fraud and illegality, such a contract does not and

cannot meet the necessary restitutionary requirements for a finding of "juristic reason" which are rooted in the sanctity of legal agreements: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, (Markham, Ontario: LexusNexus Canada, 2014) at pp. 643-645.

- [104] As was stated by the court in *Den Haag Capital* at para. 68 in the context of a Ponzi scheme: "I do not accept that any contract triggered a juristic reason". [Emphasis added.] Accordingly, I find that the relationship between the defendant and Samji, regardless of how it is described, does not constitute a juristic reason for the defendant's enrichment.
- [222] As I described earlier in these reasons, the Net Winners, like all investors, appeared to have executed a number of agreements to record their investment in MMAC. However, I adopt the above reasoning in *Whitmore* and find that the Net Winners have failed to establish any basis to retain the monies based on an established category, such as contract. As in *Whitmore*, the investments were made by Recipients in what turned out to be a Ponzi scheme. No legitimate creditor-debtor relationship existed. The Excess Funds the Recipients received were not genuine returns on their investments; rather, they were fraudulent payments using monies invested by others. Thus, no consideration passed from MMAC or Mr. Martel to the Recipients, and no legitimate contracts existed in respect of the Excess Funds.
- [223] In addition, the Net Winners have failed to rebut the presumption of enrichment by raising any other reason to deny recovery to the Trustee. As the Court stated in *Haag Capital* at para. 68, the law of unjust enrichment requires the return of profits that were paid only by reason of a Ponzi scheme, regardless of the innocence of the recipient (see *Whitmore* at para. 111).
- [224] The Net Winner can hardly say that they had a reasonable expectation of profiting through an illegal and fraudulent scheme that was perpetrated at the expense of other less fortunate investors: *Haag Capital* at para. 70.
- [225] Certain Recipients assert that, unlike *Whitmore*, they conducted thorough due diligence prior to investing in MMAC. Even if this were true, diligence is not a juristic reason to deny recovery. In *Whitmore* at para. 106, the Court stated that the defendant was "innocent of any wrongdoing, other than perhaps a failure to perform even a modicum of due diligence".
- [226] The same result also arises through the public policy lens. As was stated in *Whitmore*:
- [111] It would particularly be contrary to public policy to allow a retention of the profits in this case, given that they were not real returns on the defendant's investment but rather artificial transfers from other creditors of Samji designed to further Samji's fraud. In my view, despite the defendant's innocence with respect to the Scheme, equity requires that he not be permitted to benefit from Samji's fraud at the expense of the Net Losers who were not as lucky as the defendant. There is no evidence that the defendant will suffer undue hardship

as a result of an order to that effect.

[112] I find that no juristic reason has been shown that would or could justify the defendant keeping the Excess. It would not be just, right, or equitable for him to do so.

[227] As did the Courts in Whitmore and Haag Capital, I find that there is no juristic reason that can justify the Recipients keeping the Excess Funds, being "false profits" they received in excess of their principal investment.

d) Money Had and Received

[228] Another alternate source of liability with respect to the Net Winners arises under the common law remedy of monies had and received. This cause of action was described in Whitmore as follows:

[113] Money had and received is a claim for the return of money which the defendant has received but which the law says it would be unjust and against conscience to keep. Although "money had and received" has arguably been subsumed in the law of unjust enrichment, the courts have continued to treat it as a distinct cause of action: International Longshore & Warehouse Union Local 502 v. Ford, 2016 BCCA 226 at paras. 23-24.

[229] This cause of action centres, like unjust enrichment, on what is just in the circumstances. Again, I adopt Whitmore at para. 116 in concluding that it cannot be just that the Recipients who received "profits" from a Ponzi scheme are allowed to keep those false profits in the face of the substantial losses incurred by the Net Losers, who essentially funded the Excess Funds.

[230] Many investors argue hardship or change of position arising from the fact that they have relied on having the Excess Funds to make all manner of decisions in their lives. Whitmore described this defence at para. 118 as having the elements of an exceptional/material expenditure being incurred in reliance of the payment being received in good faith. This argument arises not only in respect of money had and received, but also unjust enrichment.

[231] However, this defence of hardship or change of position is not available in the context of a Ponzi scheme and the Excess Profits received: Whitmore at para. 124, citing Titan Investments at para. 47 and Haag Capital at para. 66. As stated in Titan Investments:

[47] Counsel was unable to direct me to any authority that considered whether the equitable defence of change of position was applicable in the context of the FPA or the Statute of Elizabeth. Without deciding conclusively whether the defence of change of position applies to the FPA or the Statute of Elizabeth, I find that the defence is not available to the Respondents in these circumstances. First, as in Anderson, the Respondents received the payments as a result of a fraud, and therefore, on the authority of Anderson, it would be against public policy to allow the defence to apply. Second, any consideration of equity with respect to the Respondents would also have to include a consideration of equity with respect

to the Underpaid Investors. It is a maxim of equity that "equality is equity" (Snell, at 102). The Overpaid Investors cannot therefore rely on the equitable defence of change of position to retain more than their equal share of redemptions from Titan. The Recipients of the Excess Funds also cannot rely on the defence of change of position. Canadian courts have held that such a defence is "inapplicable to over-paid investors in a Ponzi scheme".

- [232] At bottom, any argument of hardship or change of position cannot be advanced by the Net Winners in isolation from the entire circumstances--including the undoubted hardship and change of position that is being suffered by the Net Losers. In my view, it would be an astounding proposition to suggest that any "hardship" or "change of position" of the Net Winners in repaying these false profits outweighs the real hardship and change of position that the Net Losers had undeniably suffered, whose significant losses were the only reason the Excess Funds were paid.
- [233] In conclusion, the Trustee has established the Excess Funds also constitute money had and received and must be returned to the Trustee on that basis.

THE TAX ISSUE

- [234] Many investors refer to the hundreds of thousands (if not millions) of dollars they have paid to CRA in income taxes on the "profits" or interest income they received on their investments. Given the scale of the Scheme, there is no doubt that CRA received millions of dollars in tax revenue based on the false profits that MMAC asserted was paid to the investors, as confirmed by the T5 slips issued from 2018-2023.
- [235] Some investors suggest that their payment of the taxes alone results in hardship or change of position, arising from the possibility that they would be required to repay the Excess Funds to the Trustee, while having paid substantial taxes to CRA on that amount. To a large extent, this is a timing issue in the minds of many Recipients - ideally, they want the taxes they paid to CRA back before they have to repay the Trustee.
- [236] Needless to say, each investor's tax situation is unique. Some duly paid their taxes in the ordinary course or the tax liability was satisfied otherwise within the context of their personal returns. The taxes paid would be based on the specific information in the tax returns, with differing tax rates based on a person's level of taxable income. Some investors, no doubt after the Scheme was revealed, filed notices of objection with CRA and have not paid the taxes. Some may not have filed their tax returns at all or paid their taxes, such that they are being pursued by CRA. Even if a refund ultimately arises, it may not be payable by CRA if, for example, other taxes or amounts remain owing by that person to CRA.
- [237] The Trustee is well aware of this issue and understandably agrees that it must be addressed. Having said that, the Trustee has no control over CRA in terms of if, how and when this issue might be resolved.

[238] In his Affidavit, Mr. Bunker provided an update of the Trustee's efforts to resolve the CRA issues (para. 61), in that the Trustee has:

Commenced dialogue with the CRA with the objective of assisting investors. Following the receivership of MMAC, many investors were assessed tax on income reported on T5 slips issued by MMAC. Based on the investor database, the T5 income reported over the five years ending December 31, 2022 exceeded the cash returned to investors by approximately \$127 million. As recoveries from MMAC have not been available to the investors to help pay the tax liabilities, and many investors have struggled with navigating the tax legislation to reflect their losses from MMAC, the investors have been facing financial hardships. As a result, the Trustee:

- i) Worked with the CRA to communicate to investors that Notices of Objection should be filed with the CRA for the tax assessments. Further, the Trustee advised the investors that the CRA had agreed to pause processing these notices until it had received and considered the Trustee's proposed approach for dealing with investor tax matters.
- ii) Developed an approach for the dealing with investor tax matters and provided a submission to the CRA. The basic elements of the approach include 1) agreeing that the Trustee is authorized to amend T5 slips to reflect income only to the extent of Excess Funds received by investors and 2) obtaining a ruling from the CRA that any cash losses could qualify as Allowable Business Investment Losses (which provide for a more favorable tax treatment than if the losses are simply treated as a capital loss). The CRA is currently considering the Trustee's submission.

[239] The tax issues are complex and, at least at this stage, incapable of being resolved on a global basis.

[240] For example, the suggestion that the Recipients should be given a "dollar-for-dollar credit" for the tax paid is inappropriate since it would prefer them over the Net Losers. These monies would not be paid to the Estate for distribution and would therefore compound the inequities that arise here. Further, if a Recipient does not pay the full amount of the Excess Funds to the Trustee, then they should not get a full refund from CRA, because they are still in receipt of "interest income" for which they should pay tax. Timing issues under the tax legislation may arise with respect to any request for a refund. Finally, the suggestion from the Recipients that the Trustee should collect the tax amount from CRA is likely unworkable, at least in the abstract. Any repayment would depend on a taxpayer's individual circumstances and a full refund may not be paid. In addition, refunds are normally payable to the taxpayer (often electronically) based on their filings, not a third party such as the Trustee. If any amended filing is to be made, the individual investors must do so.

- [241] The issue of taxes paid to Canadian and US authorities in relation to Ponzi "interest" payments was considered in Haag Capital. At para. 71, the Court refers to a previous consent order that the defendants were to use their best efforts to maximize the recovery of taxes paid and file amended tax returns and refund applications. The Court concluded by granting a summary judgment and stating that recovery would come in part from all tax refunds received by the defendants.
- [242] As I have said, the Trustee is currently addressing this issue. I have no doubt that matters will evolve over time toward what is hoped to be a concrete solution to recoup the taxes so that they may be paid to the Estate. In my view, the issue is very preliminary at this stage and cannot be addressed substantively.

CONCLUSION

- [243] In conclusion, on this application (Phase I), the Trustee has established liability with respect to the Recipients. The payments to them of the Preference Payments and Excess Funds are void and must be repaid to the Estate. The Trustee is directed to proceed to the Phase II procedures to substantively address the actual amounts involved.
- [244] The order sought by the Trustee is granted, with the amendments discussed both at the hearing and on delivery of this decision.

"Fitzpatrick J."

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