CITATION: Degroote v. DC Entertainment Corp et al, 2013 ONSC 7101

COURT FILE NO.: CV-12-9886-00CL

DATE: 20131118

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SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: **RE:** MICHAEL G. DEGROOTE,

Plaintiff

AND:

DC ENTERTAINMENT CORPORATION, DON CARBONE ENTERTAINMENT INC. DREAM CORPORATION INC., KING SOFTWARE SOLUTIONS CORP, DREAM CASINO CORPORATION S.R.L., DREAM SOFTWARE SOLUTIONS INC., DREAM KIOSK SOLUTIONS INC., ANTONIO CARBONE, FRANCESCO CARBONE and ANDREW PAJAK

Defendants

BEFORE: Newbould J.

COUNSEL: *W. Niels Ortved, Eric S. Block and Byron Shaw*, for the plaintiff

Maurice J. Neirinck, for DC Entertainment Corporation, King Software Solutions Corp., Dream Corporation Inc., Dream Casino Corporation, S.R.L., Dream Software Solutions Inc., Antonio Carbone and Francesco Carbone

Ronald Flom and Robert Trifts, for Don Carbone Entertainment Inc., Dream Kiosk Solutions Inc., and Andrew Pajak

HEARD: November 13, 2013

ENDORSEMENT

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[1] The plaintiff moves for an order appointing a receiver over all of the books and records of the corporate defendants. In their factum, the defendants represented by Mr. Neirinck opposed outright any such order. However in argument their position softened. The defendants represented by Mr. Flom oppose the order sought.

Factual background

[2] Mr. DeGroote has loaned USD $111,924,208 to certain of the corporate defendants for casinos and other gambling enterprises in Jamaica and the Dominican Republic using electronic equipment manufactured in Ontario. Of this amount, $107,331,167 (96%) remains unpaid.

[3] More particularly, Mr. DeGroote advanced loans for specific purposes to three of the corporate defendants pursuant to three written agreements as follows:

(a) The "Jamaican Contract" — DC Entertainment is the borrower under a Credit Facility Agreement dated November 29, 2010. DC Entertainment borrowed $5,000,000 from Mr. DeGroote for a casino in Jamaica called the Vegas Flamingo, of which $4,306,573 (86%) remains unpaid.

(b) The "Dominican Republic Contract" — Dream is the borrower under a Credit Facility Agreement dated August 22, 2011, as amended and/or restated by written signed instruments between the parties. Dream has borrowed $91,689,000 from Mr. DeGroote for various casinos, discos, sports betting, and lotto facilities in the Dominican Republic, of which $87,789,386 (96%) remains unpaid.

(c) The “VLMT Contract” — Dream Software is the borrower under a Credit Facility Agreement dated November 18, 2011. Dream Software has borrowed $15,235,208 from Mr. DeGroote for various in-room hotel gaming operations in the Dominican Republic, of which $15,235,208 (100%) remains unpaid.

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[4] Each Agreement provides that the borrower shall make debt repayments and pay interest on the loans monthly, including interest on overdue interest according to rates specified in the Agreements.

[5] Article 7.3 of each Agreement provides, in respect of each casino or gaming facility for which funds have been advanced by Mr. DeGroote, that the borrower shall:

a. pay to Mr. DeGroote a percentage share of the profits in respect of the Funded Facility 30 days after the end of the month in which the profit was earned;

b. deliver a written report detailing the profit payment each month; and

c. deliver, within 120 days of the end of each fiscal year of the borrower, audited financial statements in respect of the Funded Facilities.

[6] Article 7.3 of the Agreements provides:

> … The Lender shall at its own expense, on THIRTY (30) DAYS’ notice be entitled to review the books and records of the Borrower in respect of the funded Facilities. The Borrower agrees that its books and records shall be maintained in accordance with accounting principles generally accepted in Canada (“GAAP”). [Underlining added.]

[7] Article 9.1(f) of the VLMT Contract provides:

> … the Lender or its agents shall have free and full access at all times during normal business hours upon thirty (30) days notice to examine and copy them. This right of access of inspection shall include the right to examine as provided herein, all agreements, contracts, license agreements, leases and other documents which are the subject matter of this Agreement and the Facilities.

[8] Mr. DeGroote claims that the defendants have perpetrated fraud and breached their obligations under the loan agreements.

[9] On December 1, 2010, Mr. DeGroote advanced $5,000,000 to DC Entertainment pursuant to the Jamaican Contract in respect of the Vegas Flamingo. In August 2011, Mr. DeGroote stopped receiving monthly profits, monthly profit reports, and debt repayments for the Vegas Flamingo, contrary to art. 7.3 of the Jamaican Contract.

[10] Mr. DeGroote's power of attorney and senior advisor, James Watt, made inquiries with the Jamaican Betting, Gaming and Lottery Commission (the "Jamaican Commission"). The Jamaica Commission is a statutory body which regulates and controls the operations of betting gaming and the conduct of lotteries in Jamaica. The Jamaican Commission provided the following information in response:

(i) the Vegas Flamingo was closed as of December 20, 2011 or earlier;

(ii) the Jamaican Commission was not previously aware of any agreement between the entity that held the gaming licence for the Vegas Flamingo (CTS Associates (Jamaica) Ltd. ("CTS")) and DC Entertainment;

(iii) the Jamaican Commission never had any dealings with DC Entertainment, Antonio or Francesco;

(iv) a website that had been operated by DC Entertainment was shut down and a notice posted that the site was closed by the U.S. Federal Bureau of Investigations and the Department of Homeland Security; and

(v) the Jamaican Commission had no intention of re-licensing the technology for the gaming machines that had been used in the Vegas Flamingo.

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[11] The Jamaican Commission provided records of the gross sales and profits of the Vegas Flamingo to Mr. DeGroote's Jamaican lawyers. The records show that, between December 2010 and September 2011, the gross profits reported to the Jamaican Commission were 8% of the gross profits reported to Mr. DeGroote by the defendants in their monthly profit reports:

	Gross Sales	**Gross Profit**
Reported to Jamaican Commission	$823,745	$267,117
Reported to Mr. DeGroote	$6,025,286	$3,423,145
Variance	$5,201,541	$3,156,028
Figures Reported to Jamaican Commission as a Percentage of Figures Reported to Mr. DeGroote	14%	8%

[12] Mr. DeGroote was never provided with copies of the bank statements for the Vegas Flamingo or any books and records of DC Entertainment.

[13] In November 2012, in response to Mr. DeGroote's motion for access to the books and records of the corporate defendants, Mr. DeGroote was told, for the first time, that the books and records relating to the Vegas Flamingo had disappeared. Antonio admitted that DC Entertainment was contractually responsible for record-keeping and banking with respect to the revenues and expenses relating to the operation of the 149 gaming machines said to have been

installed at the Vegas Flamingo. However, he testified that one Lancelot James ended up doing the recordkeeping, banking and reporting on DC Entertainment's behalf. Antonio testified that every single record relating to the Vegas Flamingo was stolen and destroyed by Mr. James; not a single piece of paper nor a byte of electronic data remain. According to Antonio, all transactions at the Vegas Flamingo were done in cash and all of the money was kept in a safe. The cash (in excess of USD $4,000,000.00) was said to have been stolen by Mr. James under cover of night. Antonio also stated in his cross-examination that the alleged theft of the money was never reported to the Jamaica police.

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[14] Between April 2011 and May 2012, Mr. DeGroote advanced $91,689,000 to Dream pursuant to the Dominican Republic Contract in specific tranches and for purchases of specific entities pursuant to the terms of that agreement. All funds advanced by Mr. DeGroote were made either to Don Carbone Entertainment or to the trust accounts of Bianchi Presta LLP or Austin Persico, lawyers acting for Dream.

[15] From June 2011 to March 2012, Mr. DeGroote received what were purported to be monthly profit payments and revenue reports for certain casinos in the Dominican Republic.

[16] In April 2012, Dream provided monthly revenue reports that differed from monthly revenue reports previously delivered. Specifically, Dream reduced Mr. DeGroote's profit by increasing operating costs and deducting Dream's repayment of Dream's shareholder loans by $107,916 for each of the 10 reporting casinos for a total of $1,079,160.

[17] Between May 2012 and October 18, 2012, Dream did not deliver any monthly revenue reports for the casinos in the Dominican Republic for which reports had previously been delivered. Since that time, delivery of monthly revenue reports has been sporadic and incomplete.

[18] The statement of claim in this matter was served on October 16, 2012. Two days later, Dream's counsel sent revised monthly revenue reports up to and including April 2012 and

monthly revenue reports from May through August 2012 for certain casinos. According to Dream's counsel, Mr. DeGroote was "overpaid on account of (i) profit and (ii) repayment of loans" and "operating costs… were inadvertently not included in the previously issued revenue reports for the months up to and including March 2012".

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[19] From May 2012 onward, Mr. DeGroote was not provided with any monthly profits or debt repayments on the assertion that he had previously been overpaid.

[20] While Mr. DeGroote has received some revenue reports for certain Dominican Republic casinos and discos, he has not received any monthly reports for several casinos and sports betting and lotto operations that he has funded. The facilities for which he has received no information at all represent $51,781,000 (56%) of the total funds advanced pursuant to the Dominican Republic Contract. In other words, Mr. DeGroote has received absolutely no records at all for approximately $52,000,000 of his investment.

[21] $46,600,000 of the funds for which Mr. DeGroote has received no information are with respect to facilities referred to in Mr. Carbone's affidavits in response to this motion as "Naco," "Merengue," and "Virgilio"/"Vilorio." Mr. DeGroote first learned that his funds had been invested in Virgilio and Vilorio upon reading Mr. Carbone's affidavits delivered in response to this motion. Mr. DeGroote had understood that he was investing in businesses known as "King" and "King Lotto," for which he received executed notes and guarantees. Mr. DeGroote does not know what happened to King or King Lotto, or how the new entities came to be.

[22] Mr. DeGroote has been requesting to review the books and records of Dream since May 2012. Each of his many requests has been met with excuses and delay. For example, by letter dated June 5, 2012, the defendants' counsel advised that the Defendants did not agree to a proposed review by PricewaterhouseCoopers, citing concerns about proprietary information and the fact that his clients had an "extreme travel and work schedule." After this action was commenced, scheduled reviews of the books and records of Dream and Dream Software were called off by the defendants on short notice on four successive occasions. It is said by the

defendant Antonio Carbone that there was good reason to call these off because of concerns regarding Mr. DeGroote and threats made. Virtually all of the evidence of that is hearsay once or twice over. It is all denied by Mr. DeGroote.

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[23] The VLMT Contract provided that Mr. DeGroote would loan up to $28,138,000 to Dream Software for in-room hotel entertainment and gaming units for use in hotels in the Dominican Republic in return for the repayment of principal, interest and a share of the profits for each Hotel VLMT Operation.

[24] In November 2011, Mr. DeGroote loaned $15,235,208 to Dream Software in respect of VLMTs. Mr. DeGroote has received no interest, principal or profit payments on his investment.

[25] Mr. DeGroote has not received any profits or monthly reports under the VLMT Contract.

[26] Mr. DeGroote's requests to examine the books and records of the corporate Defendants continued throughout 2012. In a with prejudice letter from his lawyers dated August 10, 2012, Mr. DeGroote gave notice to inspect the books and records of DC Entertainment and Dream. In his statement of claim issued on October 19, 2012, Mr. DeGroote sought an interim, interlocutory, and permanent order:

> … requiring the defendants to forthwith deliver, or cause to be delivered, the books and records of DC Entertainment, Don Carbone Entertainment, King Software, Dream, Dream Casino, Dream Software, Dream Kiosk and any affiliated or associated companies.

[27] The defendants continued to refuse to provide access to the books and records after the action was commenced. As a result, Mr. DeGroote brought a motion, which was heard by Wilton-Siegel J. on December 21, 2012.

[28] In relation to the Dominican Republic Contract, Wilton-Siegel J. held that section 7.3 provides Mr. DeGroote with a right of access to the books and records at any time. He rejected the defendants' argument that the review should occur only after the audited financial statements

had been delivered. In relation to the Dream Software Agreement, Wilton-Siegel J. held that section 9.1(f) provides an independent and general right to review the books and records of Dream Software and its affiliates.

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[29] The defendants then engaged in what appears to have been an obvious tactical manoeuvre to delay. On January 4, 2013 they appealed the order of Wilton-Siegel J. to the Divisional Court. The motion for leave was scheduled to be heard on January 31, 2013 but on January 23, 2013 they abandoned their motion for leave. On January 28, 2013, the last day of the 30-day appeal period, the defendants delivered a notice of appeal to the Court of Appeal. On February 6, 2013, Mr. DeGroote brought a motion before the Court of Appeal seeking to quash the appeal.

[30] The next day, on February 7, 2013, Mr. DeGroote's counsel wrote to the defendants' counsel and advised that Mr. DeGroote's accountants and lawyers would attend at the offices of Dream and Dream Software on February 15, 2013 to review the books and records. Defendants' counsel refused to schedule the review of the books and records "for several reasons including the outstanding Appeal," and directing that "no one should travel to the Dominican Republic" on February 15, 2013.

[31] The motion to quash the appeal was scheduled to be heard on March 26, 2013. On March 18, 2013, the defendants wholly abandoned their appeal to the Court of Appeal.

[32] After the defendants abandoned their appeal, Mr. DeGroote's counsel once again renewed efforts to review of the books and records in the Dominican Republic. The review was scheduled on four separate occasions, only to be called off at the eleventh hour each time. The Carbone defendants assert that there was good reason to call these off, allegedly because Mr. DeGroote was trying to take over Dream. This is all based on hearsay evidence that cannot be given credit on this motion.

[33] There is evidence, which Mr. DeGroote acknowledges, that he spoke to someone about obtaining evidence and paying the deponents for the evidence. He says, and there is no evidence

to contradict it, that he asked the person he was dealing with, a disbarred lawyer whom the Carbones had earlier hired, if that would be legal. He was told probably not. He then obtained advice from a Bermuda lawyer that it would be illegal and he then said he was not going to follow through with it. He acknowledges that he should not have started down that road. I would not in the circumstances of this case deny any relief because of this. Mr. DeGroote is 80 years of age and a huge amount of money appears to have been misused, and it is understandable that without any reports that he was entitled to, he would try to obtain evidence from someone who would know the situation in the Dominican Republic.

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[34] This motion was originally returnable on August 2, 2013. Prior to the motion, counsel to the Carbone defendants agreed to make the books and records available for review in the Dominican Republic. On that basis, Mr. DeGroote accepted the offer and agreed to adjourn this motion and the review was scheduled to commence on September 9, 2013.

[35] The books and records were not made available for review on September 9, 2013 as promised. On September 4, 2013, counsel to the Carbone defendants advised that the review could not proceed due to “ongoing serious security concerns”. Counsel to the Carbone defendants agreed to make the books and records available for review at the offices of Collins Barrow LLP, their corporate auditors, in Vaughan, Ontario instead of the Dominican Republic. Counsel further advised that there would be fifty-five banker’s boxes of documentation available for review commencing on September 16, 2013.

[36] The documents were not made available for review at Collins Barrow on September 16, 2013 as promised.

[37] Mr. DeGroote has not received audited financial statements for DC Entertainment in respect of the $5,000,000 loan advanced pursuant to the Jamaican Contract. According to Antonio, all books and records for the Vegas Flamingo were stolen. According to the incredible explanation given by Antonio, Mr. DeGroote will never receive any audited financial statements

for DC Entertainment. I expect a receiver would try to determine whether the books and records exist somewhere.

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[38] One of the reasons given for delaying and denying access to the books and records was that Dream was busy preparing its audited financial statements. The defendants have repeatedly extended the supposed deadlines for completion of the audit of Dream.

[39] Dream purported to change its year-end on multiple occasions in 2012:

(1) on May 9, 2012, Antonio advised that Dream's year-end would be May 31, 2012;

(2) on August 20, 2012, Mr. Persico wrote to Mr. DeGroote's counsel and advised that the "deemed fiscal year-end for [Dream] is set as August 31"; and

(3) on October 12, 2012, Dream's counsel advised that "Dream's first fiscal year end has been selected as December 31, 2012 based on professional advice from its chartered accountants… Baker, Tilley in Santo Domingo".

[40] In his affidavit sworn November 26, 2012 in response to the access motion, Antonio swore that they had a firm commitment from Dream's chartered accountants for the completion of the audited financial statements for the funded facilities by March 15, 2013. Dream did not deliver audited financial statements by March 15, 2013. On March 18, 2013, counsel to the Carbone defendants advised that audited financial statements would be delivered later in March. Dream did not deliver audited financial statements by the end of March 2013.

[41] On April 11, 2013, the parties attended at a 9:30 a.m. appointment before Wilton-Siegel J. Pursuant to his endorsement of that date, Dream was obligated to deliver its audited financial statements by April 19, 2013. Dream failed to do so. At 4:10 p.m. on April 19, 2013, counsel to the Carbone defendants advised Mr. DeGroote's counsel that Dream's auditors, Collins Barrow,

would release its audited financial statements on Monday, April 22, 2013, and that he would forward them upon receipt.

[42] The Carbone Defendants provided draft financial statements for Dream on April 22 and May 9, 2013. The draft statements contain significant financial and accounting irregularities.

[43] Mr. DeGroote has not received any financial statements for Dream Software.

[44] Antonio admits that audited financial statements for Dream Software have not yet been completed, despite the passage of over two years since Mr. DeGroote advanced approximately $15.2 million under the VLMT Contract. Antonio stated that the audited financial statements for Dream Software are "far less important" than those for Dream. He asserts that the business is not yet operating and that Dream's supposedly extensive and profitable operations have necessitated a complicated, expensive and time-consuming audit. He later stated that the preparation and completion of audited statements for Dream Software was "forgotten about" as a result of the alleged conspiracy and sabotage campaign supposedly carried out by Mr. DeGroote.

[45] In his affidavit sworn July 17, 2013, Mr. Carbone testified that since recently being served with the plaintiff's motion record, he had requested that the Dream Software audited financial statements be prepared and completed and said that they would be released as soon as they were in hand. Mr. DeGroote has still not received any audited financial statements for Dream Software.

[46] On April 11, 2013, Wilton-Siegel J. ordered that the defendants produce by May 3, 2013 a long list of documents. The defendants failed to provide this documentation by May 3, 2013. Two and a half months later, some of the documents were produced, being the formal licenses for the casinos operated by Dream. However, these were inconsequential and did nothing to indicate where Mr. DeGroote's money ended up.

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[47] The Carbone defendants agreed to make the books and records available for review at Collins Barrow in Vaughan on September 16, 2013. They indicated that fifty five boxes of records would be sent to Toronto for review. The first tranche of documents, totalling only eight boxes, were available for review at Collins Barrow's offices on October 31, 2013, less than two weeks before the return of this motion. To date, only nine boxes in total have been made available.

[48] Mr. DeGroote retained Gary Moulton, a managing director of Duff & Phelps Canada Limited. Mr. Moulton is a chartered accountant with a specialty designation in investigative and forensic accounting from the Canadian Institute of Chartered Accountants. He is a Fellow of the Institute of Chartered Accountants of Ontario and has practised in the area of forensic and investigative accounting for over 30 years.

[49] Mr. Moulton has reviewed the draft financial statements for Dream as well as the other information made available to Mr. DeGroote. Mr. Moulton concludes that:

1. Mr. DeGroote's loans were not used in a manner consistent with the Dominican Republic Contract and the underlying descriptions in the promissory notes. Mr. Moulton was unable to conclude how the loans were invested on a property-by-property basis or whether the funds were used for the specific properties for which they were intended.

2. The draft audited financial statements do not enable verification of the specific casino licenses or the valuation of the assets listed on Dream's balance sheet.

3. Only $41,543,872 of the proceeds from Mr. DeGroote's loans to Dream under the Dominican Republic Contract were invested in casino licenses and property and equipment. There is approximately $50,145,378 from Mr. DeGroote's loans to Dream remaining after taking into account the funding of casino licenses and property and equipment shown on the draft financial statements.

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4. Approximately $48,634,000.00 of the monies advanced by Mr. DeGroote to Dream pursuant to the Dominican Republic Contract was lent by Dream to an entity called Empresas de Negocio BSE, SRL, a related party entity previously unknown to Mr. DeGroote. Mr. Moulton states that he had no "details regarding the nature of business conducted by [Empresas], the quality of the underlying security of the assets, or the purpose or use of the funds invested by Dream with [Empresas]".

5. Approximately $4,873,333 of Mr. DeGroote's money was used by Dream to repay a related party entity (Dream Kiosk Inc. in St. Lucia) for an equipment loan.

6. The draft statements contain numerous accounting irregularities, including the failure to disclose contingent liabilities and the failure to disclose sufficient information about large related-party transactions totalling $64,170,930.

[50] Mr. Moulton has reviewed the material in the nine boxes provided to date and advises that the contents of the few boxes received contain mostly information related to the day-to-day operational data of various casinos operated by Dream and limited documentation relating to capital expenditures made by the casinos, consisting of receipts signed by the provider of services. The material made available for review falls far below the amount of information requested to date. According to Mr. Moulton the information and material provided is insufficient to enable the determination of the accuracy of the monthly reports provided, or the accuracy of the 2012 Draft Audited Financial Statements.

Analysis

[51] Section 101 of the *Courts of Justice Act* provides that a court may appoint a receiver where it appears to a judge of the court to be just or convenient to do so.

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[52] A court must have regard to the circumstances of the case and the rights of the parties. In this case, equity cries out for the need to have all books and records produced now. The defendants have appeared to have done their best to prevent this from happening. It is Mr. DeGroote who is suffering the prejudice by this. A receiver can be appointed for the purpose of gaining access to the books and records of a company. See *Great Atlantic & Pacific Co. of Canada v. 1167970 Ontario Ltd.*, [2002] O.J. No. 3717 and *Loblaw Brands Ltd. v. Thornton* [2009] O.J. No. 1228 at paras. 14-17. See also *Schembri v. Way*, [2010] O.J. No. 4873 at paras. 12 and 18-19

[53] There are no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depends on its own facts. While proving a strong case in fraud can obviously be of great significance in establishing the need for a receiver, it is in my view not a *sine qua non*. Having said that, in this case Mr. DeGroote has established a strong case in fraud. The reporting of false financial information regarding the Jamaican contract is but one example. The apparent misuse of some $50 million lent under the Dominican Republic contract by lending it to a company unknown to Mr. DeGroote without his knowledge, contrary to the agreement, is another example. There are very serious breaches of the agreements in the failure to produce financial information that the defendants appear to have countenanced, if not actively sought.

[54] Mr. Neirinck in opening his argument on behalf of the Carbone defendants acknowledged that there was no dispute regarding the history of the matter and that Mr. DeGroote had a right to financial information which had not occurred. He said however that the order sought was premature. His position was that his clients are trying to get the balance of the 55 boxes delivered to Toronto and that if this could not happen within 30 days, it would be appropriate to make the order sought by Mr. DeGroote. He said his clients had now been locked out of the premises in the Dominican Republic by Mr. Pajak, with whom they are in litigation regarding the shares of Dream, but they were taking some legal steps in the Dominican Republic, the details of which he could not say, to try to get back in.

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[55] I do not think it reasonable in this case to wait for 30 days. I have little faith in the Carbones doing what needs to be done to have records produced. The history of the matter belies any suggestion of good faith on their part.

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[56] Moreover, there are very important documents that are not in the 55 boxes. Dream's Chief Financial Officer, Mr. Ed Kremblewski, advised Mr. Moulton that the corporate documents relating to the purchase agreements for bancas, lottos and casinos are in the possession of Mr. Austin Persico and not available to either Mr. Kremblewski or Collins Barrow. These very basic documents have not been produced. They were the subject of the order of Wilton-Siegel J. which was ignored.

[57] As well, Mr. Persico's trust records of the money advanced by Mr. DeGroote for the Dominican Republic and VMLT contracts are of crucial importance to understand what happened to the money. Mr. Persico was the solicitor for Dream and the money advanced by Mr. DeGroote under those contracts went to Mr. Persico. It is quite clear that Mr. Persico has been taking his instructions from the Carbones who have operated the business. In the Carbone v. Pajak action, in which competing applications were heard by me last week immediately following the hearing of this motion, documents disclosed made clear that Mr. Persico is taking instructions from the Carbones and that he has been evading service of an appointment to be examined.

[58] Mr. Neirinck also asserted that some of the companies over which the receiver is sought were not parties to the lending agreements other than being guarantors. I think this not important. It is very clear that all of the companies are associated and the businesses are interwoven, with money flowing to some of them and the officers and directors being common to all of them, either the Carbones or Mr. Pajak.

[59] The draft order provides that copies of any records obtained by the receiver are to be provided to any of the defendants as their cost. Mr. Neirinck objected to his clients having to

bear the copying costs. In reply, Mr. Ortved said that his client would pay the photocopying costs.

[60] Mr. Flom for the Pajak defendants contended that there is no basis for an order regarding the Pajak companies, being Don Carbone Entertainment Inc. and Dream Kiosk Solutions Inc. However, both of those companies were involved in the movement of funds. The $5 million lent by Mr. DeGroote on the Jamaican contract was paid to Don Carbone Entertainment and Dream Kiosk Solutions routed some money to Mr. DeGroote. It is clear that these companies were involved and that their books and records should be produced.

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[61] Mr. Flom asserted that Mr. Pajak had given what was asked and thus there was no basis for an order over these two corporations. However, he could not say if Mr. Pajak could deliver the documents of those corporations. On his cross-examination, Mr. Pajak said he didn't have the records of those corporations as the offices of Dream had been ransacked. Moreover, the documentation makes clear that there were requests of the Pajak defendants made to their then solicitor Mr. Neirinck that went unanswered.

Conclusion

[62] The plaintiff is entitled to the appointment of a receiver in the form included at Tab F of his motion Record, volume IV, with the deletion from paragraph 3 (g) the words "”and subject to payments of the Receiver's associated costs" and the addition in paragraph 11 of the words "subject to any assessment" in the first line after the word "that".

[63] If there are any issues raised regarding privileged documents, they may be addressed at a 9:30 am appointment and, if necessary, by way of a motion.

[64] The plaintiff is entitled to his costs of this motion. If costs cannot be agreed, brief written submissions along with a proper cost outline can be made within 10 days and brief written reply submissions can be made within a further 10 days.

Newbould J.

Date: November 18, 2013

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