

Re DEL EQUIPMENT INC.

① This Motion was heard by videoconference in accordance with the changes to the Commercial Just in view of the Covid-19 Crisis and the Chief Justice's Notices to the Profession.

② Del Equipment Inc. ("DEL") moves for an order requiring GC9 Industries Inc. ("GC9") to return \$874,107 ("Funds") to DEL. The Funds are being held in trust pursuant to my order dated November 5, 2019.

③ DEL filed for protection under the Companies Creditors Arrangement Act ("CAA") on October 22, 2019 following a number of efforts to

turn its business <sup>(2)</sup> around. Those efforts included entering into a Management agreement with GC9 pursuant to which certain of GC9's executives took over the day-to-day management of DE1 until that agreement was terminated in July 2019.

(4) When the Management agreement was terminated in July 2019, DE1 was owed \$874,107 (i.e. the Funds) from Mock Defense LLC ("Mock") on account of purchase orders placed the previous year, in April and November 2018. The purchase orders were made and the

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products were manufactured while GCG was running DEL under the Management Agreement.

⑤ Mock paid the Funds in two installments in August and September 2019. However, rather than paying the Funds to DEL, to which they were owed, Mock mistakenly paid the Funds to GCG instead of DEL.

⑥ GCG has refused to give the Funds to DEL or to return them to Mock notwithstanding that there is no dispute that GCG was not the intended recipient of the Funds and they were paid to GCG by mistake.

⑦ I have concluded that GCG has unjustly enriched itself by retaining the funds and refusing to pay them to DET or return them to Hock. Further, GCG's retention of the funds constitutes an improper preference over DET's other creditors for the following reasons.

⑧ The test to determine whether a party has been unjustly enriched was set out by the Supreme Court of Canada in Kerr v. Baranow, 2011 SCC 10 at para 32, applied to the facts of this case it is as follows:

(a) GCG received an incontrovertible benefit by

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receiving the Funds;

(b) DEL suffered a deprivation because the Funds were owed to it and were intended to be delivered to it; and

(c) There is no justiciable reason for GC9's receipt of the Funds from Moek.

⑨ Mr Shantri, on behalf of GC9, submits that DEL did not suffer a deprivation. I disagree. The Supreme Court of Canada made it clear in Moore v. Sweet, 2018 SCC 52 at paras 49-51 that the court must take a "robust approach" to the

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deprivation element in an unjust enrichment case and focus on what the party "actually lost" - that is, property that was in his or her possession or that would have accrued for his or her benefit - and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched at the expense of the former."

(10) I find that what GCG gained from receiving the funds is the precise benefit that OEG lost - the right to receive payment of the funds.

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(11) Applying the robust approach required by the Supreme Court of Canada, I have concluded that the first two factors of the unjust enrichment test have been clearly met. GC9 received an incontrovertible benefit by receiving the Funds and DEC suffered a deprivation.

(12) I have also concluded that there is no juristic reason for GC9's enrichment of receiving and retaining the Funds because,

(a) The Funds were never intended for GC9;

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(b) GCG cannot rely on set off as a juristic reason for its enrichment because the Supreme Court of Canada made this clear at para 114 of its decision in Kerr v. Baranow, supra.

(c) GCG has acknowledged that it received the Funds by mistake which is not a juristic reason for its enrichment;

(d) GCG is not an "innocent" recipient of the Funds because its own employees were at least, in part, the cause of the mistaken payment; and

(e) GCG's retention of the Funds



⑨ constitute an improper preference over DEC's other creditors.

⑨ For all of these reasons GC9 has been unjustly enriched by the receipt and retention of the Funds.

⑩ In Sauls v Korkontzilas, 1997 Comwell Ont 1489 at para 43, The Supreme Court of Canada held that where there has been an unjust enrichment, a constructive trust is the appropriate remedy to effect restitution. I have, therefore, concluded that the Funds are subject to a constructive

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Trust in DEL's favour.

(11) DEL's motion is granted. GC9 is ordered to return the Funds to DEL forthwith.

(12) DEL is entitled to its costs of this motion. The only issue is the scale and the amount of the costs payable by GC9 to DEL. Counsel shall schedule a 15-minute teleconference with me to make submissions with respect to costs.

Hairy J.