Court File No.: CV-16-11398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

B E T W E E N:

THE TORONTO DOMINION BANK

Applicant

- and -

1882540 ONTARIO INC.

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT

June 10, 2016

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INDEX

1	*Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* 1995 CarswellOnt 39 (Ont. Gen. Div.)
2	*Bank of Nova Scotia v. D. G. Jewelry Inc.*, 2002 CarswellOnt 3443
3	*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, 2011 CarswellOnt 896
4	*Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328
5	*Anderson v Hunking,* 78 C.P.C. (6th) 189
6	*General Electric Canada Real Estate Financing Holding Co. v Liberty Assisted Living Inc.*, 2011 CarswellOnt 8054
7	*Romspen Investment Corp. v Hargate Properties Inc.*, 2011 ABQB 759
8	*WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 6182

1995 CarswellOnt 39
Ontario Court of Justice (General Division — Commercial List)

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

SWISS BANK CORPORATION (CANADA) v. ODYSSEY INDUSTRIES INCORPORATED and WESTON ROAD COLD STORAGE COMPANY

Ground J.

Heard: December 7 and 15, 1994
Judgment: January 31, 1995
Docket: Docs. 94-CU-80416, B 280/94

Counsel: *Frank Newbould, Q.C.* , for plaintiff.
Alan J. Lenczner, Q.C. and *Linda L. Fuerst* , for defendants.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm

Debtors and creditors

XIII Loans
XIII.1 General principles

Financial institutions

VI Loans and discounts
VI.11 Miscellaneous

Headnote

Banking and Banks --- Loans and discounts — General

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

Creditors and Debtors --- General — Loans

Receivers --- Appointment — Application for appointment — Grounds

Secured creditors — Validity of loan — Where loan made by lending institution in contravention of statute or regulation, loan still enforceable.

Receivers — Application for appointment — Creditor under no obligation to prove that irreparable harm would result from failure to appoint receiver.

Two debtor companies were part of a group of companies carrying on a frozen food business. OI Inc. was a holding company and WR Co. was a limited partnership. The bank advanced a loan of $47.5 million to a partnership in which OI Inc. was a partner. In return it received assignments of mortgages and a fixed and floating charge on all of OI Inc.'s assets. The loan was payable on demand.

The bank also made a loan not to exceed $10,179,750 to WR Co. In return it received a collateral mortgage over two warehouses, a general security agreement over the assets and undertaking of WR Co. and guarantees by OI Inc. and JR, who controlled the group of companies.

The group of companies proposed a restructuring plan under which certain conveyances and transfers between the various companies were made. A master agreement provided that the restructuring plan would not be effected or would be reversed unless certain parts of the plan were settled to the satisfaction of the bank.

Both loans were in default. The bank brought a motion for the appointment of a receiver-manager of the property, undertaking and assets of OI Inc. and WR Co. The debtor companies argued that the bank was not entitled to the appointment of a receiver-manager because the loan to OI Inc. was illegal, having been made in breach of regulations under the *Bank Act* . They also argued that the bank was in breach of certain provisions of commitment letters related to both loans and in breach of its fiduciary duty to the companies as borrowers. Finally, they argued that, under s. 101 of the *Courts of Justice Act* (Ont.), a receiver-manager may be appointed by the court where it is just and convenient to do so. In the circumstances, they argued that it would be unjust and inequitable to make the appointment.

Held:

The motion was allowed.

There was no evidence to suggest that various transactions resulted in the security for the loans being in jeopardy or that the ability of the companies to repay the loans was materially affected in such a way as to require the appointment of a receiver-manager. However, defaults under both loans provided ample justification for the appointment of a receiver-manager. The bank was not required to establish that irreparable harm would result from the failure to appoint a receiver-manager. Further, under the master agreement the transfer of assets was reversed or deemed never to have taken place. Therefore, the bank would receive substantial benefit from the appointment of a receiver-manager.

There was no evidence to suggest that the companies would suffer undue or extreme hardship if a receiver-manager were appointed. The fact that a receiver-manager would not have the background and expertise of the companies' principal in running the business was not a reason to refuse the motion for appointment.

The loan to OI Inc. was not illegal because it was made by an institution that was not subject to the regulations under the *Bank Act* . Further, even if a loan is made in contravention of a statute or regulation governing the lending institution, the loan is still enforceable by the lending institution.

There was little evidence to establish a special relationship or exceptional circumstances such as would result in the bank owing the companies a fiduciary duty. The commercial transactions between the parties did not go beyond the normal relationship of lender and borrower. In any event, such allegations would have to be established in an action in damages against the bank. They did not constitute a reason to refuse to appoint a receiver-manager.

Table of Authorities

Cases considered:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (S.C.) — *referred to*

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (2d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 160, 49 B.C.A.C. 1, 40 W.A.C. 1 — *considered*

Sidmay Ltd. v. Wehttam Investments Ltd., [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (C.A.) , affirmed [1968] S.C.R. 828, 69 D.L.R. (2d) 336 — *followed*

Statutes considered:

Bank Act (being Pt. 1 of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40) [R.S.C. 1985, c. B-1].

Bankruptcy Code, 11 U.S.C.

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 101

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) —

s. 88

Motion by secured creditor for appointment of receiver-manager.

***Ground J.*:**

1 This is a motion brought by the plaintiff, Swiss Bank Corporation (Canada) ("Swiss Bank") for the appointment of a receiver and manager of the property, undertaking and assets of the defendants, Odyssey Industries Incorporated ("Odyssey")

and Weston Road Cold Storage Company ("Weston").

Factual Background

2 Odyssey and Weston are part of a group of entities controlled by Joseph Robichaud ("Robichaud") which carry on business in Ontario, Quebec and the Maritime Provinces. The business is based upon the storage of frozen foods in large cold-storage warehouse facilities. Other entities controlled by Robichaud either carry on, or carried on, similar business in Western Canada and in the United States.

3 Odyssey, a corporation controlled by Robichaud, was a holding company. It held 100% of the equity of Associated Freezers of Canada Inc. ("AFC"). AFC operated the freezer business under leases from limited partnerships controlled by Robichaud which held the beneficial ownership of the various cold-storage warehouse facilities. As a result of various transactions recently undertaken by one or more of the Robichaud entities, it is in issue as to which corporation or entity manages the business, or has beneficial ownership of the various warehouse properties at this time.

4 Seven cold-storage warehouse plants are registered in the name of 606327 Ontario Limited ("606327"). They are situated in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. Until recently, 606327 held the properties in trust for a limited partnership registered in Ontario as The Polar-Freez Limited Partnership ("Polar-Freez"). Ninety percent of the limited partnership units of Polar-Freez were owned by AFC.

5 Two cold-storage warehouse facilities are owned by the defendant Weston which is a limited partnership registered in Ontario.

6 On December 13, 1988, Swiss Bank advanced approximately $47.5 million (the "Odyssey Loan") to Associated Investors Partnership ("Associated Investors"), one of the partners of which was Odyssey. The loan was repayable on demand. Associated Investors advanced the funds to Odyssey.

7 The security Swiss Bank received for the Odyssey Loan included:

(a) assignments by Odyssey of $30 million and $39 million mortgages (the "Polar-Freez Mortgages") from 606327 to Odyssey, each mortgage being registered over the seven cold-storage warehouse plants beneficially owned by Polar-Freez. The mortgage terms included an obligation to pay all taxes when due; and

(b) a fixed and floating charge debenture (the "Odyssey Debenture") in the amount of $47.5 million given by Odyssey over all of its assets as a general and continuing collateral security. The Odyssey Debenture contained standard provisions dealing with events of default and remedies, including the right to apply to a court for the appointment of a receiver and manager.

8 The Odyssey Loan was payable on demand. By letters dated July 22, 1994, Swiss Bank demanded payment of outstanding arrears and principal to be made no later than September 6, 1994. Payment was not made. Principal outstanding as of November 20, 1994 was $48,959,148.48. As of November 20, 1994, there was $1,178,241.19 of arrears of interest owing.

9 Municipal property taxes on the seven Polar-Freez properties are in arrears of approximately $2.5 million. These arrears have existed over various periods of time within the past two years.

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to exceed $10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

11 The security Swiss Bank received for the Weston Loan included:

(a) a collateral mortgage in the amount of $13 million over the two warehouses owned by Weston. The mortgage provided

that Weston was to pay all municipal taxes when due;

(b) a general security agreement over the assets and undertaking of Weston containing standard terms describing the events of the default and remedies available, including the right of Swiss Bank to apply to court for the appointment of a receiver and manager; and

(c) guarantees by Odyssey and Robichaud of the indebtedness of Weston to the amounts of $13 million and $3.5 million respectively.

12 Principal payments on the Weston Loan of $150,000 were due on December 31 each year commencing in 1990. No payments of principal were made and therefore as of December 31, 1993, and thereafter, $600,000 in principal payments were in arrears. The Weston Loan agreement provided for a hedge account to be funded by Weston. The purpose of this account was to provide protection to Swiss Bank as a hedge against any adverse movements in foreign exchange rates in the event that Weston transferred its obligations into Swiss francs. An initial deposit of $1 million was made by Weston to the hedge account at the end of December 1989 as required. Further payments of $350,000 per annum commencing on December 31, 1990 were required; however, the only payment made was a further $15,000 payment on July 31, 1992. The hedge account is in arrears of $1,040,000. Municipal tax arrears against the Weston properties of approximately $1 million have been outstanding for approximately two years.

13 By letter dated July 22, 1994, Swiss Bank demanded payment in full of outstanding principal plus interest by September 6, 1994. Payment was not made. Principal outstanding as of November 29, 1994 was $11,334,907.93. Loan interest payments have been in default since March 31, 1994. The amount of interest outstanding to November 29, 1994 is $203,686.70.

14 In the Spring of 1994, the Robichaud Group presented a restructuring plan that included a reverse take-over of a new Robichaud corporation named Polar Corp. International ("Polar Corp.") by a V.S.E.-traded corporation.

15 The restructuring plan contemplated: (i) Polar Corp acquiring the seven warehouses from Polar-Freez; (ii) a transfer of AFC's ownership interest in Polar-Freez to a corporation named Pacific Eastern Equities Inc. ("Pacific Eastern"), a corporation controlled by Robichaud with no substantial assets; (iii) a winding-up of AFC under s. 88 of the *Income Tax Act* , and conveyance of its assets to Odyssey; (iv) a sale of the leasehold interest of Odyssey (now the tenant) in the seven warehouses to Polar Corp.

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

If:

(a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;

(b) any payment required under Section 2.20 shall not be made when due;

(c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or

(d) by 5 p.m. on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,

this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

17 It appears to be agreed that the conditions set out in s. 2.21 of the Master Agreement were not fulfilled.

Submissions

18 It is the position of counsel for Swiss Bank that the transfers of assets contemplated by the Master Agreement did in fact take place and that the cancellation of the leases to AFC which were assigned to Odyssey on the wind-up of AFC constituted a breach of the covenant of Odyssey contained in the Odyssey Debenture not to dispose of any part of the charged premises except in the ordinary course of business. It is his further submission that, if I should find that the transactions contemplated by the restructuring plan did not in fact take place, there is still ample evidence before the court that the Odyssey Loan and the Weston Loan were in default and that Swiss Bank is entitled to the appointment of a receiver.

19 With respect to the restructuring plan, counsel for Swiss Bank points out that a number of the letters and memoranda and several statements contained in the affidavits of Robichaud, all submitted to the court, refer to the transactions as having taken place and the assets having been transferred in accordance with the restructuring plan. There is no reference anywhere to the transfer documents being held in escrow pending the approval by Swiss Bank to the restructuring plan. He submits that the Master Agreement is of no legal effect in that Swiss Bank gave notice that it was not satisfied as to the tax aspects of the restructuring plan and, accordingly, the situation remains as it was before the Master Agreement was entered into.

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of $1,100,000; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of $2,500,000; that there are principal payments of $600,000 in arrears on the Weston Loan, and that the annual payments of $350,000 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of $203,000; that there are municipal tax arrears on the Weston properties in amounts in excess of $1,000,000; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey Debenture has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the *Bank Act* , S.C. 1980-81-82-83, c. 40 (the "*Bank Act* ") in that the loan could not be made by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

22 Second, counsel alleges that Swiss Bank is in breach of certain provisions of the commitment letters for both the Odyssey Loan and the Weston Loan by refusing to agree to certain conversions of the loans from Swiss francs to Canadian dollars on several occasions at the request of the borrowers made pursuant to the terms of the commitment letters. In refusing to allow such conversions, counsel submit that Swiss Bank was not only in breach of the terms of the commitment letters, but was also in breach of its fiduciary duty to the borrowers in that Swiss Bank had undertaken to give advice to the borrowers as to the structure of the loans and as to currency conversions.

23 Third, counsel for Odyssey and Weston point out that Swiss Bank is not seeking the appointment of an interim receiver pending trial of this action, but is seeking the appointment of a court appointed receiver and manager to take over the business,

undertaking and assets of Odyssey and Weston to enforce the security held by Swiss Bank and effect repayment of the Odyssey Loan and the Weston Loan. Counsel submit that under the provisions of s. 101 of the C.J.A., a receiver and manager may be appointed where it appears to a judge of the court to be just or convenient to do so, and that, in seeking the appointment of a receiver and manager, Swiss Bank is seeking an equitable remedy. It is the position of counsel for Odyssey and Weston that to appoint a receiver in this case would be unjust and inequitable. They submit that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed pending the trial of the oppression action commenced by Swiss Bank. There are certificates of pending litigation registered against the properties and there is an outstanding order restricting the disposition of any assets of Odyssey and Weston. In addition, Robichaud and the Robichaud group are prepared to give an undertaking to the court that there will be no expenditures of cash outside the ordinary course of business pending the trial of the action. It is further submitted that, if it is determined at trial that the assets have been transferred in accordance with the restructuring plan, there is very little in Odyssey for a receiver to administer and that, if it is determined that the assets remain in Odyssey and Polar-Freez, a sale of such assets by the receiver would result in a substantial tax liability and Swiss Bank would not recover an amount which would substantially decrease the principal amount of the Odyssey Loan. In addition, counsel submits that to appoint a receiver would be inequitable in view of Swiss Bank's acquiescence in the asset transfer since the Spring of 1994. Further, it is submitted, the appointment would result in extreme hardship to the borrowers, that Swiss Bank does not come to court with clean hands in view of its refusal to permit conversions of the loans and that any receiver and manager appointed to run the business of Odyssey and Weston would not have the background and experience of Robichaud in the operation of the business.

24 With respect to the diversion of funds to affiliates in the United States, counsel for Odyssey and Weston submit that there is no evidence that the transfer of the deposit receipts was for any improper purpose or was not in the ordinary course of business in view of the history of relationships among the Robichaud group of companies and, in any event, does not constitute evidence that the security for the Swiss Bank loans was in jeopardy or materially affect the ability of the borrowers to repay such loans.

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to have taken place. Section 5.4 of the Master Agreement provides:

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

26 One could become embroiled in a metaphysical debate as to whether the effect of such section is that the transactions having taken place have been reversed or that the transactions are deemed never to have taken place. Whichever is the case, there has either been a default under the Odyssey Debenture which has been rectified, or no default under the Odyssey Debenture has taken place. Accordingly, it is not, in my view, grounds for the appointment of a receiver and manager by Swiss Bank. I am also not satisfied that the rather confused transactions involving the term deposits in the United States constitute grounds for the appointment of a receiver. It appears that the transfers of the term deposits to the United States were for valid business reasons, i.e. to provide security for the performance of a lease or for the approval of a proposal under c. 11. There is no evidence to support the contention of counsel for Swiss Bank that the failure to reflect one of the transfers of such term deposits

on the books of AFC was part of some nefarious plot to divert assets of the Robichaud Group companies. Accordingly, I am not persuaded that these transactions constitute a basis for determining that the security for the loans was in jeopardy, or that the ability of Odyssey and Weston to pay the loans was materially effected by these transactions so as to satisfy the court that it would be just and convenient on this ground to appoint a receiver and manager.

27 It appears, however, that the other defaults under both the Odyssey Loan and the Weston Loan referred to by counsel for Swiss Bank, would of themselves provide ample justification for the appointment of a receiver and manager. One must then consider the submissions made by counsel for Odyssey and Weston that, in this case, it would be unjust and inequitable to order such appointment.

28 The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated (see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (S.C.)).

29 The second submission of counsel for Odyssey and Weston is that there would be no substantial benefit to Swiss Bank resulting from the appointment in that, if it is determined that the assets have been transferred to Polar Corp., there is very little in Odyssey for a receiver to administer. Having found that the effect of the termination of the Master Agreement is that either the transfer of assets has been reversed or is deemed not to have taken place, substantial assets remain in Odyssey and its subsidiaries and a receiver would be in a position to administer such assets and business or to realize upon them to satisfy the indebtedness owing to Swiss Bank. Accordingly, I do not accept the submission that there is no substantial benefit to Swiss Bank from the appointment of a receiver.

30 Counsel for Odyssey and Weston submit that Swiss Bank acquiesced in the transfer of assets since the Spring of 1994, and that accordingly, it would be inequitable to appoint a receiver at this time. My reading of the material before this court is that, although Swiss Bank was aware of the intended restructuring plan and the motivation for such plan, it was concerned throughout about the effect that such plan would have on its security position and the tax ramifications of such plan, and at no time indicated its acquiescence in, or approval of, the plan.

31 With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

32 The first submission of counsel for Odyssey and Weston is that the Odyssey Loan was illegal and accordingly the security for such loan is void and unenforceable. The illegality is alleged to have arisen from the fact that Swiss Bank would not have been able to make the original loan to Odyssey itself without being in breach of certain regulations under the *Bank Act* . I am unable to accept this submission for two reasons. The initial loan made in 1985 has been repaid and it is security for the new loan made in 1989 which is now sought to be enforced. There is so far as I am aware no allegations that Swiss Bank was unable to make the new loan in 1989. In any event, Swiss Bank did not make the original 1985 loan; rather, it arranged for the loan to be made by its parent company in Switzerland and an European affiliate of its parent company, neither of whom would have been subject to the regulations under the *Bank Act* . Accordingly, I fail to see how the original loan could be said to be illegal when the loan was not made by an institution subject to the regulations under the *Bank Act* . Moreover, the decision of the Ontario Court of Appeal in *Sidmay Ltd. v. Wehttam Investments*, [1967] 1 O.R. 508 , affirmed [1968] S.C.R. 828 would seem to stand for the proposition that, even if a loan is made in contravention of a statute or regulation governing the lending institution, such loan is still enforceable by the lending institution.

33 Counsel for Odyssey and Weston further submit that Swiss Bank did not come to court with clean hands in view of the fact that it was in breach of the provisions of the commitment letters governing the Odyssey Loan and the Weston Loan by virtue of its failure to allow certain currency conversions, and was also in breach of its fiduciary duty to the borrowers in that it had undertaken to give advice with respect to the structure of the loans and the provision for currency conversion. I can see that the language of the two commitment letters dealing with currency conversions is not abundantly clear and there is little evidence before this court as to whether the requests for currency conversions were properly made on the appropriate dates and with the appropriate notice.

34 There is also very little evidence before this court to establish that this a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in *Hodgkinson v. Simms* , September 30, 1994, (unreported) [now reported at [1994] 9 W.W.R. 609]. At pp. 20-22 [pp. 629-630] of his reasons, LaForestJ. stated:

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith* . I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *LAC Minerals* , however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...
>
> In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 ; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) , leave to appeal refused, [1982] 1 S.C.R. xi (note) ....

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27 [pp. 632-633]:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest ... No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle.

36 The commercial transactions among the parties to this action do not appear to me to be those rare occasions where the fiduciary principle would be invoked.

37 In any event, in my view, such allegations of breach of contract and breach of fiduciary duty would have to be established by the borrowers in an action in damages against Swiss Bank and such damages may well be offset against the amounts owing

under the Odyssey Loan and the Weston Loan. The fact that such allegations are being made at this time does not, however, constitute a reason for refusing to grant the appointment of a receiver at this time or convince me that it would be unjust or inequitable to do so. It has not been suggested that the damages which might be awarded to Odyssey and Weston, should they be successful in any such action, would be sufficient to pay off the Odyssey Loan and the Weston Loan. In fact, the limited evidence before the court as to the damages to which Odyssey and Weston would be entitled would seem to indicate that such damages would fall far short of the amount necessary to pay off the two loans.

38 In summary, although I am not satisfied that at this time there exists any default resulting from a transfer of assets pursuant to the restructuring plan or that the transfer of the deposit receipts to affiliates in the United States constitutes grounds for the appointment of a receiver, the existence of the other defaults with respect to interest payments, principal payments, arrears of taxes and failure to pay principal on demand, in my view, justifies the appointment of a receiver and none of the submissions put forward by counsel for Odyssey and Weston convinces me that it would be unjust or inequitable to grant such appointment.

39 Accordingly, an order will issue, substantially in the form of the order annexed as Sched. "A" to the notice of motion, appointing Coopers & Lybrand Limited as receiver and manager of the property, undertakings and assets of Odyssey and Weston. If counsel are unable to settle the terms of such order, they may attend upon me. Counsel may also make oral or written submissions to me as to the costs of this motion.

Motion allowed.

2002 CarswellOnt 3443
Ontario Superior Court of Justice

Bank of Nova Scotia v. D.G. Jewelry Inc.

2002 CarswellOnt 3443, [2002] O.J. No. 4000, [2002] O.T.C. 762, 117 A.C.W.S. (3d) 245, 38 C.B.R. (4th) 7

The Bank of Nova Scotia, Applicant and D.G. Jewelery Inc. et al, Respondents

Ground J.

Heard: October 9, 2002
Judgment: October 9, 2002
Oral reasons: October 9, 2002
Written reasons: October 15, 2002
Docket: 02-CL-4707

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

IV Receivers
IV.1 Appointment

Headnote

Bankruptcy --- Interim receiver — Appointment

Creditor brought application pursuant to s. 47(1) of Bankruptcy and Insolvency Act for appointment of interim receiver with respect to property of debtor company — Application granted — Court-appointed interim receiver would be able to carry out its duties and obligations more effectively and efficiently than privately appointed receiver — Court-appointed receiver would be able to deal more effectively than private receiver with assets of debtor and its affiliates in United States and with any necessary proceedings under United States Bankruptcy Code — Creditor was not required to demonstrate that legal remedies available to it were defective or that appointment of interim receiver was necessary to preserve property from some danger which threatened it — Creditor was not required to demonstrate that there was actual and immediate danger of dissipation of assets — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47(1) — Bankruptcy Code, 11 U.S.C. 1982.

Table of Authorities

Cases considered by *Ground J.*:

Royal Bank v. Zutphen Brothers Construction Ltd., 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — considered

s. 47(1) — referred to

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — referred to

APPLICATION by creditor for appointment of interim receiver pursuant to s. 47(1) of *Bankruptcy and Insolvency Act*.

Subject:

***Ground J.* (orally):**

1 I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assests. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers Construction Ltd.*[1993 CarswellNS 22 (N.S. S.C.)] is not, in my view, the law of Ontario.

2 I accept the submission of Mr. MacNaughton that the objection based on the Notice of Application, not seeking an interlocutory order for the appointment of a Receiver is formalistic and could easily be remedied by amending the Notice of Application to seek some declaratory or other relief to create a lis as between the parties.

3 On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court-appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed. I believe that test is met in the case at bar. It appears that the role of the Receiver, in this case, will be to develop and carry out a reorganization or restructuring of the various companies and to bring a plan to this court for approval. This will permit all stakeholders to have an input into the structure and detail of such a plan. This is particularly important where there appears to be at least some possibility of some return to subsequent secured creditors, unsecured creditors or even shareholders. In addition, I am of the view that a court-appointed Receiver will be able to deal more effectively with the assets of D.G. Jewelry and its affiliates in the United States and, if necessary, to bring proceedings under the U.S. Bankruptcy Code than would a private Receiver.

4 With respect to KPMG being appointed as court-appointed Receiver, it is obvious that KPMG is well qualified to perform this function and, in view of its experience with and familiarity with the company, is the logical person to be appointed. Although I have some concerns about the same firm or related firms fulfilling various roles in CCAA/insolvency proceedings, the company in this case has consented to the appointment by the bank of KPMG as a private Receiver and it would seem illogical for the company now to object to KPMG being appointed a court-appointed Receiver with clear obligations to act in the interests of all stakeholders and the obligation to report regularly to this court and obtain the court's approval of its

activities.

5 An order will issue, pursuant to Section 47(1) of the *Bankruptcy and Insolvency Act* and Section 101 of the *Courts of Justice Act* appointing KPMG Inc. as Interim Receiver of D.G. Jewelry Inc. I will ask counsel to submit and approve the form of order to me or arrange for a 9:30 a.m. appointment to settle the formal order. The appointment is effective October 9, 2002.

Application granted.

End of Document

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.C Conduct of parties

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Debtor was in business of leasing motor vehicles — Debtor was indebted to creditor bank; vehicles guaranteed indebtedness to $1.5 million — Creditor held security over assets of debtor including general security agreement under which it had right to appoint receiver of debtor or to apply to court for appointment of receiver — Under terms of wholesale leasing facility, total advances for used vehicle financing were not to exceed 30 percent of approved lease portfolio credit line — Creditor's account manager was informed that used car lease portfolio was 60 percent of leases financed by creditor, well in excess of 30 percent condition of loan — Creditor delivered demands for payment — Creditor applied for appointment of receiver — Application granted — Debtor relied on decision in which judge was critical of actions of bank in overstating its case and making unsupportable allegations of fraud — In case at bar there was no basis to refuse order sought because of alleged misconduct on part of creditor or its counsel — If anything, shoe was on other foot as factum filed on behalf of debtor was replete with allegations of false assertions on behalf of creditor, none of which were established — Cited case was relied upon in which it was held that where security instrument permits appointment of private receiver, extraordinary nature of remedy sought is less essential to inquiry — It was preferable to have court appointed receiver rather than privately appointed one as debtor stated

that if private appointment was made it would litigate its right to do so.

Table of Authorities

Cases considered by *Newbould J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. D.G. Jewelry Inc. (2002), 2002 CarswellOnt 3443, 38 C.B.R. (4th) 7 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 35 O.A.C. 305, 62 D.L.R. (4th) 277, 1989 CarswellOnt 191 (Ont. C.A.) — referred to

Royal Bank v. Boussoulas (2010), 2010 ONSC 4650, 2010 CarswellOnt 6332 (Ont. S.C.J.) — considered

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — distinguished

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Toronto Dominion Bank v. Pritchard (1997), 154 D.L.R. (4th) 141, 104 O.A.C. 373, 1997 CarswellOnt 4277 (Ont. Div. Ct.) — considered

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — not followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243 — referred to

s. 243(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

APPLICATION by creditor for appointment of private receiver of debtor.

Newbould J.:

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was

completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar

observations:

> 28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
>
> . . .
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

Most Negative Treatment: Distinguished
Most Recent Distinguished: M & K Construction Ltd. v. Kingdom Covenant International | 2015 ONSC 2241, 2015 CarswellOnt 5609, 252 A.C.W.S. (3d) 642 | (Ont. S.C.J., Apr 20, 2015)

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Receivers --- Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the

creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 1/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

End of Document

2010 ONSC 4008, 2010 CarswellOnt 5191, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canadian Tire Corp. v. Healy | 2011 ONSC 4616, 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142, [2011] O.J. No. 3498, 206 A.C.W.S. (3d) 66 | (Ont. S.C.J. [Commercial List], Jul 29, 2011)

2010 ONSC 4008
Ontario Superior Court of Justice

Anderson v. Hunking

2010 CarswellOnt 5191, 2010 ONSC 4008, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

Garth Anderson, et al. (Plaintiffs / Moving Parties and Bryan Hunking, et al. (Defendants / Respondents)

G.R. Strathy J.

Heard: June 17, 2010
Judgment: July 16, 2010
Docket: CV-10-8597-00CL

Proceedings: additional reasons at *Anderson v. Hunking* (2010), 2010 ONSC 4920, 2010 CarswellOnt 6724 (Ont. S.C.J.)

Counsel: Lincoln Caylor, Jonathan Bell for Plaintiffs / Moving Parties
Heath Whitely, Gwendolyn L. Adrian for Hunking, et al., Defendants / Respondents
David Preger for Romspen Mortgage Investment Fund
A. Kauffman for Ernst and Young Inc., proposed receiver
No one for Chowdhry, et al.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Defendant conducted educational seminars, which were investment advertisements — Defendants allegedly promised defendants that they would receive two-thirds return on investment, which was also tax deductible — Plaintiffs claimed that

money was improperly transfered to building interest of defendant which was retirement home — Plaintiffs brought proceedings against defendant for fraud, misrepresentation and unjust enrichment — Plaintiffs claimed that defendants improperly took their investments and used them to invest in property — Plaintiffs brought application to appoint receiver of retirement home — Application dismissed — Plaintiffs did not make strong case that defendant made specifically prohibited use of money — Unjust enrichment not made out as advance of funds was met with corresponding liability — Loan was juristic reason for enrichment — No evidence of irreparable harm — Business interests of defendant appeared solvent — No evidence to support allegation that retirement residence was plan to deplete funds stolen from plaintiff — Balance of convenience did not favour appointment — Appointing receiver is intrusive.

Table of Authorities

Cases considered by *D.G. Redman Prov. J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Fisher Investments Ltd. v. Nusbaum (1988), 71 C.B.R. (N.S.) 185, 31 C.P.C. (2d) 158, 1988 CarswellOnt 180 (Ont. H.C.) — followed

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — followed

Richardson Estate v. Mew (2009), 64 R.F.L. (6th) 126, 73 C.C.L.I. (4th) 257, 2009 ONCA 403, 2009 CarswellOnt 2576, (sub nom. *Richardson (Estate Trustee of) v. Mew)* 96 O.R. (3d) 65, 310 D.L.R. (4th) 21 (Ont. C.A.) — followed

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — followed

Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — followed

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — followed

2010 ONSC 4008, 2010 CarswellOnt 5191, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — pursuant to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 41.02 — pursuant to

APPLICATION by plaintiffs to appoint receiver.

D.G. Redman Prov. J.:

1 This is a motion by the plaintiffs for an order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 41.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appointing a receiver over the assets and business of a commercial retirement project owned or controlled by the defendant Bryan Hunking ("Hunking") and referred to as the "Retirement Residence".

2 The 79 individual plaintiffs claim that they are victims of a fraudulent investment scheme orchestrated by Hunking, in concert with the defendants Rajesh Chowdhry ("Chowdhry"), Inderpal Bajaj ("Bajaj") and Ajinderpal Singh ("Singh") (collectively, including Hunking, the "Partners"). They claim that, contrary to assurances made to them that their money would be put in low risk/high return investments, some $5 million, or more than half of their investments, ended up in the Retirement Residence.

3 At the hearing of the motion, the plaintiffs asked that the receiver be given power to sell the Retirement Residence, which they say is either insolvent or at risk of imminent insolvency.

4 I will begin by describing the circumstances that give rise to this motion. I will then set out the court's jurisdiction to appoint a receiver and the principles that govern the exercise of that jurisdiction. I will then apply those principles to the facts of this case.

Background

5 The plaintiff, Dr. Robert Gibb ("Gibb"), who has sworn an affidavit in support of the motion, claims that, at some time in 2000, he and the other plaintiffs (who appear to be unrelated individual investors) began attending investment seminars conducted by the Partners. These seminars, although ostensibly for educational purposes, served as a platform to promote the Partners' investment vehicle, which has been referred to as the "Netbusmodel Group".[1] Gibb alleges that the Partners represented that 80% of investors' money contributed to Netbusmodel would be placed in "secure" investments, which would yield returns of 18-30% per annum and the balance would be placed in more speculative, high tech start-up companies. Some of the investors were induced to participate in a charitable donation plan, referred to as "Help for Humanity - Canada" on the basis that their "investment" would be fully tax deductible but that they would eventually receive a return of two-thirds of their investment.

6 This is an individual action in which 79 investors are joined as plaintiffs. It is not advanced as a class action. Gibb is the only plaintiff who has sworn an affidavit in support of this motion. Singularly lacking from his evidence, and presumably

from the records of the other plaintiffs is any documentary evidence of the allegedly fraudulent misrepresentations made by the Partners. While different investors were allegedly induced to participate in different investments within the Netbusmodel Group, and to make their investments in different ways, it is acknowledged that none of the plaintiffs were told that their money would be used to finance the Retirement Residence.

7 In approximately October, 2001, the Partners purchased a corporation called Emmanuel Village Homes (Kitchener) Inc. ("EV Homes") for a price of one dollar. In return, they took over that corporation's outstanding liabilities of about $2.4 million. The assets of EV Homes consisted of 42 town homes, all of which were subject to life leases, and a tract of land.

8 In December of 2001, the Partners began to construct the Retirement Residence on the tract of land owned by EV Homes. The money to finance the construction came from a company called Commonwealth Capital Corporation ("Commonwealth"), which was also owned by the Partners.

9 As construction of the Retirement Residence progressed, the Partners acquired additional funding by way of a $7.5 million first mortgage from Romspen Investment Corporation ("Romspen") and they severed the lands on which the Retirement Residence was being built from the balance of the lands containing the town homes. They created Emmanuel Village Residence Inc. ("EV Residence"), which took title to the lands on which the Retirement Residence was being built. EV Homes retained the town homes lands and held an unsecured debt from EV Residence, representing the money put into the Retirement Residence by EV Homes.

10 Plaintiffs' counsel claim to have established that in excess of $5 million of the $8.63 million invested by the plaintiffs found its way into the Retirement Residence. Some of that ($1.4 million) came from Help for Humanity - Canada, and some came from Commonwealth (approximately $3.7 million). The funds provided by Commonwealth are alleged to have been provided by six sources:

(a) Alcorp ($520,000);

(b) VM Press ($45,000);

(c) S & P Trading ($180,000);

(d) Harsajan Singh ($2.086 million);

(e) Birchwood ($530,000);

(f) Baby Alcorp ($370,224).

11 In March, 2003, through a series of transactions, three of the Partners, Chowdhry, Bajaj and Singh, transferred their interests in EV Homes, EV Residence and Commonwealth to a holding company owned by Hunking. In the result, Hunking now owns the Retirement Residence. The validity of these transactions is challenged in litigation between Hunking and the other three Partners.[2]

12 The plaintiffs claim that at least $3.166 million of their investments in the Netbusmodel Group was fraudulently transferred to Commonwealth and was used to construct the Retirement Residence.

13 A fundamental factual issue raised by this motion is whether Hunking, who now owns the Retirement Residence, participated in the alleged diversion of the plaintiffs' investments to the Retirement Residence.

14 The plaintiffs have provided no direct evidence on this critical question. Gibb has no direct evidence on the issue and much of his affidavit is either argumentative or the statement of information that has been provided to him as a result of investigations carried out by his counsel. The plaintiffs also rely on evidence of the Partners other than Hunking, but this evidence is disputed by Hunking and the plaintiffs concede that some of that evidence is unreliable. The other Partners are in litigation with Hunking and may well have their own reasons to embarrass him financially. While plaintiffs' counsel appear to have done an admirable job of forensic investigation, the evidence falls short of establishing that Hunking was a knowing

participant in the diversion of the plaintiffs' funds into the Retirement Residence.

Jurisdiction to appoint a receiver

15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
>
> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (Ont. H.C.);
>
> (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090 (Ont. S.C.J.), 2008 CanLII 66137, referring to *Royal Bank v. Chongsim Investments Ltd.*, 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Ont. Gen. Div.);
>
> (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), 1996 CanLII 8258;
>
> (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.);
>
> > (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
> >
> > (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude -evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);
> >
> > (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.*(2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);
>
> (f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton*, 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (Ont. S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*,

above, at para. 6:

> [T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

Analysis

17 In this section, I will apply the test for the appointment of an interlocutory receiver, having regard to the principles expressed above.

(a) Preliminary assessment of the merits of the case

18 The plaintiffs' case is based on (i) fraud; (ii) conspiracy; and (iii) unjust enrichment. The plaintiffs also claim the remedy of constructive trust over the Retirement Residence which they say was constructed using their funds.

19 The plaintiffs say that they have established a strong *prima facie* case of fraudulent misrepresentation. They claim that their investment, which was made based on the representation that it would be "secure", was in fact "funneled" into the Retirement Residence".

20 A fundamental problem with the fraudulent misrepresentation aspect of this case is that Gibb, (who is the only affiant on behalf of the plaintiffs) gives only general evidence as to what the Partners told him would be done with his money. Although he claims that 80% of his money was to be put in "secure" investments and the balance in "risky start-up high tech companies", there is no evidence that there were specific limits on the use that could be made of his funds. There were certainly no limits reduced to writing that have been put in evidence and there are no limits identified by Gibb. His evidence, and the other evidence adduced by the plaintiffs, is really to the effect that, "[n]o one ever told the investors their money would ever go into the Retirement Residence".

21 Moreover, there is no evidence of specific representations that were made to any one of the other 78 investor plaintiffs, other than the foregoing general representations.

22 A second problem is that the plaintiffs' case in fraud and conspiracy against Hunking will fall to be determined on questions of credibility as between Hunking and the other Partners.

23 Hunking's evidence is that he understood that the construction of the Retirement Residence was being funded by Commonwealth through loans advanced by the other Partners, and their families, as well as by private loan agreements with other lenders. Hunking swears that he did not participate in a fraud, that the representations made to investors concerning their investments in Netbusmodel reflected his understanding of the facts, and that he was not aware of any wrongdoings in relation to the plaintiffs' investments.

24 For the purposes of this motion, it is not disputed that the plaintiffs invested over $8 million in the Netbusmodel Group and that much of that money has not been returned to them. Nor is it disputed that some of this money found its way through Commonwealth and into EV Homes and EV Residence. What is altogether unclear is what happened in the "messy middle" to use the expression of counsel for the plaintiffs. The plaintiffs have not established anything more than that Hunking *might* have been responsible for the misappropriation of investors' funds and the use of those funds for the Retirement Residence.

25 While the plaintiffs' counsel points to a number of circumstances that cast doubt on Hunking's explanation that the money was provided by the other Partners, there are - equally -circumstances that suggest that the other Partners controlled

the flow of funds from Netbusgroup through Commonwealth and to EV Homes and/or EV Residence. On the evidence before me, I cannot say that a strong case of fraud (or, for that matter, a *prima facie* case of fraud) has been made out against Hunking. For the same reason, I cannot say that there is strong evidence that Hunking was a party to a conspiracy to defraud the plaintiffs.

26 The plaintiffs' alternative claim is in unjust enrichment. The well-settled elements of this cause of action are: (a) enrichment of the defendant; (b) corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.); *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.) at para. 36. While there is a basis for concluding that there has been a deprivation of the plaintiffs because they have lost their investments, it does not follow that there has been an enrichment of the defendant because the advance of funds by Commonwealth is reflected by a liability of EV Residence to Commonwealth. As well, there is a juristic reason for the "enrichment" - namely, the funds were advanced as a loan.

(b) Irreparable Harm

27 The plaintiffs rely on the following observation of Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, above, at para. 59:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. CrainInc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

28 The plaintiffs say that the liabilities of the "EV Group" are increasing daily and that, because of Hunking's actions, there is a strong likelihood that by the time of trial the amount of equity in the EV Group, and in the Retirement Residence in particular, will be insufficient to satisfy the plaintiffs' claim. They say that there is no evidence that Hunking has any asset other than the Retirement Residence to satisfy their claims.

29 The plaintiffs rely on unaudited financial statements of EV Residence for the year ended February 28, 2009, which show assets of approximately $11.75 million (with lands and buildings reflected at book value) as against liabilities of over $18 million and a negative cash flow. The notes to the financial statements indicate that:

> The company has incurred significant losses from operations, has a working capital deficiency and a deficit of $6,640,465 as at February 28, 2009. The continuation of the company as a going concern is dependent on its ability to generate sufficient cash to meet its obligations as they come due and achieving a profitable level of operations.

30 In spite of this, it was acknowledged by counsel for Romspen, which does not oppose the appointment of a receiver provided it does not have to fund the cost, that his client's mortgage and the realty taxes are current and in good standing.

31 Hunking has tendered the affidavit of Theresa Landry, Executive Director of the Retirement Residence, to the effect that the facility has, since late 2005, maintained occupancy levels at approximately 96% and has a number of long-term employees. Contrary to the plaintiffs' assertions, through Gibb, that Hunking is living an "extravagant" and "luxurious lifestyle" from the profits of the Retirement Residence. Ms. Landry deposes that from approximately 2004 to February 2009, Hunking and his wife received no salary from the Retirement residence and were only reimbursed for their expenses in the amount of about $24,000. Commencing in February, 2009, Hunking was paid a salary of about $95,000 per annum before

taxes and his wife (who has worked at the Retirement Residence on a full-time basis since 2008) was paid about $60,000 per annum before taxes.

32 There is no evidence to support the plaintiffs' inflammatory allegations (which appear to be fueled by hearsay information supplied by the other Partners who are in litigation with Hunking) that Hunking is using the Retirement Residence as his personal bank account to deplete funds "stolen" from them. Nor is there any current, independent, reliable evidence to show that the Retirement Residence is being operated as anything other than a going concern or that it is a wasting asset or being dissipated in any way.

33 The Retirement Residence is subject to a substantial mortgage in favour of Romspen, an apparent arms-length commercial lender, which presumably has a keen interest in ensuring that the asset is not dissipated. It is also subject to two certificates of pending litigation, obtained by the plaintiffs, which will effectively prevent the sale or further encumbrance of the Retirement Residence.

34 The plaintiffs' submission on irreparable harm overlooks the fact that, apart from Hunking, his wife and his companies, there are other defendants, including the other three Partners, who may well be either wholly or partly liable to the plaintiffs and there is no independent evidence to show that these parties lack the means to satisfy a judgment. I conclude that it would be pure speculation to say that the plaintiffs will suffer irreparable harm if a receiver is not appointed.

(c) Balance of convenience

35 I have noted above that the appointment of a receiver is intrusive and that the effect on the parties must be considered in the exercise of the court's discretion. In this case, the plaintiffs are neither judgment creditors nor secured parties. They simply have a potential claim against Hunking. The plaintiffs seek, at a minimum, the appointment of a receiver to take possession of and manage the Retirement Residence and, at the more extreme end, to sell it. It is quite obvious that the appointment of a receiver could have drastic consequences in terms of the business itself, and the confidence of staff, suppliers and residents in the viability of the business. It would take out of the hands of Hunking an enterprise in which he appears to have invested some seven years of work and could well see the enterprise sold from under him. I note, in that regard, that the plaintiffs have not given any undertaking as to damages, should it be determined that this relief ought not properly to have been granted. I also note that there has been no guarantee by the plaintiffs that Hunking and his wife would remain employed by the receiver.

36 In a nutshell, the appointment of a receiver would likely have disastrous consequences for Hunking, someone who may, at the end of the day, be found innocent of wrongdoing.

37 Balanced against this is the existing security that the defendants have by way of a certificate of pending litigation against the Retirement Residence as well as the potential for recovery against the other defendants, and Hunking, in the event that they prove liability and damages at trial. There is no evidence of dissipation of the Retirement Residence and it appears to be operating as a going concern. While there is a risk that the plaintiffs will not be able to enforce a judgment against Hunking, should they obtain one, I am not satisfied that the appointment of a receiver will attenuate that risk.

Conclusion

38 For these reasons, the plaintiffs' motion for the appointment of a receiver is dismissed, with costs. If costs are not agreed upon, written submissions may be made to me care of Judges' Administration.

39 Counsel for the defendants indicated that he is prepared to cooperate with counsel for the plaintiffs to finalize a schedule in order to bring this matter on to trial within a reasonable time. If the parties are unable to agree on a timetable an appointment can be made through my assistant in order to set a timetable.

40 I encourage counsel to discuss the removal of one of the two certificates of pending litigation and the temporary lifting of the certificate to enable the Retirement Residence to refinance the Romspen mortgage, which is at 11%, a rate which is a burden on the defendant. I will remain seized of the matter should a motion be necessary.

Application dismissed.

Footnotes

1 The "Netbusmodel Group" consisted of three companies, which have been referred to as "Netbusmodel", "Alcorp" and "Baby Alcorp".

2 Superior Court of Justice File 04-CV-271509CM3.

2011 ONSC 4704
Ontario Superior Court of Justice (Divisional Court)

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 8054, 2011 ONSC 4704, 205 A.C.W.S. (3d) 678, 282 O.A.C. 345, 81 C.B.R. (5th) 265

General Electric Canada Real Estate Financing Holding Company and General Electric Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its Capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

S.N. Lederman J.

Heard: August 4, 2011
Judgment: August 10, 2011 *
Docket: Toronto 348/11

Proceedings: refusing leave to appeal *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867 (Ont. S.C.J. [Commercial List])

Counsel: Timothy Pinos for Moving Party, 729285 Ontario Limited
Clifton Prophet, Nicholas Kluge for Respondents, Meyers Norris Penny Limited in its capacity as Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc.
Lou Brzezinski, Grace J. Kim for Applicants
S. Mitra, D. Reiter for Receiver, Albert Gelman Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Investigative receiver — 729 Ltd. was majority shareholder of holding company — Holding company controlled bankrupt companies that operated number of retirement residences — Trustee in bankruptcy learned of transfer of funds that took place between interconnected entities, including 729 Ltd., during time bankrupt companies were insolvent — Trustee brought motion for order appointing investigative receiver — Judge appointed investigative receiver over 729 Ltd. pursuant to s. 101 of Courts of Justice Act — 729 Ltd. brought motion for leave to appeal from order appointing investigative receiver — Motion dismissed — Neither test for leave to appeal under R. 62.02(4)(a) nor (4)(b) of Rules of Civil Procedure was met — Judge was alive to correct test in appointing investigative receiver and his decision did not conflict in principle with other cases — There was no good reason to doubt exercise of judge's discretion under s. 101, having regard to the factual context in which decision was made and strong interconnection between 729 Ltd. and bankrupt companies and his finding that monies flowed around this group of companies on regular basis — Appointment of investigative receiver in

circumstances was just and convenient to assist trustee in fulfilling his mandate to ascertain true state of affairs — Factors upon which judge based his decision were fact specific and did not give rise to issues of general public importance to administration of justice.

Table of Authorities

Cases considered by *S.N. Lederman J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — followed

Stroh v. Millers Cove Resources Inc. (1995), 85 O.A.C. 26, 1995 CarswellOnt 275 (Ont. Div. Ct.) — considered

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc. (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 62.02(4)(a) — referred to

R. 62.02(4)(b) — referred to

MOTION by 729 Ltd. for leave to appeal from judgment reported at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867 (Ont. S.C.J. [Commercial List]) appointing investigative receiver over 729 Ltd.

***S.N. Lederman J.*:**

1 The Moving Party, 729285 Ontario Limited ("729") seeks leave to appeal to the Divisional Court from the Order of Brown J. whereby he appointed an investigative receiver over 729, and seeks a stay of the Order if leave is granted.

2 Mr. Pinos, on behalf of 729, submitted that Brown J.'s decision is in conflict with the established case law with respect to the appointment of receiver (including an investigative receiver) in that it was incumbent upon the court to first find evidence of fraud, dissipation of assets or other improper activities that threaten the ability of a creditor to obtain recovery. In the instant case, 729 was not subject to any security agreement or contractual rights allowing for the appointment of a receiver. The sole claim here is in debt and there is no allegation of fraud or improper conduct. Mr. Pinos submits that although Brown J. cited the appropriate principles, he misapplied them and in effect provided an unlimited scope for the appointment of an investigative receiver where a party is dissatisfied with discovery or cross-examination answers. Accordingly, he submits that there is good reason to doubt the correctness of the decision.

3 729 is a majority shareholder of a holding company that controls 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc., (the "bankrupt respondents") that operated a number of retirement residences.

4 The GE Group of Companies are secured lenders of the bankrupt respondents and are owed approximately $20 million.

5 The trustee in bankruptcy of the bankrupt respondents obtained certain financial information in a piecemeal way and learned of the transfer of funds that took place between the interconnected entities, including 729, during a time that the bankrupt respondents were insolvent.

6 Brown J. looked at all the circumstances surrounding these transactions and the less than candid disclosure by the respondents about these matters and concluded that:

> a) the respondents were not completely forthcoming to the trustee about these transactions;
>
> b) there were serious concerns about the flows of money between the bankrupt respondents and 729 and the use that 729 made of those funds; and
>
> c) there were misrepresentations made to the trustee and the court about the true state of the Royalton proceeds held in the law firm's trust account and there were serious questions whether 729's investment in the Royalton Residences was by way of debt or equity.

7 Brown J. considered the principles applicable to the appointment of a receiver under s. 101 of the *Courts of Justice Act*, as recently summarized in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.). He applied a comparable *RJR-MacDonald* test for interlocutory injunctions and determined that in all the circumstances it was just inconvenient to appoint a limited investigative receiver over 729. Of importance in this case was that the mandate of the trustee was thwarted and made ineffective by the conduct of the respondents.

8 In his Order it is clear that the receiver is to have limited powers and is not to operate the business or take possession of the assets of 729; that 729 is to remain in possession of its current and future assets and is to continue to carry on business in a manner consistent with the preservation of its business and property.

9 The receivership is to last for a period of 120 days and the receiver is to provide the court with a comprehensive report on the business and affairs of 729.

10 Appointment of an investigative receiver over a company has taken place in circumstances where the company is intricately involved with companies already in receivership, and it is necessary to review and ascertain the transactions that have taken place within the network of companies: *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009] O.J. No. 4285 (Ont. S.C.J. [Commercial List]).

11 Moreover, the Divisional Court has pointed out that the remedy of an investigative receiver is not as intrusive or drastic as a receiver who is put in possession of assets: *Stroh v. Millers Cove Resources Inc.* (1995), 85 O.A.C. 26 (Ont. Div. Ct.).

12 729 serves as a conduit for investments. It does not carry on an active business enterprise and, as stated in *Stroh*, *supra*, paragraph 7:

> In the first place, the company is not an operating company and the impact of the receivership will not be the same as it would be if it was engaged in active business. In the second place, the main thrust of the order is to make sure, as far as it will be possible to do so, that the assets of the company and the various arrangements can be fully examined and considered so that future actions can be then planned.

13 Brown J. held that the circumstances stated above justified that appointment of an independent third party:

> a) to look into the transactions that took place between the bankrupt companies and 729;
>
> b) to determine the true state of 729's interest in the Royalton proceeds, i.e. whether they were held in trust for others, or whether 729 had a beneficial interest in them; and
>
> c) to determine who actually received the Royalton proceeds.

14 Brown J. was alive to the correct test in appointing an investigative receiver and his decision does not conflict in principle with other cases.

15 I have no good reason to doubt the exercise of Brown J.'s discretion under s. 101 of the *Courts of Justice Act*, having regard to the factual context in which his decision was made and particularly the strong interconnection between 729 and the bankrupt companies and his finding that monies flowed around this group of companies on a regular basis. The appointment of an investigative receiver in these circumstances was just and convenient to assist the trustee in fulfilling his mandate to ascertain the true state of affairs.

16 Moreover, the factors upon which Brown J. based his decision are fact specific and do not give rise to issues of general public importance to the administration of justice which transcend the immediate interests of the parties involved.

17 In the end, neither the test for leave to appeal under rule 62.02(4)(a), nor (4)(b) has been met.

18 The motion is, therefore, dismissed. There is no need to consider the motion for a stay.

19 I trust that the parties will come to an agreement with respect to the costs of these motions, failing which they may make written submissions within 30 days.

Motion dismissed.

Footnotes

* Additional reasons at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 10661, 2011 ONSC 5699 (Ont. Div. Ct.).

2011 ABQB 759
Alberta Court of Queen's Bench

Romspen Investment Corp. v. Hargate Properties Inc.

2011 CarswellAlta 2133, 2011 ABQB 759, [2012] A.W.L.D. 1141, 209 A.C.W.S. (3d) 843, 86 C.B.R. (5th) 49

Romspen Investment Corporation (Plaintiff) and Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd. (Defendants)

Donald Lee J.

Heard: November 15, 25, 2011
Judgment: December 2, 2011
Docket: Edmonton 1103-17749

Counsel: Schuyler V. Wensel, Q.C. for Plaintiff
Andrew Chamberland for Defendants
Scott Stevens for Receiver, D. Manning & Associates Inc.
Lindsay Miller for Second Mortgagee, Allied Hospitalities Services Inc.
Atul Omkar for Dr. Singh

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles

Plaintiff RIC was Ontario corporation registered extra-provincially in Alberta — Defendant companies were Alberta corporations, individual defendant was officer, director, shareholder, and controlling mind of defendant companies — In accordance with terms of certain loan transactions RIC advanced $32,000,000, repayable on demand, to defendant companies in November 2010 — Defendant companies provided security for loans in form of registered mortgage in favour of RIC on two distinct parcels of land — One parcel of land had operating hotel on it, other had church — In October RIC made demand for repayment, however defendant companies refused or neglect to pay — Receiver/manager was appointed for mortgaged lands and hotel — Receiver discovered that hotel was operated by separate corporation,CLCPL, and all hotel revenues were being paid to CLCPL — Plaintiff brought motion for order that receiver/manager have control over all property of both defendant companies and CLCPL — Given CLCPL's central role in operating hotel business, that its existence might be in breach of loan agreement, that it appeared to be in significant tax arrears, it was just and convenient that receiver/manager have control of all of property of both defendant companies and CLCPL.

Table of Authorities

Cases considered by *Donald Lee J.*:

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265, 282 O.A.C. 345 (Ont. Div. Ct.) — followed

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc. (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244(1) — referred to

Land Titles Act, R.S.A. 2000, c. L-4
Generally — referred to

MOTION by plaintiff to include newly discovered corporation in receivership order.

***Donald Lee J.*:**

1 The Plaintiff Romspen Investment Corporation ("RIC") is a corporation incorporated pursuant to the laws of the Province of Ontario, registered extra-provincially in the Province of Alberta. The Defendant companies are bodies corporate incorporated pursuant to the laws of the Province of Alberta. The Defendant Kevyn Ronald Frederick also known as Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick ("Frederick"), is alleged to be the officer, director, shareholder and controlling mind of the Defendants.

2 In accordance with the terms of certain loan transactions alleged, RIC advanced $32,000,000 to Hargate Properties Inc. ("Hargate") and 1410973 Alberta Ltd. ("1410973") in 2010. The amount due and owing under the Loan Commitment from Hargate and 1410973 to RIC as of November 7, 2011 is submitted to be $32,743,923.42 with per diem interest thereafter at $8,746.66.

3 In addition to the Commitment by Hargate and 1410973 to repay the principal and interest, there was also additional security for the loans issued pursuant to the Commitment. Hargate and 1410973 executed and delivered to RIC a *Land Titles Act* mortgage dated May 28, 2010 which was registered with the Land Titles Office for the Alberta Land Registration District on August 10, 2010 whereby Hargate and 1410973 mortgaged in favour of RIC two distinct parcels of land. One title hereafter referred to as the "Hotel Lands" is the downtown location upon which the Chateau Lacombe Crown Plaza Hotel is situated; and the second parcel of land consists of 20.07 acres located on the south end of Edmonton on which a Church is located, hereinafter referred to as the "Church Lands".

4 It is submitted that these two parcels of land secured the payment of the principal sum of $32,000,000 together with interest on all amounts remaining unpaid, both before and after default at an interest rate of 10% per year. It is alleged that default has been made pursuant to the terms of the mortgage and as described previously as of November 7, 2011 the sum of $32,743,923.42 plus interest is due and owing. It was an express term of the Commitment, Mortgage as well as a further General Security Agreement ("GSA") dated May 28, 2010 that all indebtedness owing to RIC was repayable on demand.

5 By demand in writing made October 11, 2011 RIC made demand for repayment of the Indebtedness pursuant to the Commitment, the Mortgage and the GSA, however it is alleged that Hargate and 1410973 have refused or neglected to pay. On October 11, 2011 a Notice of Intention to Enforce Security pursuant to Section 244(1) of the *Bankruptcy and Insolvency Act* was delivered to all of the Defendants.

6 It is also alleged that there is a continuing unlimited Guarantee in writing dated March 28, 2011 in effect that was made in consideration of RIC making the loan to Hargate and 1410973 in which Voipus Canada Ltd. ("Voipus"), 1333183 Alberta Ltd. ("1333183"), Bellavera Green Condominium Corp. ("Bellavera") and Frederick all unconditionally guaranteed on a full indemnity basis any money and charges incurred by RIC in recovering the Indebtedness.

7 On November 15, 2011 with respect to the Church Lands consisting of 20 acres, counsel for Dr. Singh appeared submitting that his client should be appointed the Receiver with respect to those lands, separate and apart from any application being made by D. Manning and Associates to be appointed receiver of the Hotel Lands and the hotel operation. Although taxes have not been apparently paid on the Church Lands to the City of Edmonton, the Church on the 20 acres of land pays rent of approximately $24,000 a year. Foreclosure proceedings have apparently been commenced by Dr. Singh with respect to those lands, and his appointment as Receiver was sought with respect to the Church Land rentals.

8 Remaining counsel present on November 15, 2011 took the position that an independent professional receiver should be appointed with respect to the Church Lands as opposed to Dr. Singh, who may also be engaged in other litigation with respect to the securitisation of the RIC loan in the future. It was proposed that D. Manning and Associates Ltd. be appointed receiver for the Church Lands as well.

9 Counsel for Dr. Singh was concerned about the costs involved in having a professional receiver appointed for such a simple series of transactions with respect to collecting rentals on the Church Lands.

10 An Order was eventually issued appointing D. Manning and Associates Ltd. to be the Receiver/Manager for both lands on the understanding that certain limiting set fees would be charged with respect to the Church Lands. All parties were generally in agreement with respect to the ultimate Receivership Order that was signed on November 15, 2011 containing the standard template provisions with two amendments which read as follows:-

> (a) Allowed the Receiver to engage the hotel management services of Allied Hospitalities Services Inc.;
>
> (b) Allowed the Receiver to make payments to secured and other creditors including RIC, to ensure the ongoing operations of the debtor.

11 After this application for a Receivership Order was heard and granted on November 15, 2011, an Amended Statement of Claim was filed on November 21, 2011 adding as a Party the Defendant Chateau Lacombe Capital Partners Ltd. ("CLCPL"), and an Order was sought to include CLCPL within the definition of "Debtor" in the initial Receivership Order.

12 It is alleged that following to the Receiver/Manager Order of Hargate granted on November 15, 2011, the Receiver/Manager took possession of all of the Property as defined in that Order on November 15, 2011. The Receiver/Manager then discovered the existence of CLCPL for the first time. It was determined that all of the 120 unionized employees, and all 60 to 70 non-union employees of the Hotel were employed and contracted by CLCPL, allegedly contrary to the terms of the Commitment, Mortgage and GSA.

13 The Receiver Manager also determined that contrary to the terms of those three securitisations, that all of the revenue from the use and operation of the Hargate Property and the Hotel Lands had been diverted to CLCPL and deposited to CLCPL's operating accounts with the HSBC Bank of Canada (the "Operating Accounts").

14 At the time of the granting of the original November 15, 2011 Order, it is alleged that the Operating Accounts had a balance of $295,000 but that on the morning of the granting of the Order on November 15, 2011, Frederick caused $145,000 to be transferred from the Operating Accounts to his own personal account with RBC Securities.

15 The Receiver Manager is also alleging from his review of the records of Hargate and CLCPL that the Canada Revenue Agency ("CRA") issued a Requirement to Pay to the CRA account of CLCPL dated September 21, 2011 in the amount of $513,340.07; and that the balance outstanding for GST Remittances due as of October 31, 2011 is $407,624.40.

Conclusion

16 The creation and existence of CLCPL as a separate entity for the operation of the hotel business known as Crown Plaza Chateau Lacombe Hotel makes it central to the effective operation of that hotel in combination with the Hotel Lands, the property of Hargate, and the employees. CLCPL apparently receives all of the revenues from the Hotel's business operations, and employs all of the employees.

17 It is proposed that the Receiver/Manager have control over all of the property of both Hargate and CLCPL as Receiver/Manager. Given CLCPL's central role in operating the hotel business, that its existence may be in breach of the Loan Documents, and CLCPL appears to be in significant arrears to the CRA, I conclude that it is just and convenient that the Receiver/Manager have control of all of the property of both Hargate and CLCPL.

18 *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), at paragraph 37 is applicable in the present circumstances:-

> 37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the Courts of Justice Act. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*
>
> [Underlining Added]

19 Similarly in *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.), the appointment of an investigative receiver over a company has occurred in circumstances where the company is intrinsically involved with the companies already in receivership, and where it is necessary to review and ascertain the transactions that have taken place within the network of companies.

20 The additional appointment of a Receiver for CLCPL is consistent with the factors a Court may consider in determining whether it is appropriate to appoint a receiver as described by my colleague Romaine J at paragraph 27 in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 CarswellAlta 1531, 2002 ABQB 430 (Alta. Q.B.)

> 27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

21 I conclude that it would be appropriate to amend the November 15, 2011 Order to include within the definition of "debtor" CLCPL. Accordingly all the terms of the original November 15, 2011 Order shall apply to CLCPL from the date of that Order. Furthermore I will seize myself with all future applications in this matter.

Motion granted.

2009 CarswellOnt 6182
Ontario Superior Court of Justice [Commercial List]

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.

2009 CarswellOnt 6182, [2009] O.J. No. 4285, 181 A.C.W.S. (3d) 472, 59 C.B.R. (5th) 303

WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.

S.E. Pepall J.

Judgment: September 1, 2009
Docket: CV-09-8201-00CL

Counsel: J. Carhart, A. Sambasivan for Unit Owners, Other Unit Purchasers
R. Shayne Kukulowicz, J. Dietrich for Receiver of RRDI
P. Hugg for WestLB AG
G. Moffat for Marriott Hotels of Canada, Ltd.
D.G. Cohen for Fortress Credit Corp.
D. Byers, M. Konyukhova for Rosseau Resort Management Services Inc.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles

R Inc. was ordered into receivership — At time of receivership, it was developing and constructing hotel and condominium complex and several units had been sold but transaction had not closed — Hotel Management Agreement ("HMA") governed management and operations of hotel — RR Inc. was shell corporation and was related to and owned by same shareholder group as R Inc. — RR Inc. assigned to W all its right, title and benefit in HMA — Rental Pool Management Agreement ("RPMA") was agreement between unit owners and purchasers whose agreements of purchase and sale had not yet closed — All unit owners were required to enter into RPMA — Obligations and entitlements of parties to various agreements were intricately connected, intertwined, and inter-dependent — RR Inc. owed obligations to unit owners that it was unable to perform — Having delegated responsibilities to others, it was dependent on agreements with R Inc. — RPMAs could not be performed independently of HMA — Receiver of R Inc. and representative counsel for unit owners and unit purchasers whose transactions had not yet closed brought motion for appointment of receiver of all right, title and interest of RR Inc. in various agreements relating to resort property and sought approval of sixth report of receiver — Motion granted — It was just and convenient to appoint receiver of all right, title and interest of RR Inc. in and to HMA, RPMAs and other agreements and arrangements requested by moving parties — In six month period, receiver was obliged to record all fees that would have been received by RR Inc. as result of RPMAs it entered into with unit owners and purchasers — Once RR Inc. receiver was appointed, it should be in position to consider binding nature of any agreement relating to contribution and indemnity with respect to HMA and whether amounts were owed by RR Inc. and R Inc. and

were improperly appropriated — Record would enable court to consider whether RR Inc. had any real entitlements — R Inc. and RR Inc. had joint obligations under HMA to fund operating losses and working capital deficiencies — There was deadlock amongst various stakeholders — Unit holders were stranded in RMPAs that were incapable of performance.

Table of Authorities

Cases considered by *S.E. Pepall J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc. (2007), 2007 CarswellOnt 7332 (Ont. S.C.J. [Commercial List]) — referred to

O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd. (2003), 2003 CarswellOnt 3598 (Ont. S.C.J.) — referred to

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), 1972 CarswellOnt 1010, 25 D.L.R. (3d) 386, [1972] 2 O.R. 280 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(2)(c) — referred to

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

MOTION by related corporation and representative counsel for unit owners for appointment of receiver.

***S.E. Pepall J.*:**

Relief Requested

1 The Receiver of Rosseau Resort Developments Inc. ("RRDI") and Representative Counsel for unit owners and unit purchasers whose transactions have not yet closed request the appointment of a receiver of all right, title and interest of Rosseau Resort Management Services Inc. (RRMSI) in various agreements relating to the property known as the Rosseau Resort and seek approval of the sixth report of the Receiver. RRMSI moves to amend paragraph 6 of my order of August 18, 2009. No one supports RRMSI's motion and all those appearing support the motion of the Receiver and Representative Counsel. [1]

Backround Facts

2 Rosseau Resort Development Inc. (RRDI) is the registered owner of property on Lake Rosseau in Muskoka. When it was ordered into receivership on May 22, 2009, RRDI had been developing and constructing a first class hotel and condominium complex (the "Hotel"), the construction of which was incomplete. RRDI's property consists of about 40 acres plus the land on which the Hotel is situate. At the time of the receivership, 72 of a total of 221 units had been sold and closed, 65 had been sold but the sale transactions had not closed, and 84 remained to be sold. The terms of the agreements of purchase and sale required

that the units be included in a rental pool and then be made available for rent by guests of the Hotel. The court appointed receivership was initiated by the first secured creditor, WestLB AG ("WestLB"). The construction of the Hotel has now been substantially completed.

3 To understand the nature of the motions before me, one must examine various inter-related agreements.

4 Firstly, there is a hotel management agreement ("HMA") that governs the management and operations of the Hotel. It is between the operator of the Hotel, Marriot Hotels of Canada, Ltd., RRDI and RRMSI. The receivership of RRDI is an event of default under the HMA that permits Marriott Hotels to terminate the HMA.

5 RRMSI is a shell corporation. RRMSI is related to and owned by the same shareholder group as RRDI. Mr. Ken Fowler holds the principal equity interest in both RRDI and RRMSI. RRMSI assigned to WestLB all its right, title and benefit in the HMA, including all monies or other benefits which may be claimed under it and the right to surrender, cancel or terminate the HMA.

6 Amongst other things, the HMA provides that:

- It is for a term of 25 years renewable for 4 successive periods of 10 years.

- RRDI and RRMSI are collectively defined as the "Owner". The obligations of RRDI and RRMSI under the HMA are joint and several. The rights of either RRDI or RRMSI as Owner may be exercised by either RRDI or RRMSI and any act or failure to act by either of them is treated as an act or failure to act by each of them.

- The Owner is obliged to require that all unit owners execute a rental pool management agreement ("RPMA") as a condition of purchase. RRMSI is described in the HMA as the rental pool manager. Under the HMA, RRMSI as the rental pool manager delegated all of its obligations under the RPMAs to Marriott Hotels except the obligation to provide periodic financial statements to unit owners and to make distributions to them. As a result of this delegation, Marriott Hotels is in essence responsible for the rentals and employs all staff necessary for the management and operation of the Hotel.

- The operation of the Hotel is placed under the exclusive supervision and control of Marriott Hotels. Marriott Hotels undertakes responsibility for all aspects of the Hotel operations, from employing staff, to booking the facilities, to marketing and promotion. It is not required to fund expenses of the Hotel and is not obliged to incur any liability or obligation. It collects all revenue of the Hotel and is responsible for applying and distributing it in accordance with the HMA. If it does incur any liability or obligation, it may deduct this amount from future distributions to the Owner.

- Generally speaking, Marriott Hotels may deduct its Hotel and management expenses from gross revenues. The remaining operating profit, if any, may be distributed to the Owner but the HMA does not specify which one. Marriott Hotels may treat either RRDI or RRMSI as the Owner under the HMA.

- To the extent that expenses exceed gross revenue, there is an operating loss. The Owner must fund operating losses within 30 days of request by Marriott Hotels. In addition, the Owner must provide Marriott Hotels with sufficient working capital to carry on Hotel operations if gross revenues are insufficient to do so. According to the Receiver's second report dated July 3, 2009, operating losses had been consecutively incurred at the Hotel since it opened in December, 2008 and, while the Hotel was forecast to generate modest operating profits from July to September, 2009, the operating profits will be insufficient to offset the actual and forecasted operating losses for the pre July, 2009 and post September, 2009 periods respectively. In April, WestLB funded the sum of $1.9 million to RRDI to reimburse Marriott Hotels and in June, the Receiver funded an additional sum of $550,000.

7 The second relevant agreement to consider is the RPMA. It is between the unit owners or purchasers whose agreements of purchase and sale have not yet closed and RRMSI. It governs the lease and occupation of the units. As mentioned, the units must be included in the rental pool and all unit owners must enter into a RPMA. Unit owners are prohibited from leasing or

permitting occupation of their units except as permitted by the RPMAs. In the RPMAs, RRMSI is appointed as the exclusive rental pool manager.

8 In the disclosure documents provided to each potential unit purchaser, RRMSI was described as a single purpose newly incorporated entity that had no assets and that had no prior history of managing rentals or rental pools. The documents stated that its ability to fulfill its obligations to fund the ongoing operations of the rental pool may depend on its ability to arrange other sources of funding. Prior to the receivership, RRMSI had no employees of its own and all of the functions of RRMSI under the agreements were performed by employees of RRDI.

9 The disclosure documents state that RRDI arranged for RRMSI to act as the exclusive rental pool manager. There is no written agreement between the two companies. Mr. Fowler states that RRMSI was appointed as the exclusive rental pool manager by verbal agreement with RRDI. The disclosure documents describe RRMSI as the initial rental pool manager. This seems to contemplate that another entity could be a successor rental pool manager. Mr. Fowler states further that there was also a verbal agreement between RRDI and RRMSI that RRDI would fund all amounts required to be funded by the HMA. This is not reflected in the disclosure documentation. Mr. Fowler states that this is because the verbal agreement it had with RRDI related to RRDI's obligations to Marriott Hotels and was not material to the obligations as between RRMSI and the unit owners. The verbal agreement is not referenced in the HMA.

10 In spite of the fact that, according to Mr. Fowler, RRMSI had no obligations to Marriott Hotels because they had been assumed by RRDI, in January, 2009, RRMSI delivered to Marriott Hotels funds in the amount of $435,000 on account of operating losses. Mr. Fowler states that this payment was made by way of an inter-company transfer between RRMSI and RRDI. There was another inter-company transfer from RRMSI to RRDI in the amount of $54,000. Mr. Fowler states that this transfer was to have been made to Red Leaves Development Inc., a company related to RRDI and RRMSI.

11 The rental pool manager's ability to pay revenue to unit owners arises from the payment of operating profit by Marriott Hotels of which there has been none. According to the Receiver, the distribution of operating profit does not match the expectation of distributable profit to unit owners under the RMPAs. The Court has ordered that any payments under the HMA be paid to the Receiver but to date there have been none given the lack of any operating profit. According to the Receiver, under the existing structure, the calculation of amounts owing to unit owners under the RPMAs could result in there being amounts owing to unit owners even when the Hotel incurs an operating loss.

12 Amongst other things, the RPMAs provide for the following:

- The term is 25 years renewable for 4 successive periods of 10 years.
- It addresses periods of personal use by the unit owner and availability of the unit for rent to the public.
- RRMSI is to provide cleaning, rental and management services to the units. These responsibilities have been delegated to Marriott Hotels.
- If in a fiscal year, certain costs exceed the gross rental pool revenue, the rental pool manager guarantees to pay the deficiency to unit owners. This is regardless of whether any operating profits are payable to the Owner by Marriott Hotels under the HMA. The Receiver is of the view that RRMSI does not have the resources to meet this obligation.
- Marriott Hotels is granted the right to enforce all rights and privileges of the rental pool manager against the unit owners.
- The rental pool manager may terminate its appointment on 180 days notice. The unit owner may terminate if, amongst other things, the rental pool manager fails to observe any material covenant that materially adversely affects the owner and the default continues for 45 days following written notice and if more than $^3/_4$ of the owners approve the termination provided that the rental pool manager will be given not less than 120 days prior written notice of the termination. Disputes are to be settled by arbitration although both the unit owner and RRMSI may commence legal proceedings for mandatory,

declaratory or injunctive relief as may be necessary to define or protect the rights and enforce the obligations contained in the RPMA pending the settlement of the dispute.

• The rental pool manager is entitled to a management fee.

• The rental pool manager is to deposit all gross rental pool revenue into an operating account. This revenue is defined as all amounts collected by the rental pool manager as charges for the rental of all of the units. The gross rental pool revenue is adjusted as a result of various deductions such as marketing and royalty fees. An owner is entitled to net rental revenue that reflects a calculation based on factors including the adjusted gross revenue and the days the subject unit was in the rental pool. The obligations imposed by the RPMA are conditional upon sufficient funds being available in that account from the gross rental pool revenue or from the owner's resources. Owner refers to the unit owner, not RRMSI.

13 There are also other agreements executed with Marriott Hotels and/or its affiliates. These consist of a License Royalty Agreement, an International Services Agreement, a Technical Services Agreement and a Marketing License Agreement. RRDI is a party to all of these agreements and RRMSI is a party to the first two of these agreements. Marriott Hotels is entitled to certain fees under these agreements.

14 In its second report, which was approved by Cumming J., the Receiver reported that in light of the assignment of the HMA to WestLB and the delegation of RRMSI's responsibilities to Marriott Hotels, it appeared that RRMSI had no practical ability to perform any services as rental pool manager under the RPMAs and that the Receiver understood that RRMSI had no ability to fund any distributions to unit owners under the RPMAs in respect of the calculation of net rental revenue. At least since the beginning of June, 2009, efforts have been made to address these and other problems with Mr. Fowler on behalf of his various companies without success. On July 8, 2009, Cumming J. authorized the Receiver to undertake a sales and marketing process which included the sale and marketing of the 84 unsold condominium units and the residual interest of RRDI in the Hotel and other assets. On July 24, 2009, the price list proposed by the Receiver for a "One-Day Only Sale" on August 22, 2009 was approved by Campbell J. He stated that it was opposed by RRDI and in his endorsement, he noted that given the nature of the resort and its location, time was of the essence. He fixed costs in the amount of $2000 to reflect the failed opposition but stated that the amount would be payable at the discretion of any judge dealing with the matter if so minded and who concluded on a further attendance that there was no foundation to the opposition.

15 On August 17, 2009, the Receiver brought a motion requesting a variety of relief including: an order authorizing the Receiver to repudiate the HMA and to enter a new HMA on behalf of RRDI with Marriott Hotels; authorizing the Receiver to repudiate the arrangements between RRDI and RRMSI whereby RRMSI was appointed rental pool manager; and approving the Receiver's fourth report.

16 In its fourth report, the Receiver expressed its conclusion that the financial and legal structure underlying the Hotel's rental pool and the form of RPMAs entered into between RRMSI and the unit owners were not viable in their current form, that the HMA could not be assumed nor adopted by the Receiver on behalf of RRDI, and that it had to implement a restructuring of the various agreements and arrangements to which RRDI was a party. The Receiver outlined the steps it proposed to take including entering into new RPMAs with unit owners, purchasers of units whose agreements of purchase and sale had not yet closed, and new unit purchasers including those buying at the "one day only" sale so as to restructure the rental pool and enable it to be financially viable. The Receiver could then sell the unsold units to purchasers and sell the residual interest of RRDI in the Hotel. The Receiver was of the view that the steps outlined were necessary to preserve the value of the assets, maintain the operations of the Hotel and successfully carry out the sales and marketing process. Absent same, the Receiver stated that the operations of the Hotel would be jeopardized. The Receiver stated that in order to undertake sales of units to prospective new unit purchasers, the Receiver had to have in place for the one day sale the necessary arrangements with Marriott Hotels, an appropriate and workable RPMA, and the requisite disclosure documentation to facilitate sales pursuant to the retail sales programme.

17 The Receiver noted that the RMPAs require the payment of revenue by the rental pool manager to the unit owners but the rental pool manager's ability to do this arises from the payment of operating profit by Marriott Hotels under the HMA. RRMSI does not have an ownership interest in the Hotel or an exclusive right to receive distributions from Marriott Hotels.

The Receiver stated that it cannot continue the structure of the RPMAs. The calculation of amounts owing to the unit owners could result in there being an amount owing to the unit owners even when the operations of the Hotel incur an operating loss. The structure appears to have been developed on the premise that RRDI would have the financial resources to backstop the obligations of RRMSI to unit owners and the Receiver was of the view that it was inappropriate to continue in this manner with new unit purchasers. I agree. The Receiver also determined that it was desirable to continue with Marriott Hotels as the Hotel operator. It negotiated a new HMA in which RRDI's obligations would be secured by a court ordered charge in the amount of $5 million subordinate only to the Receiver's charge and borrowing charge and priority construction lien claimants and it also negotiated a charge in favour of unit owners in the amount of $5.3 million.

18 Following extensive negotiations with stakeholders, the Receiver was successful in reaching a resolution of outstanding issues relating to the August 17, 2009 motion with all but RRMSI. The secured creditors, WestLB and Fortress Credit Corp., represented unit owners, purchasers with agreements of purchase and sale that had not yet closed, lien claimants and Marriott Hotels all consented or were unopposed to the Receiver's proposals. The Receiver had negotiated terms of settlement with a committee of unit owners, a key element of which was a new RPMA to be entered into with RRDI as the rental pool manager.

19 On August 13, 2009, Mr. Fowler on behalf of RRMSI wrote to the Receiver and its counsel. He stated amongst other things, that having reviewed the proposed new RPMAs, he considered the financial terms to be reasonable but felt they were prejudicial to RRMSI and without legal authority. He stated that the purpose of the letter was to register RRMSI's objection to the order sought and that RRMSI did not consent to the order. He requested that the Receiver provide a copy of its letter to the Court and said that RRMSI did not intend to file additional material or to instruct counsel to attend at Court. The Receiver confirmed that it would file the letter in Court which it did.

20 Thus, although served, RRMSI opted not to oppose the motion in court on August 17, 2009. Faced with this peculiar position, and the pending one day only court ordered sale of units a few days later, I granted the order requested but somewhat amended on August 18, 2009. Although already provided for in the initial receivership order, I specifically authorized the Receiver to repudiate the HMA and the verbal agreement appointing RRMSI as the rental pool manager and approved a new form of RPMA for execution by new purchasers of units as well as existing unit owners and purchasers. Marriott Hotels had previously expressed its intention to terminate the HMA upon repudiation by the Receiver and the need to negotiate a new HMA.

21 I also indicated that the relief set forth in paragraph 6 of the order dealing with termination of the RPMAs between RRMSI and unit owners was subject to any motion to vary or amend returnable August 20, 2009. Paragraph 6 stated:

> THIS COURT ORDERS AND DECLARES that as a result of the repudiation by the Receiver and termination by Marriott of the Current Hotel Management Agreement, and the repudiation by the Receiver on behalf of RRDI of any agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the Existing Rental Pool Management Agreements between RRMSI and Unit Owners and Existing Purchasers are not capable of performance and may be terminated by Unit Owners and Existing Unit Purchasers. The execution by a Unit Owner or Existing Unit Purchaser of the New Rental Pool Management Agreement shall be deemed to be notice of the termination by the Unit Owner or Existing Unit Purchaser of their Existing Rental Pool Management Agreement; provided further that any action against a Unit Owner or Existing Unit Purchaser by RRMSI by reason of the execution of a New Rental Pool Management Agreement by a Unit Owner or Existing Unit Purchaser is stayed pending further Order of this Court.

22 Paragraph 6 provided protection and certainty for the affected unit owners and purchasers. Absent a mechanism to facilitate the unit owners entering into viable rental pool contracts without the threat of litigation from RRMSI, a gap would be created whereby unit owners and purchasers would continue to be party to their RPMAs while RRMSI was not in a position to perform. The time required to terminate the RPMAs would create an unworkable scenario in which there would be an overlap of two rental pool regimes. 59 unit owners have closed their transactions and paid for their units for an aggregate gross purchase price of approximately $26 million.

23 I also granted an order appointing Miller Thomson LLP as representative counsel for the unit holders and purchasers whose agreements had not yet closed but all of whom had executed RPMAs with RRMSI ("Representative Counsel") but reserved the right to any such party to opt out of the representation. None has.

24 RRMSI brought a motion to vary and the Receiver and Representative Counsel brought the within motion returnable August 20, 2009. A timetable that recognized the urgency of the matter was established and I also arranged for a settlement conference on August 26, 2009 before Campbell J.

25 On August 21, 2009, Marriott Hotels wrote to the Receiver expressing the need for certainty with respect to paragraph 6 of my order and indicating that it is not prepared to remain a party to the HMA with only RRMSI as owner. Marriott requires certainty that the party fulfilling the obligations of the owner under any hotel management agreement has the necessary funds and resources to satisfy the owner's obligations thereunder. It reiterated its intention to terminate the HMA with RRDI and RRMSI.

26 At the sale on August 22, 2009 which continued into August 23, 2009, agreements of purchase and sale were entered into with respect to 76 of the remaining units available for sale (subject to a 10 day rescission period). These new unit purchasers will be presented with the new RPMAs for execution with RRDI by its Receiver. According to the Receiver, to complete those sales, it is imperative that the RRDI Receiver establish a new HMA and a certain and stable rental pool.

27 The Receiver has been advised by some unit owners that they understood they would receive distributions under the RPMA even if there were no funds in the operating account. Indeed, in circumstances where there were no funds paid by Marriott Hotels into the operating account, RRMSI made payments to unit holders. Mr. Fowler states that since the opening of the Hotel in December, 2008, unit owners were delivering funds to RRMSI with respect to the interim occupancy of their units and RRMSI deposited those funds into the operating account. As evidenced by correspondence dated November 5, 2008, sent on letterhead of Red Leaves to Gordon and Judy Jacobs, unit purchasers whose transaction had not yet closed, the Jacobs were to pay interim occupancy fees which were described in the letter as representing a combination of interest on the balance of the purchase price, common expenses and property taxes. The letter stated that "The receipt of rental revenue and use of your suite will unfortunately be withheld if RRMSI is not in receipt of your Interim Occupancy fees on or before December 5, 2008 due date." In his affidavit, Mr. Fowler states that these funds belonged to RRMSI but the moving parties submit that this was not the case given that all of these payments would be for the account of RRDI in that it was the registered owner to whom common element and taxes would be paid and was the one who had entered into the agreements of purchase and sale with the Jacobs and who therefore would be entitled to the interest payment. Mr. Carhart as Representative Counsel submits that this was akin to a Ponzi scheme in that RRMSI was funding payments to the unit purchasers out of money paid by the unit purchasers that should have been paid to satisfy their obligations to RRDI.

28 The aforementioned 59 unit owners have signed a settlement agreement with the Receiver which calls for the execution of a new RPMA. As stated in the moving parties' factum, "They are the ones most directly put at risk by the allegations of RRMSI that it can still perform the current RPMAs (suggesting a cause of action against them if they execute a new RPMA) and that RRMSI can prevent Marriott Hotels from renting their units to guests of the Hotel (thereby depriving them of revenue from their unit)."

29 Since the commencement of Hotel operations in December, 2008, Marriott Hotels has made no distributions of operating profit or any other funds to either RRDI or RRMSI as owners under the HMA nor has it paid any distributions to the Receiver.

30 The settlement conference on August 26, 2009 was unsuccessful and the motions were argued on August 28, 2009.

Positions of Parties

31 The Receiver and Representative Counsel submit that it is just and convenient for the RRMSI Receiver to be appointed given the intertwined contractual relationships and obligations of RRDI and RRMSI. The moving parties submit that RRDI and RRMSI are inextricably linked and the position of RRMSI creates a deadlock stranding unit owners in RPMAs that RRMSI

cannot perform and stalling the ability of the Receiver to regularize the rental pool arrangements, complete a new HMA with Marriott Hotels, and close transactions with existing and new unit purchasers. A receivership addresses this deadlock. There is no real prejudice to RRMSI. It has no ownership interest in the Hotel and has paid no consideration or contribution for the value it now seeks to obtain. Both RRDI and RRMSI are owned primarily by Mr. Fowler. RRMSI is holding the unit holders hostage in circumstances where RRDI was unable to complete construction of the Hotel, unable to fund operating expenses to Marriott Hotels, did not maintain the construction holdbacks required by the *Construction Lien Act*, owes approximately $5 million to its construction trades who built the Hotel, and is unable to meet the payments under incentives it offered to purchasers to induce them to buy units. The requested receivership is just and convenient in these circumstances.

32 The moving parties also submit that a receiver is merited given RRMSI's suspicious and questionable conduct. Noting the Jacobs' experience, Representative Counsel argues that RRMSI has played fast and loose with the unit purchasers, paying them a rental pool distribution under the RPMA with their own money with a view to inducing the closure of purchase agreements. In addition, RRMSI appropriated funds in the nature of interest, common expense and property tax payments that belonged to RRDI and is a creditor of RRDI for those amounts.

33 Furthermore, the RMPAs are so obviously incapable of performance as a result of the repudiations that have been authorized and the termination of the HMA by Marriott Hotels when effective. RRMSI cannot fund payments to unit owners and purchasers and cannot fulfill the operational obligations that were delegated to Marriott Hotels. Furthermore, without the HMA, the RPMAs are orphaned and incapable of performance. RRDI's receivership is an event of default under the HMA and treated as an event of default of RRMSI that entitles Marriott Hotels to terminate. The moving parties submit that the RMPAs have been frustrated and there has been an anticipatory breach in that RRMSI has made it impossible to perform the RMPAs. No damages could be recovered by RRMSI against unit owners for having executed new RPMAs. Paragraph 6 should be sustained as it permits the unit owners to participate in new RMPAs without threat of action by RMSI.

34 RRMSI states that it is not in default of any obligations and has valuable contractual choses of action. It submits that the structure developed for the project was not unique and reflects the business deal that was negotiated. It is not indebted to RRDI or the Receiver and is not a guarantor of RRDI's debts. It is also not in breach of any obligations under the RMPAs for failure to make payments to the unit owners because the obligation is conditional upon sufficient funds being available in the operating account from the gross rental pool revenue and there are none. The appointment is sought to benefit RRDI and its stakeholders and the Receiver should be disqualified to be the receiver of RRMSI as well as RRDI. WestLB did not obtain an assignment of the contractual choses in action and it, Fortress, Marriott Hotels and the unit owners were aware of RRMSI's status and limited assets prior to entering into their respective agreements with RRDI and RRMSI. The parties should be left to negotiate their differences. Under the RPMAs, the unit owners agreed to resolve disputes by good faith negotiations and arbitration. Under the HMA, all parties are required to cooperate upon request in good faith to amend the HMA or substitute it provided that the parties' rights and obligations are not materially changed. Furthermore, there could be two rental property managers.

35 RRMSI submits that none of RRMSI, Marriott Hotels or the unit owners is in receivership and Canadian courts have often expressed unease with unduly interfering with the rights of third parties in an insolvency context. The moving parties are asking the Court to circumvent the termination provisions of the HMA and the RMPAs under the guise of the receivership of RRDI and paragraph 6 of the order should be deleted.

36 There is no basis for a receiver to be appointed and in any event, the Receiver of RRDI would have a conflict relating to its duties to RRDI and to RRMSI.

Discussion

37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.* [2], as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already

in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])] [3]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.* [4].

38 RRMSI is a shell company. It is owned by the same shareholder group as RRDI. Mr. Fowler holds the principal equity interest of both RRDI and RRMSI. Prior to the receivership of RRDI, RRMSI had no employees and its functions were performed by employees of RRDI. It has no ownership interest in the Hotel and no exclusive right to receive distributions under the HMA. In any event, RRMSI assigned its rights relating to the HMA to WestLB. As noted in RRMSI's factum, under the HMA, RRMSI delegated to Marriott Hotels most of its obligations under the RPMAs including collection of all hotel rental payments, paying expenses, and accounting functions. The exceptions were the obligation to provide periodic financial statements to unit owners and to make distributions to unit owners. Although the RPMAs seem to render RRMSI liable to unit owners, nothing is payable unless funds are in the operating account.

39 The obligations and entitlements of the parties to the various agreements are intricately connected, intertwined, and inter-dependent. RRMSI owes obligations to the unit owners that it is unable to perform. Having delegated its responsibilities to others, it is dependent on agreements with RRDI. The RPMAs cannot be performed independently of the HMA. The Receiver recommended and was authorized to repudiate the HMA. Marriott Hotels has expressed its termination intentions with respect to the HMA. Paragraphs 9.01 and 11.30 of the HMA entitle Marriott Hotels to terminate based on the event of default of the receivership of RRDI. An event of default by either of RRDI or RRMSI is treated as an event of default of the other. Section 11.28 of that agreement cannot be read as a bar in these circumstances.

40 While a party need not be a creditor to seek the appointment of a section 101 receiver, RRDI and RRMSI have joint obligations under the HMA to fund operating losses and working capital deficiencies to Marriott Hotels. Joint and several debtors have a restitutionary right of contribution among themselves: *Chitty on Contracts* [5]. While Mr. Fowler states that RRDI orally agreed to fund all amounts required to be funded by the HMA, no particulars of when that agreement was made were forthcoming and RRMSI did pay $435,000 to Marriott Hotels although Mr. Fowler suggests that the transfer was to have been made to Red Leaves Development Inc. There is also the issue of the other payments and distributions made by RRMSI.

41 Even if one accepts Mr. Fowler's evidence however, there clearly is a deadlock amongst the various stakeholders. The unit holders are stranded in RPMAs that are incapable of performance. For obvious reasons, the development did not contemplate and should not encompass two property managers and two RPMAs. The $26 million value invested by the unit owners is at risk as is the residual value of the Hotel.

42 As noted by the moving parties in their factum, even if there is no current default of RRMSI under the RPMAs (which it denies), such a default will arise through the passage of time such as on the repudiation or termination of the HMA. The receivership will permit the implementation of the settlement agreements with unit owners and unit purchasers, a key element of which is their agreement to enter into a new RPMA; the continued operation of the Hotel in an orderly manner; the establishment of a working rental pool and the execution of a sustainable new HMA; and the resolution of the deadlock and wasting of value if the status quo is allowed to continue. Counsel for RRMSI submits that the parties should negotiate these problems but the parties have already engaged in extensive negotiations including a settlement conference with Justice Campbell. They have come to Court seeking a just resolution. I am also not persuaded that the Receiver is obliged to attend at arbitration and am satisfied that it may seek the relief it requests.

43 In all of the circumstances outlined, it is both just and convenient to appoint a receiver of all right, title and interest of RRMSI in and to the HMA, the RPMAs and the other agreements and arrangements requested by the moving parties. That said, it seems to me just that for the period commencing September 1, 2009 and continuing for 6 months, the receiver be obliged to record all fees, if any, that would have been received by RRMSI as a result of the RPMAs it entered into with unit owners and purchasers. This time period reflects in an approximate way the termination provisions contained in the RPMAs. In submissions, counsel for the Receiver indicated that it would be possible to track those amounts. Once the RRMSI receiver is appointed, it should be in a position to consider the binding nature of any agreement relating to contribution and indemnity with respect to

the HMA and whether amounts are owed by RRMSI to RRDI and were improperly appropriated. The record would also enable the Court to consider whether RRMSI has any real entitlements. In all of these circumstances, paragraph 6 of my order also should be sustained without prejudice to claims that may be made by either the Receiver or RRMSI to the subject matter of the aforementioned record. For greater certainty, this would not detract from the ability of the unit owners and unit purchasers to terminate by entering new RPMAs, my intention being to provide them with full protection and at the same time preserving the possibility of a claim by RRMSI to the fees, if any, reflected in the record.

44 While this outcome may not be perfect from the viewpoint of all stakeholders, as Farley J. commented in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* [6], the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. Although he was dealing with the broad powers under section 47(2)(c) of the *Bankruptcy and Insolvency Act*, he stated that the Court could enlist the services of an interim receiver to do not only what justice dictates but also what practicality demands. His observations apply equally to this case.

45 RRMSI also complains that Alvarez & Marsal Canada ULC should not be appointed receiver of RRMSI as its duties will conflict with those relating to RRDI. The appointment of a different receiver would be very costly for a project that already faces serious challenges. In addition, it would be inefficient. Alvarez & Marsal Canada ULC has already indicated its proposed course of action should it be appointed receiver of RRMSI and may attend to seek the Court's approval of its actions. A receiver is a Court appointed officer and acts under the Court's supervision. In my view, it is impractical, unnecessary and undesirable to appoint a receiver other than Alvarez & Marsal Canada ULC.

46 In conclusion, the motion of the moving parties is granted and the motion of RRMSI is dismissed subject to the need of Alvarez & Marsal Canada ULC to maintain a record as discussed. It seems to me appropriate that there be no order for costs.

Motion granted.

Footnotes

1 Any relief granted is without prejudice to the rights and obligations of 18 unit purchasers whose transactions have not closed and who wish to get out of their agreements.

2 [1972] 2 O.R. 280 (Ont. C.A.)

3 (07-CL-6913)

4 [2003] O.J. No. 3766 (Ont. S.C.J.).

5 30th ed. (London: Sweet & Maxwell, 2008) para. 17-027.

6 (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]).

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

THE TORONTO-DOMINION BANK and **1882540 ONTARIO INC.**
Applicant Respondent

Court File No.: CV-16-11398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

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