SA Capital Corp. v. Brooks, as Executor of the Estate of Mander, Deceased, et al.
Sbaraglia v. RSM Richter Inc. et al.
[Indexed as: SA Capital Corp. v. Mander Estate]

110 O.R. (3d) 765

2012 ONSC 2800

Ontario Superior Court of Justice,

Pattillo J.

May 23, 2012

Securities regulation -- Full answer and defence -- Disclosure -- Production of third party records -- Moving party facing allegations of serious breaches of Securities Act -- Moving party seeking order requiring court-appointed receiver to disclose documents and information obtained by it in course of court-ordered investigation -- Principles and procedures set out in R. v. O'Connor concerning production of third party records applying to motion -- General rule that court-ordered receiver is not required to provide documents or information to others beyond what is contained in its reports being subordinate to right of accused person to production in order to make full answer and defence -- Moving party only entitled to production of documents which were "likely relevant" to Ontario Securities Commission's allegations and his defences.

In the course of its investigation into the affairs of M and his company, who were allegedly carrying on a Ponzi scheme, a court-appointed receiver compelled production of documents from parties with knowledge of the affairs of M and his companies, including their lawyers and accountants. The receiver suggested that an investigation should be undertaken of S, his wife and their companies. The Ontario Securities Commission ("OSC") applied successfully for the appointment of a receiver over S's companies. The OSC then commenced proceedings against S, alleging that he had breached the Securities Act, R.S.O. 1990, c. S.5 by committing fraud and misleading the OSC staff. S brought a motion for an order compelling the receiver to provide him with certain documents and information obtained by the receiver during the investigations of S, M and their companies. He claimed that he was entitled to production of the requested documents and information in order to make full answer and defence.

Held, the motion should be granted in part.

The principles set out in R. v. O'Connor and R. v. McNeil concerning the production of third party records applied to S's motion. The protection granted to a court-appointed receiver from having to provide information or documents regarding the receivership to others beyond what is contained in its reports cannot operate to interfere with or defeat an accused's right to production in order to make full answer and defence. S was required to follow the procedure set out in O'Connor and to establish that the documents and information sought were likely to be relevant in the OSC proceeding. He met the "likely relevant" requirement with respect to some, but not all, of the requested material.

Cases referred to

R. v. McNeil, [2009] 1 S.C.R. 66, [2009] S.C.J. No. 3, 2009 SCC 3, 246 O.A.C. 154, 238 C.C.C. (3d) 353, EYB 2009-153175, J.E. 2009-174, 301 D.L.R. (4th) 1, 383 N.R. 1, 62 C.R. (6th) 1; R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, 130 D.L.R. (4th) 235, 191 N.R. 1, [1996] 2 W.W.R. 153, J.E. 96-64, 68 B.C.A.C. 1, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, 29 W.C.B. (2d) 152, apld [page766]

Other cases referred to

Anvil Range Mining Corp. (Re), [2001] O.J. No. 1125, 21 C.B.R. (4th) 194, 104 A.C.W.S. (3d) 16 (S.C.J. (Commercial List)); Battery Plus Inc. (Re), [2002] O.J. No. 261, [2002] O.T.C. 55, 31 C.B.R. (4th) 196, 111 A.C.W.S. (3d) 213 (S.C.J. (Commercial List)); Bell Canada International Inc. (Re), [2003] O.J. No. 4738, 2003 CanLII 22640, 126 A.C.W.S. (3d) 790 (S.C.J. (Commercial List)); Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713, [2003] S.C.J. No. 62, 2003 SCC 61, 232 D.L.R. (4th) 1, 179 O.A.C. 1, 13 Admin. L.R. (4th) 1, 126 A.C.W.S. (3d) 164; Impact Tool & Mould Inc. (Re), [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.); R. v. Stinchcombe, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, 130 N.R. 277, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 7

Criminal Code, R.C.S. 1985, c. C-46

Securities Act, R.S.O. 1990, c. S.5, ss. 11(1), 127 [as am.], 129(1) [as am.]

MOTION for the production of third party records.

Kevin D. Toyne and Richard Niman, for Peter Sbaraglia, moving party.

Matthew P. Gottlieb and Shannon Beddoe, for receiver Duff & Phelps Canada Restructuring Inc.

Jennifer M. Lynch, for Ontario Securities Commission.

Evan Cobb, for applicant SA Capital Growth Corp.

Frank Lamie, for Tonin & Co. LLO and Peter Tonin.

PATTILLO J.: --

Introduction

[1] This motion raises the question of whether a court-appointed receiver should be required to disclose documents and information obtained by it pursuant to a court-ordered investigation to one of the subjects of the investigation who is facing serious allegations by the Ontario Securities Commission ("OSC").

[2] The moving party, Dr. Peter Sbaraglia ("Sbaraglia"), seeks an order compelling the court-appointed receiver, Duff & Phelps Canada Restructuring Inc. (formerly RSM Richter Inc.) (the "Receiver"), to provide him with requested documents and information obtained by the Receiver during a court-ordered investigation of Sbaraglia and others in order to assist him in responding to the OSC's allegations of securities fraud and misleading staff.

Background

[3] On March 17, 2010, the Receiver was appointed receiver over the assets, property and undertaking of E.M.B. Asset Group [page767] Inc. and Robert Mander (the "Mander debtors"). It was alleged that Mander and his company EMB were carrying on a Ponzi scheme and that Mander had misappropriated tens of millions of dollars. Mander committed suicide on the same day and the receivership was subsequently continued against his estate.

[4] Following its appointment and pursuant to orders issued by the court, the Receiver compelled production of documents from certain parties with knowledge of the affairs of Mander and his companies, including their lawyers and accountants. It also met with several individuals who had knowledge of or were involved with Mander and his companies.

[5] In its fourth report to the court dated July 4, 2010, the Receiver advised that, as part of its investigation of Mander and his companies, it identified numerous issues which suggested that an investigation should be undertaken of Sbaraglia, his wife, Mandy Sbaraglia, and their companies, CO Capital Growth Corp. ("CO Capital") and 91 Days Hygiene Inc. (collectively the "CO Group").

[6] Based on the evidence contained in the fourth report, the court issued an order on July 14, 2010, authorizing and directing the Receiver to commence an investigation into the business and affairs of the CO Group. The order granted broad powers to the Receiver to carry out the investigation, including meeting with the CO Group, their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions and behalf and to obtain books and records relating to the business or affairs of the CO Group. The order specifically provided that Peter Welsh, the former solicitor for Mander and his companies and Tonin & Co. LLP, the accountants for Mander and his companies and CO Capital, deliver up their books and records in respect of those companies.

[7] On September 9, 2010, the Receiver filed its seventh report to the court summarizing its findings of its investigation of the CO Group. The Receiver stated that in preparing the report, it relied upon, among other things, "documents, records and information provided by various parties, including several financial institutions, the CO Group, Tonin & Co. LLP, the former accountant to Mander and the CO Group, and Aylesworth LLP and Peter R. Welsh, former legal counsel to the CO Group". The Receiver disclaimed any opinion on the accuracy of the information obtained.

[8] The report indicated the investigation was ongoing and highlighted major issues identified by the Receiver to date, including that Sbaraglia's testimony before the OSC in July 2009 [page768] was misleading and incomplete; that the CO Group knew or ought to have known that they were not generating returns sufficient to repay their obligations to investors; that the CO Group were insolvent based on an admission by Sbaraglia in an affidavit filed; and that the CO Group had advised they may make payments to family members in preference to other creditors. The Receiver recommended that a receiver be appointed over the CO Group.

[9] The Receiver has continued to provide periodic reports to the court concerning both the Mander debtors' receivership and the CO Capital debtors' receivership.

The OSC Proceedings

[10] On September 8, 2010, following an investigation pursuant to s. 11(1) of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Securities Act"), which began in July 2008, the OSC commenced an application to the Superior Court (Commercial List) pursuant to s. 129(1) of the Securities Act, for the appointment of a receiver over the business, assets and undertakings of the CO Group.

[11] The CO Group strenuously opposed the OSC's application. They took the position they had done nothing wrong and were victims of Mander's fraud. Extensive materials were filed in opposition and numerous cross-examinations were conducted.

[12] The OSC's application was heard by Justice Morawetz in December 2010. In lengthy oral reasons on December 23, 2010, Justice Morawetz granted the OSC's application and appointed the Receiver as receiver over the CO Group.

[13] On February 24, 2011, the OSC issued a notice of hearing and statement of allegations naming Sbaraglia as the respondent and alleging that Sbaraglia had breached the Securities Act by committing fraud and misleading the OSC staff.

[14] As particularized in the statement of allegations, the OSC alleges that Sbaraglia committed fraud by

(a) failing to do any due diligence with respect to Mander and his investment scheme and obtaining any objective evidence from Mander about the alleged investment profits;
(b) misleading and deceiving investors by operating CO Capital's business in a way which deviated from its purported business model by keeping approximately $6-7 million of $21 million raised from investors in CO Capital and using the funds for (i) making payments to CO Capital investors with newly received funds from other CO Capital investors; [page769] (ii) making investments in securities, either directly in trading accounts of CO Capital or indirectly in trading accounts in the names of other companies, that resulted in significant losses; and (iii) making payments for personal expenses of the Sbaraglias; and
(c) using CO Capital investor moneys to fund his lifestyle.

[15] In respect of the allegation of materially misleading the OSC staff, the OSC alleges that during his July 9, 2009 examination by the OSC staff that was conducted under oath with counsel present, Sbaraglia failed to disclose liabilities of approximately $9.4 million owing to CO Capital investors and misled the staff about the assets that were allegedly available to satisfy CO Capital's obligations. It is also alleged that an undertaking given to the OSC by Sbaraglia on August 7, 2009 was materially misleading because it failed to identify material obligations of CO Capital in its schedule of outstanding loans.

[16] The hearing in respect of the OSC's allegations against Sbaraglia, which was originally scheduled to begin on June 4, 2012, has been adjourned at Sbaraglia's request and is currently scheduled to take place beginning October 22, 2012.

[17] The OSC has provided Sbaraglia with full disclosure (subject to its ongoing disclosure obligations) of all relevant documents in its possession and custody. Included in this disclosure are some of the Receiver's reports to the court and the entire record in the OSC's application for the appointment of a receiver over the CO Group.

[18] The Receiver is not a party to the OSC's proceedings against Sbaraglia.

Sbaraglia's Motion

[19] On this motion, Sbaraglia requests an order requiring the Receiver to

(i) produce transcripts, recordings and/or notes of interviews with 16 named individuals who met with the Receiver as part of its investigation;
(ii) produce documents provided to the Receiver by the individuals;
(iii) produce documents provided to the Receiver by the lawyer and accountant to both the Mander debtors and the CO Group pursuant to court order; [page770]
(iv) produce copies of e-mails to and from Sbaraglia which had been deleted but subsequently recovered by the Receiver from CO Capital's computers and servers and which are referred to in the Receiver's fourth report to the court;
(v) prepare an index of all the documents in the Receiver's power, possession and control; and
(vi) produce any additional documents that may be requested by Sbaraglia once he has had an opportunity to review the index.

The Position of the Parties

(a) Sbaraglia

[20] Sbaraglia submits, given the serious allegations alleged against him by the OSC and the potential sanctions that could be levied against him if the allegations are established, he is entitled to production of the requested documentation and information in order to make full answer and defence. The documents and information sought are relevant to the matters at issue before the OSC and will assist Sbaraglia in defending himself. It is submitted that the motion is analogous to an O'Connor application for third party production as dealt with by the Supreme Court of Canada in R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98. Sbaraglia further submits that the Receiver has an obligation to provide relevant documents to "interested parties" such as himself.

(b) The Receiver

[21] The Receiver opposes Sbaraglia's motion on a number of grounds. It submits that the documents and information requested arose as a result of work done by it as an officer of the court pursuant to a court order. It cannot and should not be compelled to produce documents, including its working papers, either in the proceeding for which it was appointed or for purposes outside of it, which is what Sbaraglia's request amounts to. The Receiver further submits that it is prohibited from producing documents and other evidence obtained by it from third parties for any purpose other than for use in the proceeding in which the Receiver obtained the materials based on the common law implied undertaking rule. The Receiver further submits that the test in O'Connor has no application on this motion and, in any event, Sbaraglia has failed to adduce cogent evidence that the sought-after documents are likely relevant. Finally, the Receiver points to the estimated expense of complying with [page771] Sbaraglia's request and submits that the cost will result in a significant depletion of the estate's remaining cash which is otherwise available to distribute to creditors.

(c) The OSC

[22] The OSC appeared on the motion and filed a factum setting out some background information regarding its proceedings involving Sbaraglia and some of the OSC's rules of procedure. The OSC took no position on the motion.

(d) SA Capital Growth Corp.

[23] SA Capital Growth Corp., the applicant in the Mander debtor receivership, opposed the motion on the grounds that compliance with the request will result in the depletion of the estate's funds which should be distributed to the creditors.

(e) Tonin & Co. and Peter Tonin

[24] Tonin & Co. and Peter Tonin filed no material on the motion but adopted the positions of the Receiver and SA Capital against production.

Discussion

[25] The issues raised on this motion intersect principles from both insolvency law and criminal law.

[26] The Receiver submits that a court-appointed receiver cannot be compelled to produce documents obtained as part of its mandate in one proceeding for use in a separate proceeding.

[27] There is no question that receivers, as court-appointed officers, are afforded certain protections by the court in order to enable them to carry out their duties in an efficient and cost-effective manner. Court-appointed receivers file reports with the court for the purpose of providing information regarding the proceeding to the court and interested parties. Beyond the information contained in the reports, a receiver is not generally required to produce the details of its investigations, either within the receivership or for a purpose outside it. Receivers are not generally subject to cross-examination on their reports except in "exceptional or unusual" circumstances. See Bell Canada International Inc. (Re), [2003] O.J. No. 4738, 2003 CanLII 22640 (S.C.J. (Commercial List)); Impact Tool & Mould Inc. (Re), [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.); and Anvil Range Mining Corp. (Re), [2001] O.J. No. 1125, 21 C.B.R. (4th) 194 (S.C.J. (Commercial List)). A receiver is required only to respond to parties' reasonable requests for information [page772] regarding the receivership but is not required to produce all documents in its possession: Battery Plus Inc., [2002] O.J. No. 261, 31 C.B.R. (4th) 196 (S.C.J. (Commercial List)).

[28] The Receiver submits that, given the strict limits placed on the ability to compel the receiver to testify in respect of its own report in its own proceeding and the limit on the receiver to produce documents to parties relevant only to the receivership proceeding, the court ought not compel the Receiver to produce its preparatory notes and working papers in respect of a report for the purposes of a proceeding outside the receivership.

[29] Based on the above, therefore, and even though Sbaraglia is an interested party in both the Mander debtors and the CO Capital Group receiverships, he is not entitled to production of the information he seeks from the Receiver given the law relating to receiverships.

[30] That, however, does not end the issue. Sbaraglia submits that based on s. 7 of the Canadian Charter of Rights and Freedoms, he is entitled to production of the information requested in order to enable him to make full answer and defence in respect of the serious allegations that he is facing from the OSC.

[31] In R. v. Stinchcombe, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, the Supreme Court of Canada held that in a criminal prosecution, the Crown has a duty to disclose to the accused all information in its possession or control unless it is clearly irrelevant or protected by a recognized form of privilege. The duty arises from the Crown's position and the accused's constitutional right as contained in s. 7 of the Charter to make full answer and defence.

[32] The duty of the Crown to disclose all information in its possession and control (and its corollary, the right of an accused to make full answer and defence) applies equally to the OSC and its prosecutors in respect of proceedings under s. 127 of the Act. See Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713, [2003] S.C.J. No. 62.

[33] Not long after Stinchcombe, the Supreme Court of Canada held in O'Connor, supra, that production of documents in the hands of third parties not involved in the prosecution may also be required to be produced to enable an accused to make full answer and defence. The court recognized, however, that because third parties have no duty to disclose to an accused, are not involved in the proceedings and have potential privacy issues in the information sought to be disclosed, that different rules for production of third party documents should apply. [page773]

[34] O'Connor dealt with the production of medical and therapeutic records of a complainant in a case involving numerous sexual offences. Subsequent to the decision, Parliament amended the Criminal Code, R.S.C. 1985, c. C-46 to provide a procedure for disclosure of third party records containing complainants' personal information in sexual assault cases. Nevertheless, the principals and procedure set out by L'Heureux-Dubé J., writing for the majority in O'Connor, have been recognized and adopted as applying to all requests by accused for production of documents in the hands of a third party who is not involved in the proceedings against the accused.

[35] The procedure established by O'Connor essentially involves an application to the court by the accused, supported by affidavit evidence, showing that the documents or information sought are likely to be relevant in the proceeding. Notice of the application is given to the prosecutor, the person who has control of the records, the person who is the subject of the records and anyone else who might have a privacy interest in the information sought. On the return of the application, the judge is required to engage in a two-step procedure. First, he or she must determine from the evidence whether the information sought is "likely relevant" to the proceedings the applicant is facing. If the judge is satisfied the information is "likely relevant", the next step is for the court to

review the documents. In that regard, the court may order production of the record for inspection by the court. Following review of the document or documents, the judge must then determine whether and to what extent, if any, production should be ordered to the applicant.

[36] In establishing the procedure to be followed in permitting production to an accused of third party records in criminal cases, L'Heureux-Dubé J. set out the considerations that must be borne in mind, at para. 132 of O'Connor:

> The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfill the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on [page774] the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

[37] The procedure set out in O'Connor was considered and confirmed by the Supreme Court of Canada in R. v. McNeil, [2009] 1 S.C.R. 66, [2009] S.C.J. No. 3. At para. 33, Charron J., on behalf of the court, set out the meaning of "likely relevant" as referred to in O'Connor:

> "Likely relevant" under the common law O'Connor regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (O'Connor, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

[38] In discussing the second stage of the O'Connor procedure, the review and determination by

the court of whether or not to order production, Charron J. stated, at para. 35 of McNeil:

> In O'Connor, this Court provided the following list of factors for consideration in determining whether or not to order production to the accused (at para. 31):
>
> > "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para. 156).
>
> The factors set out in O'Connor should not be applied mechanically. It should be kept in mind that O'Connor involved the production of the complainant's private records in proceedings for a sexual offence, an area of law subsequently overtaken by Parliament's enactment of the Mills regime. Some of the factors listed in O'Connor, in particular items 4 and 5 above, were obviously tailored to meet the exigencies in sexual assault proceedings and, consequently, are unlikely to be of assistance in other contexts. Ultimately, what is required at this second stage of the common law regime is a balancing of the competing interests at stake in the particular circumstances of the case. No exhaustive list can be crafted to suit every situation; however, I will elaborate somewhat on the balancing process. [page775]

[39] In my view, the principles set forth in O'Connor and McNeil concerning the production of third party records to enable an accused to make full answer and defence are of general application to records held by all third parties, regardless of whether they are private citizens, government agencies or court officers. The protections granted to a court-appointed receiver in a receivership to not have to generally provide information or documents regarding the receivership to others beyond what is contained in its reports cannot operate, in my view, to interfere with or defeat an accused's right to production in order to make full answer and defence. It follows that a court-appointed receiver is not prevented from having to produce its records to enable an accused to make full answer and defence where such documents are "likely relevant" and the balancing of the competing interests at stake favours the disclosing of the record.

[40] The procedure and safeguards set forth in O'Connor and elaborated on in McNeil are more than sufficient, in my view, to meet any concerns about production that the Receiver has raised in this case, including privacy and costs, while at the same time giving effect to Sbaraglia's right to make full answer and defence to the allegations he is facing before the OSC.

[41] Having said that, however, in order to obtain production, it is incumbent on Sbaraglia to

follow the procedure set out in O'Connor and establish the necessary requirements. The onus is on Sbaraglia.

Likely Relevant

[42] Sbaraglia seeks the records of the Receiver arising from interviews and documents obtained by it from 16 individuals during the Mander debtors' receivership which he submits will assist him in demonstrating that he did not know nor could he have known that Mander was engaged in fraudulent activities. Of the 16 individuals, 11 are former partners, associates, employees or clients of Mander; three are lawyers who acted for both Mander and CO Capital; one is an accountant; and one is the OSC staff investigator who conducted the investigation of Sbaraglia for the OSC.

[43] Sbaraglia also seeks production of certain deleted e-mails the Receiver has recovered as well as an index of all documents in the Receiver's possession and control from the Mander debtors' receivership and the right to request production of further documents once the index has been produced. [page776]

(a) Former partners, associates, employees or clients of Mander

[44] The Receiver, in the course of its mandate in the Mander debtors' receivership, interviewed, had discussions with and communicated periodically with nine of the 11 individuals. Two of the individuals, Grant Walton and Tascha Fluke, were never interviewed or corresponded with. None of the interviews or discussions were recorded or transcribed. What exists in the Receiver's files are notes and internal memoranda concerning the discussions.

[45] In addition, two of the individuals, David Amato and Thomas Obradovich, are former lenders to CO Capital and filed affidavits in the OSC's application for the CO Group receivership. They were cross-examined at length by the CO Groups' counsel during the application. They have also been examined by the OSC and the transcripts of those proceedings have been produced to Sbaraglia as part of the OSC's disclosure obligations.

[46] The Receiver further indicates that it did not keep any schedule of documents received from the individuals.

[47] In my view, Sbaraglia has not established, based on the allegations in the OSC's notice of hearing and the evidence or lack thereof before me, that the information or documents provided to the Receiver by the 11 individuals who were former partners, associates, employees or clients of Mander is likely relevant to his defence to the OSC allegations. Sbaraglia has not established that the information requested is either logically probative to an issue before the OSC or relates to the credibility of a witness or the reliability of other evidence in the case. I have reached this conclusion for a number of reasons.

[48] First, and given that the Receiver has had no communication with either of Walton and

Fluke, there is no evidence that there is any record in the hands of the Receiver concerning them that is likely relevant to Sbaraglia's due diligence defence.

[49] Of the nine individuals remaining, there is no evidence that any of them have refused to speak to Sbaraglia or his counsel about their dealings with the Receiver or to provide copies of the documents they provided to the Receiver, if any. In fact, [the] Sbaraglia affidavit indicates that in the case of three of the individuals, Zurini, Auriemma and Ward, either he or his wife spoke with them after they met with the Receiver. Sbaraglia has listed the nine individuals specifically and the Receiver has confirmed that it had discussions with them. Any information or documents given to the Receiver that Sbaraglia now seeks to obtain [page777] came from the individuals and one would have thought they would be the first persons to speak to about it. It is no answer, in my view, to say that the discussions with the Receiver took place a long time ago and the Receiver's record is therefore the best evidence when no attempt whatsoever has been made to speak with these individuals in the first instance.

[50] Further, some of the individuals have been cross-examined at length by Sbaraglia's counsel in the CO Group receivership application. No explanation has been provided by Sbaraglia as to why the information obtained from that proceeding about the individuals' relationship with Mander and Sbaraglia is not sufficient. In fact, it was not mentioned at all by Sbaraglia in his affidavit.

[51] I am mindful that in both O'Connor and McNeil, the court noted that the onus on the applicant in an application for third party production to establish likely relevant is not high given that the applicant has no information about what's in the documentation being sought. In my view, however, where an applicant seeks records of information given by specific individuals and has not first established that the information is unavailable from the individuals, the applicant has failed to meet his or her onus.

[52] The nine individuals who the Receiver spoke with and received documents from were associated with Mander, worked with him or dealt with him. To simply say, as Sbaraglia does many times in his affidavit, that information concerning what the person said or gave to the Receiver is necessary to assist him in his due diligence defence is, without more, speculative and without substance. The OSC's allegation of failure to exercise due diligence is that Sbaraglia failed to do any due diligence with respect to Mander and his investment scheme and obtain any objective evidence from Mander about the alleged investment profits. I am unable to conclude, in the absence of some specific information from Sbaraglia, that the relationships between the nine individuals and Mander and their dealings with him are in any way likely relevant to Sbaraglia's due diligence defence.

[53] Nor has Sbaraglia established that the information sought is necessary for the credibility of witnesses or the reliability of other evidence in the case. The OSC has indicated that it intends to call two staff investigators and a number of Sbaraglia's former clients as witnesses at the hearing. There is no indication any of the nine individuals will be witnesses at the hearing. Further, the OSC

staff has advised Sbaraglia on at [page778] least two occasions that it does not intend to call the Receiver as a witness at the hearing against Sbaraglia.

[54] As a result, I find that Sbaraglia has failed to establish that the Receiver's records relating to its discussions with the nine individuals as part of the Mander debtor receivership which he seeks production of are likely relevant to the OSC's allegations against him. In my view, his request for such records is nothing more than a fishing expedition, which is clearly not permissible.

(b) The lawyers

[55] Julia Dublin and Michael Miller from Alysworth LLP acted for Sbaraglia and Mander from approximately May 2009 to early 2010. The Receiver interviewed them with Sbaraglia's consent and recorded the interviews. No transcript of those interviews has been prepared.

[56] Peter Welsh acted for both Mander and his companies and CO Capital. As noted, the July 14, 2010 order required Mr. Welsh to produce documents relating to the Mander debtors and CO Capital to the Receiver. The Receiver met with Mr. Welsh.

[57] I view Sbaraglia's request for production of information received by the Receiver from the lawyers to be different from the records requested concerning the nine individuals. The record indicates that Sbaraglia is suing the lawyers from which I infer that speaking to them about what they said or gave in the way of documents to the Receiver or what they may say to support his due diligence defence is not realistic. Accordingly, I am not troubled by the fact that there is no evidence of any attempt by Sbaraglia or his lawyers to speak with the lawyers.

[58] Dublin and Miller were present when Sbaraglia was interviewed by the OSC. It is that interview and some of the answers provided by the lawyers (with Sbaraglia present) that is part of the OSC's allegation that Sbaraglia misled the OSC. What Dublin and Miller told the Receiver during their interviews could likely be relevant to the allegations Sbaraglia is facing. Similarly, any documents that they provided to the Receiver concerning their representation of CO Capital may also be likely relevant.

[59] I am of the same mind in respect of any documents provided by Welsh to the Receiver concerning his representation of CO Capital.

[60] With respect to any discussions with Welsh, there is no transcript. I do not regard the Receiver's notes of any discussions to be likely relevant. They are the note-taker's impression [page779] of the discussion and do not necessarily reflect what was said by the interviewee. Nor can they be used to impeach credibility.

(c) The accountant

[61] Also as noted, the July 14, 2010 order required Tonin & Co. LLP, who acted for Mander's

companies and CO Capital, to produce all related documents to the Receiver. In addition, the Receiver met with Peter Tonin, the partner who was in charge of the clients.

[62] There is no indication on the record why Sbaraglia or his counsel cannot speak with Tonin concerning his discussions with the Receiver. I infer, however, from the position taken by Tonin's counsel before me that any such request may not have had much success.

[63] For the same reason as noted concerning Welsh, it is my view that any documents which Tonin provided to the Receiver concerning CO Capital may be likely relevant to the OSC's allegations and Sbaraglia's defence. I do not, however, consider the Receiver's notes, if any, of any discussions with Tonin to be likely relevant for the reasons stated in respect of Welsh.

(d) The OSC staff investigator

[64] Pursuant to para. 30 of the fresh as amended receivership order in the Mander debtors' receivership dated March 31, 2010 which requested, among other things, that any regulatory or administrative body in Canada assist the Receiver in carrying out the order, the OSC staff investigator and other OSC staff members met with the Receiver and provided information concerning the OSC's investigation of, among others, Mander and Sbaraglia. All of the material provided to the Receiver by the OSC has been disclosed to Sbaraglia by the OSC as part of its disclosure obligations.

[65] Further, the investigator filed an affidavit in the OSC's receivership application against the CO Group and was cross-examined at some length by the CO Group's counsel.

[66] In my view, Sbaraglia has not established that any records the Receiver has with respect to its meeting with the OSC investigator are likely relevant to the issues raised by the OSC. The investigator was not interviewed by the Receiver. The OSC and the Receiver to some extent conducted parallel investigations. Sbaraglia has obtained full disclosure from the OSC concerning its investigation which is all of the information provided by the OSC to the Receiver. In addition, Sbaraglia has cross-examined the investigator at length in the OSC receivership application. [page780]

(e) Deleted e-mails

[67] As a result of the consent of CO Capital, the Receiver had access to CO Capital's computers and servers and identified e-mail correspondence from and to Sbaraglia that had been previously deleted, including e-mails sent to Sbaraglia on March 24, 2010, one day prior to the Receiver attending at CO Capital's office.

[68] Sbaraglia states in his affidavit that although he does not know what the deleted e-mails contain or whether he has copies, the Receiver's fourth report which refers to them gives the impression they contain relevant information and, accordingly, he believes that they will assist him

in defending the OSC's allegations.

[69] While I consider the reference to the deleted e-mails in the Receiver's report was simply to note a concern that e-mails had been deleted, particularly in and around the time when it was appointed receiver of the Mander debtors and is not a comment concerning their specific relevance, unlike the information requested from the nine individuals, because the deleted e-mails are to and from Sbaraglia, I am unable to conclude based on the information before me that they are not likely relevant to his defence of the OSC's allegations.

(f) Index of documents and information in the Receiver's possession and control

[70] As noted, Sbaraglia requests that the Receiver produce an index of all documents and information in its power, possession and control. Sbaraglia believes that it will assist him in defending the OSC's allegations. He further seeks the right to request production of any document which may appear in the index.

[71] There is no basis in the evidence for establishing that the Receiver should produce an index of all documents and information received by it during the two-year period of the Mander debtors' receivership. I am not prepared to find, in the absence of some specific information, that such an index is likely relevant to any of the issues raised in the OSC's allegations. The Receiver indicates that no such inventory has been prepared. The documents number in the hundreds. The request, in my view, is simply too bald and general to meet the test of likely relevant. In my view, it amounts to nothing more than a fishing expedition and not something the court can or will permit. [page781]

Conclusion

[72] Accordingly, for the above reasons and with the procedure set forth in O'Connor in mind, I direct that the Receiver have a transcript made of its interviews with Dublin and Miller for my review. The Receiver should also prepare and produce for my review the documents provided by Welsh and Tonin pursuant to court order concerning CO Capital only along with the deleted e-mails it recovered from CO Capital's computers and servers. I request that this be done as soon as possible and, in any event, by June 10, 2012 in order that I can review the transcript and documents to determine whether and to what extent production, if any, of the transcripts and documents should be ordered to Sbaraglia having regard to the factors set out in O'Connor and McNeil and the issues raised by the Receiver and Sbaraglia on the motion. If there is an issue concerning the timing I have set out, I may be spoken to.

[73] I am mindful of the costs to the Mander debtors' receivership of these additional requests placed upon the Receiver. I do not think, however, that the costs of producing the requested information should be significant. They must, however, be borne by the Receiver at this stage. The Receiver should keep track of its costs in preparing and providing the requested transcripts and documentation and I will deal with them along with the costs of the motion generally upon

completion of the motion.

Motion granted in part.