Court File No.: CV-16-00011351-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GOLD CANDLE LTD.

Applicant

-and-

GSR MINING CORPORATION and AJ PERRON GOLD CORP.

Respondents

BRIEF OF AUTHORITIES OF THE APPLICANT
(Application Returnable May 3, 2016)

April 26, 2016

Fogler, Rubinoff LLP
77 King Street West
Suite 3000
P.O. Box 95
Toronto-Dominion Centre
77 King Street West, Suite 3000
Toronto, ON M5K 1G8

Gregory R. Azeff (LSUC# 45324C)

Tel: (416) 365-3716
Fax: (416) 864-9700
Email: gazeff@foglers.com

Lawyers for the Applicant

TO: GSR MINING CORPORATION
103 Government Road East
Kirkland Lake, ON
P2N 1A9

AND TO: AJ PERRON GOLD CORP.
1 Kerr Cr Dr
Virginiatown, ON
P0K 1X0

AND TO: JOHN E. PERRON
103 Government Road East
Kirkland Lake, ON
P2N 1A9

1595 Griffiths Place
Kelowna, BC
V1Z 2T7

AND TO: FRANK C. SMEENK
18 Willington Boulevard
Etobicoke, ON
M8X 2H2

AND TO: J. PERRON
1 Kerr Cr Dr
Virginiatown, ON
P0K 1X0

AND TO: JAMES ARTHUR ROBERT VOISON
18 Mair Court
St. Clements, ON
N0B 2M0

AND TO: VICTOR J. ELIAS
7212 Maple Street
Vancouver, BC
V6P 5P6

AND TO: A. FARBER & PARTNERS INC.
Bankruptcy Trustee
150 York Street
Suite 1600
Toronto, ON
M5H 3S5

Attention: Peter Crawley

AND TO: TORKIN MANES LLP
151 Yonge Street
Toronto, ON
M5C 2W7

Attention: Stewart Thom

Lawyers for the Receiver, A. Farber & Partners Inc.

AND TO: THE PUBLIC GUARDIAN AND TRUSTEE
595 Bay Street
Suite 800
Toronto, Ontario
M5G 2M6

AND TO: THE ONTARIO MINISTRY OF NORTHERN DEVELOPMENT AND MINES
MINISTRY OF NORTHERN DEVELOPMENT AND MINES
159 Cedar Street
Sudbury, ON
P3E 6A5

AND TO: THE TOWNSHIP OF MCGARRY
27 Webster Street
Virginiatown, ON
P0K 1X0

AND TO: SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Toronto, ON
M5G 2G8

Attention: Darrell Brown

Lawyers for United Steel Workers of America, Local 9283

AND TO: BRADLEY BROS. LIMITED
98 14th Street
Rouyn Noranda, QC
J9X 5A9

AND TO: MCDOWELL BROTHERS INDUSTRIES INC.
2018 Kingsway
Sudbury, ON
P3B 4J8

index

INDEX

Tab	Case
1.	*Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont Gen Div)
2.	*Degroote v. DC Entertainment Corp et al.* 2013 ONSC 7101 (Ont. S.C.J. [Commercial List])
3.	*Elleway Acquisitions Limited v The Cruise Professionals Limited*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List])
4.	*RMB Australia Holdings Limited v Seafield Resources Ltd.*, 2014 ONSC 5205 (Ont. S.C.J. [Commercial List])
5.	*Bank of Montreal v Sherco Properties Inc.* , 2013 ONSC 7023 (Ont. S.C.J. [Commercial List])
6.	*GE Real Estate v Liberty Assisted Living*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]) General Electric *Real Estate v Liberty Assisted Living* Inc., 2011 ONSC 4704 (Ont. S.C.J. [Div. Ct])
7.	*Canada (Attorney General) v. Reliance Insurance Co.*, 2007 CarswellOnt 6391 (Ont. S.C.J.)
8.	*Royal Bank of Canada v. Correia*, [2006] O.J. No. 3206
9.	*Adelaide Capital Corp. v. 412259 Ontario Ltd. et al*, [2006] O.J. No. 4175
10.	*Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (Ont. CA)
11.	*British Columbia v A & A Estates Ltd.* [1999] BCJ No 2923
12.	*Elleway Acquisitions Ltd. v. 4358376 Canada Inc.* 2013 ONSC 7009 (Ont. S.C.J. [Commercial List])
13.	*Montrose Mortgage Corporation Ltd. v. Kingsway Arms Ottawa Inc.* 2013 ONSC 6905 (Ont. S.C.J. [Commercial List])
14.	*Tool-Plas Systems Inc., Re*, (2008) 2008 CarswellOnt 6258 (Ont. S.C.J. [Commercial List])

tab 1

Indexed as:

Bank of Nova Scotia v. Freure Village on Clair Creek

Between
Bank of Nova Scotia, applicant, and
Freure Village on Clair Creek, Freure Management and Freure Investments, respondents/defendants, and
Toronto-Dominion Bank and Canada Trust, creditors

[1996] O.J. No. 5088

40 C.B.R. (3d) 274

1996 CarswellOnt 2328

1996 CanLII 8258

Ontario Court of Justice (General Division)
Commercial List

Blair J.

May 31, 1996.

Mortgages -- Mortgage actions -- Action on covenant -- Practice -- Summary judgment -- Receivers -- Appointment -- By court.

This was a motion by the Bank of Nova Scotia for summary judgment regarding covenants in certain mortgages and the appointment of a receiver-manager. Three of the mortgages granted by Freure Village to the Bank had matured and had not been paid. A fourth mortgage was in default due to tax arrears. The Bank was owed in excess of $13,200,000. Freure argued that the Bank had agreed to forebear for six months to a year such that the monies were not due and owing at the time the demand was made. The mortgage covenants permitted the Bank to appoint a private receiver-manager. Freure argued that the Bank could effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver. Freure also argued that a court-appointed receiver was more costly than a privately-appointed one.

HELD: Motion granted. On the evidence, there was no merit to the defence that the Bank had agreed to forebear. The Bank was entitled to summary judgment. It was just and convenient for there to be a court-appointed receiver. An attempt by the Bank to enforce its security privately

would probably have led to more litigation. The interests of debtors and creditors and the orderly disposition of the property were better served by the Court appointing a receiver-manager.

Statutes, Regulations and Rules Cited:

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

Ontario Rules of Civil Procedure, Rules 20.01, 20.04.

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.

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1 **BLAIR J.** (endorsement):-- 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).

This endorsement pertains to both motions.

The Motion for Summary Judgment

2 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.

3 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; Irving Ungerman Ltd. v. Galanis (1993) 4 O.R. (3d) 545.

4 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).

5 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.

6 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.

7 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

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

9 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.

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.

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 rem-

edy 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.

13 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 11/2 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.

14 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.

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

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

BLAIR J.

tab 2

Case Name:

Degroote v. DC Entertainment Corp.

RE: Michael G. Degroote, Plaintiff, and DC Entertainment Corporation, Don Carbone Entertainment Inc. Dream Corporation Inc., King Software Solutions Corp, Dream Casino Corporation S.R.L., Dream Software Solutions Inc., Dream Kiosk Solutions Inc., Antonio Carbone, Francesco Carbone and Andrew Pajak, Defendants

[2013] O.J. No. 5207

2013 ONSC 7101

7 C.B.R. (6th) 232

2013 CarswellOnt 15647

Court File No. CV-12-9886-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: November 13, 2013.
Judgment: November 18, 2013.

(64 paras.)

Civil litigation -- Civil procedure -- Production and inspection of documents -- Objections and compelling production -- Orders for production -- Motion by the plaintiff for an order appointing a receiver over all of the books and records of the corporate defendants allowed -- The plaintiff loaned USD $111,924,208 to certain corporate defendants for use in gambling enterprises -- The defendants were in breach of the loan agreements which required payment to the plaintiff of a share of profits and ongoing production of financial documents -- The plaintiff established a strong case in fraud and defendants clearly delaying matters -- Equity cried out for production now -- Courts of Justice Act provided for appointment of receiver where just and convenient -- Courts of Justice Act, s. 101.

Corporations, partnerships and associations law -- Corporations -- Receivers and receiver managers -- Appointment -- Powers of the court -- Motion by the plaintiff for an order appointing a receiver over all of the books and records of the corporate defendants allowed -- The plaintiff loaned USD $111,924,208 to certain corporate defendants for use in gambling enterprises -- The defendants were in breach of the loan agreements which required payment to the plaintiff of a share of profits and ongoing production of financial documents -- The plaintiff established a strong case in fraud and defendants clearly delaying matters -- Equity cried out for production now -- Courts of Justice Act provided for appointment of receiver where just and convenient -- Courts of Justice Act, s. 101.

Motion by the plaintiff for an order appointing a receiver over all of the books and records of the corporate defendants. The plaintiff loaned USD $111,924,208 to certain of the corporate defendants for casinos and other gambling enterprises in Jamaica and the Dominican Republic using electronic equipment manufactured in Ontario. $107,331,167 (96 per cent) remained unpaid. The plaintiff claimed that the defendants perpetrated fraud and breached their obligations under the terms of the loan agreements. The agreements provided, in part, that the plaintiff would receive a percentage share of the profits of the casino within thirty days of earning, detailed written reports, and audited financial statements each fiscal year. The plaintiff was also entitled to review the books and records of the casinos with 30 days' notice. At the time of hearing, the defendants had or were in ongoing breach of these terms. Various explanations were provided for the defendants' failure to meet their obligations under the agreements, including theft, that certain records had been destroyed, and that more time was needed to prepare properly audited records.

HELD: Motion allowed. Section 101 of the Courts of Justice Act provided that a court might appoint a receiver where it appeared to a judge of the court to be just or convenient to do so. A court must have regard to the circumstances of the case and the rights of the parties. In this case, equity cried out for the need to have all books and records produced now. The defendants appeared to have done their best to prevent this from happening. The plaintiff suffered the resulting prejudice. A receiver could be appointed for the purpose of gaining access to the books and records of a company. There were no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depended its own facts. The defendants had engaged in tactical manoeuvres to delay matters, including initiating and then abandoning appeal proceedings and attempting to evade service. Although some documents had been produced, they did not include the very basic documents required under the agreements. While proving a strong case in fraud could obviously be of great significance in establishing the need for a receiver, it was not a necessity. Nevertheless, the plaintiff established a strong case in fraud. The reporting of false financial information regarding the Jamaican contract was but one example. The apparent misuse of some $50 million lent under the Dominican Republic contract by lending it to a company unknown to the plaintiff without his knowledge, contrary to the agreement, was another example. There were very serious breaches of the agreements in the failure to produce financial information that the defendants appear to have countenanced, if not actively sought. The history of the matter belied any suggestion of good faith on the part of the defendants, so a delay of 30 days to allow production was not reasonable.

Statutes, Regulations and Rules Cited:

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

Counsel:

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

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

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

[Editor's note: An amended judgment was released by the Court November 29, 2013. The changes were not indicated. This document contains the amended text.]

ENDORSEMENT

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

Factual background

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

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

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

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

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

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

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

> a. pay to Mr. DeGroote a percentage share of the profits in respect of the Funded Facility 30 days after the end of the month in which the profit was earned;
> b. deliver a written report detailing the profit payment each month; and
> c. deliver, within 120 days of the end of each fiscal year of the borrower, audited financial statements in respect of the Funded Facilities.

6 Article 7.3 of the Agreements provides:

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

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

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

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

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

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

> (i) the Vegas Flamingo was closed as of December 20, 2011 or earlier;
> (ii) the Jamaican Commission was not previously aware of any agreement between the entity that held the gaming licence for the Vegas Flamingo (CTS Associates (Jamaica) Ltd. ("CTS")) and DC Entertainment;
> (iii) the Jamaican Commission never had any dealings with DC Entertainment, Antonio or Francesco;
> (iv) a website that had been operated by DC Entertainment was shut down and a notice posted that the site was closed by the U.S. Federal Bureau of Investigations and the Department of Homeland Security; and

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

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

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

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

13 In November 2012, in response to Mr. DeGroote's motion for access to the books and records of the corporate defendants, Mr. DeGroote was told, for the first time, that the books and records relating to the Vegas Flamingo had disappeared. Antonio admitted that DC Entertainment was contractually responsible for record-keeping and banking with respect to the revenues and expenses relating to the operation of the 149 gaming machines said to have been installed at the Vegas Flamingo. However, he testified that one Lancelot James ended up doing the recordkeeping, banking and reporting on DC Entertainment's behalf. Antonio testified that every single record relating to the Vegas Flamingo was stolen and destroyed by Mr. James; not a single piece of paper nor a byte of electronic data remain. According to Antonio, all transactions at the Vegas Flamingo were done in cash and all of the money was kept in a safe. The cash (in excess of USD $4,000,000.00) was said to have been stolen by Mr. James under cover of night. Antonio also stated in his cross-examination that the alleged theft of the money was never reported to the Jamaica police.

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

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

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

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

18 The statement of claim in this matter was served on October 16, 2012. Two days later, Dream's counsel sent revised monthly revenue reports up to and including April 2012 and monthly revenue reports from May through August 2012 for certain casinos. According to Dream's counsel, Mr. DeGroote was "overpaid on account of (i) profit and (ii) repayment of loans" and "operating costs ... were inadvertently not included in the previously issued revenue reports for the months up to and including March 2012".

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

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

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

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

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

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

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

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

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

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

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

28 In relation to the Dominican Republic Contract, Wilton-Siegel J. held that section 7.3 provides Mr. DeGroote with a right of access to the books and records at any time. He rejected the defendants' argument that the review should occur only after the audited financial statements had been delivered. In relation to the Dream Software Agreement, Wilton-Siegel J. held that section 9.1(f) provides an independent and general right to review the books and records of Dream Software and its affiliates.

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

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

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

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

33 There is evidence, which Mr. DeGroote acknowledges, that he spoke to someone about obtaining evidence and paying the deponents for the evidence. He says, and there is no evidence to contradict it, that he asked the person he was dealing with, a disbarred lawyer whom the Carbones had earlier hired, if that would be legal. He was told probably not. He then obtained advice from a Bermuda lawyer that it would be illegal and he then said he was not going to follow through with it. He acknowledges that he should not have started down that road. I would not in the circumstances of this case deny any relief because of this. Mr. DeGroote is 80 years of age and a huge amount of money appears to have been misused, and it is understandable that without any reports that he was entitled to, he would try to obtain evidence from someone who would know the situation in the Dominican Republic.

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

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

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

37 Mr. DeGroote has not received audited financial statements for DC Entertainment in respect of the $5,000,000 loan advanced pursuant to the Jamaican Contract. According to Antonio, all books and records for the Vegas Flamingo were stolen. According to the incredible explanation given by Antonio, Mr. DeGroote will never receive any audited financial statements for DC Entertainment. I expect a receiver would try to determine whether the books and records exist somewhere.

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

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

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

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

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

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

41 On April 11, 2013, the parties attended at a 9:30 a.m. appointment before Wilton-Siegel J. Pursuant to his endorsement of that date, Dream was obligated to deliver its audited financial statements by April 19, 2013. Dream failed to do so. At 4:10 p.m. on April 19, 2013, counsel to the Carbone defendants advised Mr. DeGroote's counsel that Dream's auditors, Collins Barrow, would release its audited financial statements on Monday, April 22, 2013, and that he would forward them upon receipt.

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

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

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

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

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

47 The Carbone defendants agreed to make the books and records available for review at Collins Barrow in Vaughan on September 16, 2013. They indicated that fifty five boxes of records would be sent to Toronto for review. The first tranche of documents, totalling only eight boxes,

were available for review at Collins Barrow's offices on October 31, 2013, less than two weeks before the return of this motion. To date, only nine boxes in total have been made available.

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

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

1. Mr. DeGroote's loans were not used in a manner consistent with the Dominican Republic Contract and the underlying descriptions in the promissory notes. Mr. Moulton was unable to conclude how the loans were invested on a property-by-property basis or whether the funds were used for the specific properties for which they were intended.
2. The draft audited financial statements do not enable verification of the specific casino licenses or the valuation of the assets listed on Dream's balance sheet.
3. Only $41,543,872 of the proceeds from Mr. DeGroote's loans to Dream under the Dominican Republic Contract were invested in casino licenses and property and equipment. There is approximately $50,145,378 from Mr. DeGroote's loans to Dream remaining after taking into account the funding of casino licenses and property and equipment shown on the draft financial statements.
4. Approximately $48,634,000.00 of the monies advanced by Mr. DeGroote to Dream pursuant to the Dominican Republic Contract was lent by Dream to an entity called Empresas de Negocio BSE, SRL, a related party entity previously unknown to Mr. DeGroote. Mr. Moulton states that he had no "details regarding the nature of business conducted by [Empresas], the quality of the underlying security of the assets, or the purpose or use of the funds invested by Dream with [Empresas]".
5. Approximately $4,873,333 of Mr. DeGroote's money was used by Dream to repay a related party entity (Dream Kiosk Inc. in St. Lucia) for an equipment loan.
6. The draft statements contain numerous accounting irregularities, including the failure to disclose contingent liabilities and the failure to disclose sufficient information about large related-party transactions totalling $64,170,930.

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

of the accuracy of the monthly reports provided, or the accuracy of the 2012 Draft Audited Financial Statements.

Analysis

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

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

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

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

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

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

57 As well, Mr. Persico's trust records of the money advanced by Mr. DeGroote for the Dominican Republic and VMLT contracts are of crucial importance to understand what happened to the money. Mr. Persico was the solicitor for Dream and the money advanced by Mr. DeGroote under those contracts went to Mr. Persico. It is quite clear that Mr. Persico has been taking his instruc-

tions from the Carbones who have operated the business. In the Carbone v. Pajak action, in which competing applications were heard by me last week immediately following the hearing of this motion, documents disclosed made clear that Mr. Persico is taking instructions from the Carbones and that he has been evading service of an appointment to be examined.

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

59 The draft order provides that copies of any records obtained by the receiver are to be provided to any of the defendants as their cost. Mr. Neirinck objected to his clients having to bear the copying costs. In reply, Mr. Ortved said that his client would pay the photocopying costs.

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

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

Conclusion

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

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

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

F.J.C. NEWBOULD J.

tab 3

Case Name:

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.

APPLICATION UNDER Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended
RE: Elleway Acquisitions Limited, Applicant, and
The Cruise Professionals Limited, 4358376 Canada Inc.
(Operating as itravel2000.com) and 7500106 Canada Inc.,
Respondents

[2013] O.J. No. 5399

2013 ONSC 6866

Court File No. CV-13-10320-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: November 4, 2013.
Judgment: November 27, 2013.

(34 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Notice -- Order -- Appointment of receiver -- Powers -- Realization of property -- Managing the business of the debtor -- Sales by receiver -- Equitable receivers -- Grounds -- Just and convenient -- Application by creditor for order appointing GTL as Receiver without security over all property, assets and undertakings of respondents allowed -- Respondents were debtors and guarantors of credit facility in default and acknowledged inability to pay and consented to early enforcement -- Respondents were insolvent and would need to borrow to continue operating, but unlikely to find willing lenders -- With GTL's appointment and approval of asset sales to applicant's affiliates, purchasers would assume some of respondents' liabilities, cancel portion of indebtedness and continue to operate respondents' travel business, thus saving jobs -- Appointing GTL as receiver just and convenient.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243, s. 244(1), s. 244(2)

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

Counsel:

Jay Swartz and Natalie Renner, for the Applicant.

John N. Birch, for the Respondents.

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver.

ENDORSEMENT

1 **G.B. MORAWETZ J.:--** At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

2 Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"), without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

3 The application was not opposed.

4 The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of GBP 17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

5 Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

6 Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately GBP 3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

7 Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

8 Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

9 It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

10 Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

11 itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

12 The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

13 Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

14 The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court

of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

15 Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

16 Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the "Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

17 Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

18 Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

19 Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

20 If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

21 The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

22 The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

23 This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

24 Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

25 Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

26 In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 at para. 10 (Gen. Div.)

27 Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

28 Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;
(a) the relationship between the debtor and the creditors;
(b) the likelihood of preserving and maximizing the return on the subject property; and
(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

29 Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

30 It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

(a) the potential costs of the receivership will be borne by Elleway;
(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;

(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;
(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and
(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

31 It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

32 Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

33 Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

34 Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

G.B. MORAWETZ J.

tab 4

CITATION: RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205

COURT FILE NO.: CV-14-10686-00CL

DATE: 20140910

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	)	
	)	
RMB AUSTRALIA HOLDINGS LIMITED	)	*Maria Konyukhova and Yannick Katirai*, for
	)	the applicant
Applicant	)	
	)	
– and –	)	
	)	
SEAFIELD RESOURCES LTD.	)	*Wael Rostom*, for KPMG
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** September 9, 2014

NEWBOULD J.

[1] On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

[2] The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

[3] Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

[4] Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

[5] Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

[6] Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

[7] On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement

provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

[8] All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

[9] RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

[10] The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

[11] Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

[12] Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

[13] Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

[14] Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

[15] In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

[16] Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

[17] Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

[18] Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

[19] Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

[20] On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

[21] The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

[22] In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

[23] Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

[24] Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

[25] RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

[26] Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

[27] As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

[28] In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. S.C.J.) stated that in deciding whether the appointment of a receiver was just or convenient, the court 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, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> 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.

[29] See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary

> or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra,* at para. 12; *Canadian Tire Corp. v. Healy,* 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited,* 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

[30] The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

[31] RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

[32] Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa,* a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

[33] Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

[34] RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

[35] Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

[36] RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

[37] In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Newbould J.

Released: September 10, 2014

CITATION: RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205

COURT FILE NO.: CV-14-10686-00CL

DATE: 20140910

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

RMB AUSTRALIA HOLDINGS LIMITED

Applicant

– and –

SEAFIELD RESOURCES LTD.

Respondent

REASONS FOR JUDGMENT

Newbould J.

Released: September 10, 2014

tab 5

Case Name:

Bank of Montreal v. Sherco Properties Inc.

APPLICATION UNDER s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985 c-B-3, S. 101 of the Courts of Justice Act, R.S.O. c. C-43, and Rules 14.05(2), (3) (d), (g) and (h) of the Rules of Civil Procedure
RE: Bank of Montreal, Applicant, and Sherco Properties Inc., Sherk Farm Limited, Cosher Properties Inc. and Donald Sherk, Respondents

[2013] O.J. No. 5500

2013 ONSC 7023

Court File No. CV-13-10244-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: November 4, 2013.
Judgment: December 3, 2013.

(55 paras.)

Bankruptcy and insolvency law -- Administration of estates -- Administrative officials and appointees -- Receivers -- Appointment -- Duties and powers -- Sale of assets -- Application by Bank for appointment of receiver allowed in part -- Sherco was in default of loan facilities to it by Bank, which were guaranteed by Farm and Sherk -- Sherk's guarantees contained collateral mortgages over two residential properties -- It was just and convenient to appoint a receiver as terms of security and mortgages held by Bank permitted appointment of Receiver, value of security continued to erode and Sherk had not been able to complete refinancing or sale -- It was just and convenient for lands and properties other than matrimonial home to be marketed and sold by receiver.

Creditors and debtors law -- Receivers -- Court appointed receivers -- Sales by receiver -- Application by Bank for appointment of receiver allowed in part -- Sherco was in default of loan facilities to it by Bank, which were guaranteed by Farm and Sherk -- Sherk's guarantees contained collateral mortgages over two residential properties -- It was just and convenient to appoint a receiver as

terms of security and mortgages held by Bank permitted appointment of Receiver, value of security continued to erode and Sherk had not been able to complete refinancing or sale -- It was just and convenient for lands and properties other than matrimonial home to be marketed and sold by receiver.

Application by a creditor, Bank of Montreal (the "Bank") for the appointment of a receiver. The respondent Sherk was the owner of Sherco Properties Inc ("Sherco") and Sherk Farm Limited ("Farm"). Sherco was a developer and sub-divider of real property in Ontario. It was the principle debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, had granted general security agreements to the Bank. Sherk and another company had also executed guarantees. As additional security, Sherk granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000 over two residential properties. Each mortgage contained an appointment of receiver and manager provision in the event of default. Sherco was involved in the development of a subdivision in Penetanguishene. After the first phase of the development was completed, there was a significant shortfall of funds which were to repay the Bank. As a result, the Bank became concerned about Sherco's ability to repay the loans and it advised Sherco that it was no longer willing to fund the development of the subdivision project. Subsequently, Sherco failed to make interest payments to the Bank. In addition, realty taxes on Sherk's two residential properties were in arrears. Sherco had attempted to secure alternative financing for the subdivision project, but was unsuccessful. As of September 2013, Sherco was indebted to the Bank in the amount of $2,619,669. The Bank took the position that Sherco had an abundance of time to secure alternative financing. As it had lost confidence in Sherk, the Bank now sought the appointment of a receiver in respect of Sherco and the Farm. The Bank also sought a receivership order in respect of the two residential properties owned by Sherk.

HELD: Application allowed in part. It was just and convenient to appoint a receiver. The terms of the security and the mortgages held by the Bank permitted the appointment of a Receiver, the value of the security continued to erode as interest and tax arrears continued to accrue and Sherk had not been able to complete a refinancing or sale. It was just and convenient for the subdivision project lands and the vacant residential property to be marketed and sold by a receiver. Appointing a receiver over the second residential property, which was the matrimonial home occupied by Sherk, was more intrusive than necessary. However, the Bank was entitled to pursue its contractual remedies in respect of that property.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1), s. 244

Courts of Justice Act, R.S.O. c. C-43, s. 101

Rules of Civil Procedure, Rule 14.05(2), Rule 14.05(3)(d), Rule 14.05(3)(g), Rule 14.05(3)(h)

Counsel:

S.D. Thom, for the Applicant.

R.B. Moldaver, Q.C., for the Respondents.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

2 Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

3 The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

4 The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

5 Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

6 Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

7 In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

8 As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

9 Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

10 Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

11 In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

12 The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

13 The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

14 In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

15 At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

16 Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

17 As of September 9, 2013, interest arrears total approximately $124,346.79.

18 In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;
(b) 325 Estate Court: $59,596.49.

19 The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

20 On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

21 On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;
(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and
(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

22 The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

23 The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;
(b) the remaining realty tax arrears;
(c) Sherco continued not to pay its monthly interests;
(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and
(e) the Bank was concerned about servicing issues regarding the phases of development.

24 Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

25 The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

26 The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

27 Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

28 Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or

obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

29 In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

30 The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;
(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;
(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and
(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

31 The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

32 From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

33 Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

34 Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers to be just or convenient to do so:

> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> (c) take any other action that the court considers advisable.

40 Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investment Limited* (1982) 21 Sask.R. 14 (Q.B.) where Estey J. (as he then was) reasoned as follows:

> ... that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank of Canada v. Whitecross Properties Limited Saskatchewan*, (1984), 53 C.B.R. (N.S.) 96.

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
(b) the terms of the mortgages permit the appointment of a receiver upon default;
(c) the value of the security continues to erode as interest and tax arrears continue to accrue;
(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

48 In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

49 In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

50 I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

51 However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

52 In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;
(b) Farm; and
(c) 317 Estates Court

53 The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

54 The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

55 The Bank is also entitled to its costs on this application.

G.B. MORAWETZ J.

tab 6

CITATION: GE Real Estate v. Liberty Assisted Living, 2011 ONSC 4136
COURT FILE NO.: CV-11-9169-00CL
DATE: 20110630

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: General Electric Canada Real Estate Financing Holding Company and General Electric Capital 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

BEFORE: D. M. Brown J.

COUNSEL: C. Prophet and N. Kluge, for the Receiver

L. Brzezinski, D. Magisano and G. Kim, for the Applicants

T. Pinos, for the Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, and Rahim Bhaloo

S. Mitra, for Albert Gelman Inc., the proposed receiver

R. Macklin, for 2068308 Ontario Inc.

HEARD: June 27, 2011

REASONS FOR DECISION

I. Motion to appoint an investigative receiver

[1] MNP Ltd., formerly Meyers Norris Penny Limited ("MNP"), is the Trustee in Bankruptcy of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited, and 2007383 Ontario Inc. (the "Bankrupt Companies"). The Bankrupt Companies were part of a group of related companies which invested in and operated retirement homes (the "Liberty Group").

[2] MNP seeks an Order appointing Albert Gelman Inc. as receiver with full powers of investigation and monitoring in relation to the respondents, Liberty Assisted Living Inc. ("Liberty Assisted") and 729285 Ontario Limited ("729285"), pursuant to Section 101 of the *Courts of Justice Act*, and section 248 of the Ontario *Business Corporations Act* ("*OBCA*"), but without power or obligation to take possession and control of the property, assets and undertakings of Liberty Assisted or 729285, and with the power to assign 729285 into bankruptcy. MNP argues that the Court should grant the relief requested because it has not received satisfactory answers to its inquiries regarding various transactions and relationships among the Liberty Group entities and investors.

[3] The applicants, General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company ("GE"), support the Trustee's motion.

[4] The Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, and Rahim Bhaloo, whom I will periodically refer to as the "Liberty Group Respondents", oppose the Trustee's motion, contending that the Trustee is seeking extraordinary receivership orders against a corporation which has no loan or security agreements with the applicants. 729285 submits there is no factual or legal basis for the relief sought, and that the motion represents an unwarranted and inappropriate attempt by the Trustee to reach far beyond the scope of its powers, and to unjustifiably attack these respondents personally and in their business.

[5] 2068308 Ontario Inc. submits that no order should be made freezing the balance of the Royalton Proceeds presently held in trust at Cassels Brock LLP.

[6] For the reasons set out below, I grant the motion, in part.

II. Background Facts

A. The Liberty Group

[7] The Bankrupt Companies operated three retirement residences in Toronto and Windsor - Beach Arms, Liberty Place, and La Chaumière. Each Bankrupt Company was owned by a separate company, which in turn was owned by the Beach Group Limited, who in turn held its interests in trust for a group of investor co-owners.

[8] The respondent, Liberty Assisted Living Inc., is the management company that until recently managed those three retirement residences. Gregory Goutis is the Chief Financial Officer of Liberty Assisted.

[9] 729285 Ontario Limited is a company related to Liberty Assisted. 729285 is a shareholder of the Beach Group Limited which holds all the shares of the Bankrupt Respondents.

[10] Amir Kassam and Rahim Bhaloo are officers and directors of the Bankrupt Companies, Liberty Assisted, and 729285.

[11] 729982 Ontario Limited ("729982") is the family holding company of Kassam.

[12] In addition to the Bankrupt Companies, Liberty Assisted also manages two other retirement residences in Quebec, Château Royal and Château Dollard.

B. Default by the Bankrupt Companies

[13] General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company are the secured lenders of the Bankrupt Companies, and as at April 6, 2011, were owed the sum of $19,399,225.00. GE had purchased the loan and attendant security from Column Financial on June 25, 2008.

[14] As a result of a series of defaults under its security, GE secured the appointment of MNP as Receiver of the Bankrupt Companies on March 10, 2011, with the power to assign them into bankruptcy. The defaults included the failure of the Bankrupt Companies to provide quarterly financial statements as required by the terms of the mortgages securing the loans. On March 21, 2011, a further order was made extending the receivership to another numbered company involved in the operation of one of the residences and terminating the management agreement between the residences and Liberty Assisted.

[15] The Receiver assigned the Bankrupt Companies into bankruptcy on March 15, 2011. The Receiver is now the Trustee in Bankruptcy.

[16] The Trustee contends that the Bankrupt Companies were insolvent during the period from January 1, 2010, and March 11, 2011 (the "Insolvency Period"). The Companies dispute that, but only to the extent that the period of insolvency might have been a few months shorter.

[17] During the Insolvency Period the Bankrupt Companies were seriously in arrears of the payment of realty taxes, and GE paid tax arrears to the relevant municipalities in January, 2011. By early this year some of the Bankrupt Companies were in arrears in paying their employees' salaries.

C. Efforts by Trustee to obtain information about the transactions

[18] This Court has made several orders requiring the Bankrupt Companies and others in the Liberty Group to provide financial information to the Trustee. On April 14, 2011, Mesbur J. ordered Messrs. Goutis, Bhallo and Kassam to submit to *BIA* section 163 examinations and required Liberty Assisted and 729285 to deliver various financial records to the Trustee. On April 21 I ordered Liberty Assisted and 729285 to deliver to the Trustee copies of their unaudited 2008 and 2009 financial statements. To date the Trustee has obtained evidence regarding activities involving the Bankrupt Companies in the following stages:

(a) Affidavits sworn April 7, 2011 by Bhaloo and Goutis;

(b) Affidavit of Goutis sworn April 13, 2011;

(c) Examinations of Kassam, Bhaloo, and Goutis on April 20 and 21, 2011;

(d) Answers to undertakings arising out the April 21 Examinations;

(e) Affidavit of Goutis sworn May 19, 2011;

(f) Examination of Goutis on May 27, 2011;

(g) Answers to undertakings arising out of the May 27 Examination; and,

(h) Affidavit of Bhaloo sworn June 23, 2011.

D. Financial relationship between 729285 and the Bankrupt Companies

[19] As mentioned, Beach Group is the sole shareholder of the Bankrupt Companies. 729285 is the single largest shareholder and co-owner of Beach Group, owning 40 of the 123 units (a 33% interest). Kassam is a director of Beach Group, 729285 and the Bankrupt Companies.

[20] In 2007, the Bankrupt Companies refinanced their loan of approximately $17,000,000.00 with Column Financial. Approximately $2,500,000.00 of the loan was distributed to the shareholders/co-owners, including 729285, as an equity takeout proportionate to their co-ownership interest in the Bankrupt Companies. The Trustee presumes that 729285 received $825,000.00 of this equity payout. According to the Trustee, that amount was not used to refinance existing encumbrances or to reinvest into the Bankrupt Companies.

[21] It is the position of the Trustee that between January 2010 and March 11, 2011, the Bankrupt Companies were insolvent. In its Second Report dated April 25, 2011 the Trustee reported on the intercompany payments from the Bankrupt Companies to 729285 during that Insolvency Period. The amounts reported, subject to later adjustment, were as follows:

(i) Beach Arms paid a minimum of $145,600.00 to 729285;

(ii) La Chaumière paid a minimum of $633,313.22 to 729285; and,

(iii) Liberty Place paid a minimum of $97,177.84 to 729285.

[22] In its Second Report the Trustee stated:

> In the circumstances and on the basis of all the information provided thus far, the Trustee believes that preference actions or action in relation to under-value transactions (in the nature of fraudulent preference or fraudulent conveyance proceedings) should be initiated in relation to payments from the Bankrupt Residences to 729285 and Liberty Assisted during the period from January 1, 2010 to March 11, 2011, at a minimum.

[23] Mr. Goutis swore an affidavit dated April 13, 2011, in which he set out the work he had performed to ascertain the intercompany indebtedness as between 729285 and the Bankrupt

Companies. He was cross-examined on his work product on May 27. During the course of his cross-examination he admitted that as at the date of bankrupty:

(i) 729285 owed Beach Arms $218,656.00;[1]

(ii) 729285 owed Liberty Place $35,270.00;[2] and,

(iii)La Chaumière owed 729285 the sum of $38,700.00.[3]

[24] According to the Trustee, during the Insolvency Period the Bankrupt Companies paid a total of $876,170.97 to 729285 and presently 729285 is a net debtor of the Bankrupt Companies in the amount of $215,926.00, or in the amount of $602,870.25 – the Trustee stated that the evidence of Goutis varied on this point.

[25] 729285 submitted that the Liberty Group of companies were operated on the basis that the companies transferred funds amongst themselves to meet expenses as they arose. As a result, during the Insolvency Period the Bankrupt Companies, 729285, Liberty Assisted, and 729982 transferred funds from and to each other. Funds were also transferred to and from these entities and Chateau Dollard and Chateau Royale, two retirement residences in Quebec of which Kassam is the director and to which Liberty Assisted provided management services. In its Second Report the Trustee commented on the "complex and apparently random use of corporate vehicles in connection with the Liberty Group and the operation of the Bankrupt Residences".

[26] 729285 states that when one examines the state of accounts of the Bankrupt Companies during the Insolvency Period in respect of all the other related companies, the Bankrupt Companies are net debtors of the remaining Liberty Group of companies.

E. Financial relationship between Liberty Assisted and the Bankrupt Companies

[27] Liberty Assisted was the manager of the Bankrupt Companies which paid it management fees. Amir Kassam is the officer and director of Liberty Assisted and is also the officer and director of the Bankrupt Companies.

[28] According to the Trustee, during the Insolvency Period, the following payments were made to Liberty Assisted by the individual Bankrupt Respondents:

(i) Beach Arms paid Liberty Assisted $371,452.00;

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[1] Transcript, May 27 examination of Goutis, Q. 649.

[2] *Ibid.*, QQ. 663-664.

[3] *Ibid.*, Q. 660.

(ii) La Chaumière paid Liberty Assisted $1,466,427.05; and,

(iii)Liberty Place paid Liberty Assisted $289,440.00.

[29] The Trustee states that Liberty Assisted presently is a debtor of the Bankrupt Companies in the following amounts:

(i) Liberty Assisted owes Beach Arms $308,512.93;

(ii) Liberty Assisted owes La Chaumière $1,288,893.59; and

(iii)Liberty Assisted owes Liberty Place $175,522.58.

F. The Royalton Residences

F.1 Ownership structure

[30] 729285 had an ownership interest in three retirement residences located in Kanata, Kingston, and London, Ontario, known in these proceedings as the "Royalton Residences". Given the centrality of the Royalton Residences to the relief sought on this motion, let me describe their ownership structure in some detail.

[31] Each of the three Royalton Residences was established as a limited partnership. The general partner for each limited partnership was owned 50% by the Maestro Group and 50% by a corporation – one for each residence – which the parties have referred to as the Royalton Companies. The ownership of each of the Royalton Companies was identical: an entity known as the Coram Group owned 50% of each Royalton Company, and 729285 owned the remaining 50%.

[32] In sum, 729285 indirectly owned a 25% interest in each of the three Royalton Residences.

[33] Whether 729285 held those ownership interests on its own behalf or in trust on behalf of other investors is a key issue on this motion. 729285 asserts that it held the interests only as a trustee for other investors; the Trustee takes the position that matters are not so clear cut and require further investigation.

F.2 Proceeds of sale of the Royalton Residences

[34] Why this issue matters is that recently the Royalton Residences were sold and generated significant sales proceeds. The Royalton Residences located in Kanata and Kingston were sold on April 28, 2011, for $89,700,000.00. The balance of the closing funds after deducting amounts required to discharge encumbrances and legal fees (the "Royalton Proceeds") were transferred to the trust accounts of Cassels Brock LLP, counsel for 729285 and Liberty Assisted.

[35] The Royalton Residence located in London, Ontario was sold to the Maestro Group for the net amount of $1.00.

[36] The Trustee takes the position that a court appointed receiver would be entitled, in law, to a minimum of 25% of net Royalton Proceeds. 729285 contends that its only claim to those proceeds is as trustee for other investors.

F.3 Procedural history following the sale of the Royalton Residences

[37] On April 26, 2011, MNP sought the appointment of a Receiver over 729285 and Liberty Assisted. Those Respondents opposed the motion and sought an adjournment.

[38] On April 26, 2011, the Mesbur J. ordered, as a term of the adjournment, that 729285 and 729982 not sell, transfer, encumber, or otherwise deal in any manner with any beneficial interest up to a value of $3 million either of them may currently have or in the future may acquire in any of the Royalton Residences, including their interest in the Royalton Proceeds, pending further order of this Court.

[39] Royalton Kanata and Royalton Kingston were sold on April 28, 2011.

[40] On or about April 28, 2011, Gowlings inquired of Cassels Brock regarding compliance with the Order of Mesbur J. In a letter dated May 12, 2011, Cassels Brock delivered a letter asserting the following:

> [729]285 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.
>
> 729982 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.

[41] On May 27, 2011, Goutis, the CFO of the Liberty Group, was cross-examined on his affidavits. Goutis confirmed that the Royalton Proceeds were being held in trust at Cassels Brock.

[42] On the same day, Gowlings sent a letter to Cassels Brock claiming an interest in the Royalton Proceeds on behalf of the Trustee and requesting ten days' notice prior to any distribution of the Royalton Proceeds.

[43] Around June 8, 2011, Cassels Brock LLP requested an adjournment of this motion without confirming or undertaking that they would not distribute the Royalton Proceeds in the interim. On June 14 the motion came before me, and I adjourned it on the following basis:

> The respondents seek an adjournment; the T^{ee}/Receiver strongly opposes.
>
> The Royalton net sale proceeds have been released from Cassels Brock trust account. As a result the main issue is whether the T^{ee}/Receiver has a claim for interim relief in the

> nature of the appointment of an investigator/receiver which would facilitate a tracing of those funds. The respondents want an opportunity to respond to their undertakings.
>
> After balancing the respective interests, I adjourn the motion to my list on Monday, June 27/11 on the following terms: …

I then gave directions regarding the treatment of advisements and refusals made by the Liberty Group Respondents on various examinations which, in the result, disappeared as a problem because the Liberty Group Respondents answered most of the advisements and refusals.

[44] In fact not all of the Royalton Proceeds had been disbursed from the Cassels Brock trust account. This became apparent when on June 21 the Liberty Group respondents provided their answers to undertakings and advisements from the examination of Goutis conducted on May 27, 2011. Those answers revealed that $931,212.97 of the Royalton Proceeds remained held in trust for the Kingston and Kanata Royalton Companies.

[45] The parties re-attended before me on June 23 at which time I made the following endorsement:

> I order that Cassels Brock shall not disperse any remaining net sale proceeds from the Royalton transactions until my further order. Counsel advise that the hearing shall proceed, as scheduled, in 4 days on Monday, June 27, 2011. The issue of the funds held by Cassels Brock can be addressed at that time.

III. Concerns of the Trustee

[46] The Trustee has expressed concerns about the accuracy and completeness of certain of the information it has received concerning the Bankrupt Companies, 729285, Liberty Assisted, and other persons and entities involved with the Liberty Group, and in particular the Royalton Residences. The Trustee regards the evidence obtained to date as incomplete, incorrect, conflicting, or otherwise unclear with respect to a number of aspects of this proceeding, in particular:

(a) The ownership interests in the Royalton Residences;

(b) The nature of the investments by 729285 into the Royalton Residences;

(c) The adequacy of the documentation produced to establish that 729285 held its interest in the Royalton Residences in trust; and,

(d) The disbursement of the Royalton Proceeds.

The Trustee seeks the appointment of an investigative receiver in order to obtain correct and complete information on all of these issues to allow it to evaluate whether the Bankrupt Companies have creditor or preference claims to any of the Royalton Proceeds.

[47] By way of a general response the Liberty Group Respondents take the position that the scope of the allegations made by GE and the Trustee about inter-company transfers involving the Bankrupt Companies have shrunk significantly since this application was started. Although in its Preliminary Report dated March 30, 2011 the Trustee identified certain transactions involving Liberty Assisted and 729285 which it "believes required further investigation", the Trustee expressed no view as to the propriety or otherwise of the transfers identified. (It did make comment, however, in its Second Report, as noted above.)

[48] When GE then commenced this application it alleged that the assets of the Bankrupt Companies had been "stripped" and asserted that $5 million had been transferred out of the accounts of the Bankrupt Companies.

[49] The Liberty Group Respondents then delivered two affidavits to respond in a preliminary fashion to the allegations of GE. In one affidavit Mr. Goutis deposed that contrary to the numbers in the Trustee's preliminary report: (i) the amounts paid into the La Chaumière account in fact exceeded payments out of the La Chaumière account; (ii) an amount in excess of $495,000.00 was paid by Liberty Assisted and 729285 for the payroll of Liberty Place and Beach Arms for a period in 2010, which amount was still owing by Liberty Place and Beach Arms to Liberty Assisted Living and 729285 Ontario Limited; (iii) other amounts were paid by entities in the Liberty Group and by directors and officers of the Liberty Group for expenses of the Bankrupt Companies which have not been repaid; and, (iv) the remaining transfers from Liberty Place and Beach Arms to other Liberty entities were in the course of being reviewed and being reconciled.

[50] The Liberty Group Respondents state that further analysis of the inter-company accounts confirmed the incompleteness and inaccuracy of the amounts identified in the Trustee's Preliminary Report: (i) the report failed to identify substantial payments into Liberty Place and Beach Arms from non-bankrupt Liberty entities; and (ii) when one totalled the inter-company transfers to and from the Bankrupt Companies and the remaining entities in the Liberty Group, the end result was that the Bankrupt Companies owed the Liberty Group amounts in excess of $250,000.00. This takes into account the payroll amounts previously identified as owing by Mr. Goutis, and unpaid management fees owing to Liberty Assisted.

[51] The Liberty Group Respondents also submit that the Trustee has no factual basis for its allegation that 729285 is entitled to proceeds from the sale of the Royalton Kingston and Royalton Kanata residences and that the evidence only supports the conclusion that 729285 has no beneficial interest in the proceeds of those sales.

A. Ownership Interests in the Royalton Residences

A.1 Concerns of Trustee

[52] In his April 13 affidavit Mr. Goutis deposed: "Neither Mr. Kassam nor Mr. Bhaloo own shares, directly or indirectly, in the Royalton companies."

[53] Amir Kassam provided answers to undertakings given on his April 21, 2011 examination. One answer concerned "The Royalton Projects" (the "April 21 Royalton Undertaking Answer"). The undertaking answer stated, in part:

> Each Royalton company is held 50% by or for investors associated with the Coram group, the identities of which are unknown to Mr. Bhaloo, Mr. Kassam and Mr. Goutis. The other 50% of each Royalton company is held for a group of investors assembled by Mr. Kassam and Mr. Bhaloo ("Liberty Royalton investors"). Each investor invested varying amounts which were used as 50% of the equity contributed by each Royalton company in connection with the development of each Royalton retirement residence. The other 50% of the equity contributed by each Royalton company was provided by the Coram investors. In other words, Liberty Royalton investors accounted for 25% of the equity contributed to each Royalton limited partnership.
>
> The funds of each Liberty Royalton investor was to be paid to 729285 Ontario Inc., who then disbursed the funds as equity to each Royalton company as required.
>
> The names of each of the Liberty Royalton investors and their total investments to date are as follows:

There then followed the names of some 24 investors who invested $3.889 million through 729285 into the Royalton projects. The undertaking answer concluded:

> None of the money contributed to the Royalton properties came directly or indirectly from the Liberty Group.[4] We take "contribution" to mean investment or advance by way of debt or equity. As was disclosed on the examinations, Liberty Assisted Living made certain payments on behalf of one or more of the Royalton residences, which were reimbursed.

[54] The *BIA* section 163 examination of Mr. Goutis continued on May 27. As a result of directions which I gave on June 14, responses to advisements and refusals taken on that examination were delivered to the Trustee on June 21. One question taken under advisement for which an answer was provided concerned the production of documents evidencing the investment of funds in and through 729285 by the investors in the Royalton projects; if no such documents existed, the precise terms of the trust were to be described. The response stated, in part:

---

[4] In his April 13 affidavit Mr. Goutis had deposed: "I can categorically state that from January 2010 to the end of March 2011 no money was transferred from any of the bankrupt or non-bankrupt retirement residences, or Liberty Assisted Living or 729285 to any of the Royalton residences, directly or indirectly.

> The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects. (emphasis added)

[55] On this motion 870898 Ontario Inc., 842501 Ontario Inc., and 87065 Ontario Inc. were referred to as the "800 Series Companies". Kassam and Goutis are closely involved in the 800 Series Companies: Kassam is an officer and the sole director of 870898 Ontario Inc.; Kassam is an officer, and Goutis is an officer and director, of 842501 Ontario Limited; and, Goutis is an officer and the sole director of 870865 Ontario Limited.

[56] The Trustee has expressed concerns about the inconsistent evidence provided about the ownership interests in the Royalton Residences - and the corresponding entitlement to the Royalton Proceeds - particularly the disclosure on June 21 that previously unknown 800 Series Corporations in which Kassam and Goutis are involved received 50% of the interest in the Royalton Proceeds held by 729285. Those companies were not disclosed as investor beneficiaries in the April 21 Royalton Undertaking Answer. It is the Trustee's position that accurate information is crucial to understanding the entitlement, if any, of the Bankrupt Companies as creditors and/or preference claimants to the Royalton Proceeds.

A.2 Position of the Liberty Group Respondents

[57] The Liberty Group Respondents submitted that 729285 did not own any beneficial interest in the Royalton projects. It held 50% of its interest in the projects in trust for numerous individual and corporate investors assembled by Liberty for the purposes of investing in the Royalton projects. The remaining 50% interest was held by 729285 in trust for three companies pursuant to the terms of Declarations of Trust which have been produced. These Respondents argued that there was no evidence before the court to support the suggestion that 729285 had any entitlement to any proceeds from the sale of the Royalton retirement residences.

B. Investments by 729285 into the Royalton Residences

B.1 Concerns of the Trustee

[58] The Liberty Group Respondents take the position that 729285 held its interest in the Royalton Companies in trust for unrelated investors. In the April 21 Royalton Undertaking Answer the investments by 729285 in the Royalton Residences were described as equity contributions.

[59] The 729285 financial statements from 2008 described the investment in the Royalton Residences as a "project in progress" equity asset. In the 2009 financial statements, the Royalton Residences investment had been reallocated to be a "loan receivable" debt investment.

[60] Mr. Goutis was asked about this inconsistency on his May 27 section 136 examination.:

Q. 889: ...But then somehow in 2009 on the GL – I know you changed the designation of the accounts – that equity is now a loan receivable. So what's the basis for that?

A. Yeah, but what I'm saying is if you look in the GL, the actual account numbers never change.

...

Q. 891: I get that. But why did you make that change though?

A. I was adding it up. I probably popped it into AR instead of moving it up top.

...

Q. 895: And what caused you to make this re-characterization?

A. Well, that was just me typing it in.

The Trustee does not regard this answer as a principled explanation for the change in the financial statement description of the 729285 interest in the Royalton Residences from equity to debt. The Trustee is concerned that disbursements of the Royalton Proceeds by 729285 to the investors may have been improper in light of the conflicting information about the status of the investment by 729285 in the Royalton Residences.

[61] The Trustee also has expressed a concern that funds provided to 729285 by the Bankrupt Companies, as part of the inter-company flow of funds within the Liberty Group, may have ultimately flowed to some or all of the Royalton Residences. The Trustee states that at the present time it does not possess information about how the funds received from the Bankrupt Companies were disbursed by 729285.

B.2 Position of the Liberty Group Respondents

[62] In response the Liberty Group respondents stated that Mr. Goutis fully explained the alleged change in the asset profile in his May 19th affidavit. There was no change in the assets disclosed by 729285, merely a change in how those assets were allocated to accounts as between the years 2008 and 2009. The Liberty Group submitted that 729285 produced its general ledger listings which confirmed the lack of substantial change with respect to its assets as between 2008 and 2009.

[63] The Liberty Group Respondents also submitted that the evidence showed that assertions in the Trustee's April 25 Report and the questions asked on the examinations suggesting that money from the Liberty Group of companies, including the Bankrupt Companies, may have found their way into one or more of the Royalton projects were not true.

[64] The evidence of Mr. Goutis was that Liberty Assisted earned substantial management and leasing fees for services performed for the Royalton Kingston and Royalton London projects.

While from time to time Liberty would pay incidental expenses associated with the Royalton projects, it sought and received reimbursement from the appropriate Royalton projects for these services.

C. Sufficiency of Trust Documentation regarding investments through 729285 into the Royalton Companies

C.1 Concerns of the Trustee

[65] 729285 produced documents relating to investments made through it by arm's-length investors in the Royalton Residences. Two basic documents were produced: (i) the Terms and Conditions of Investment Pool Number 1, and (ii) the Investment Commitment for Liberty Fund Number 1.

[66] Under the Investment Commitment an investor agreed to make a stipulated investment in one of the Royalton Residences and undertook to make the investment cheque payable to "729285 Ontario Limited, in Trust". The Investment Commitment stated that the investor and Liberty would be bound by the terms and conditions set out in the Terms and Conditions of Investment. That document recited the three Royalton Residences and, as well, a property in Peterborough on which Liberty proposed "to undertake similar projects in partnership with the Project Partner". In section 3 of the Terms and Conditions Liberty agreed and acknowledged "that it shall hold fifty percent (50%) of its ownership interest in each of the Projects in trust for the Investors". (As noted above, Liberty – i.e. 729285 – held an indirect 25% interest in each Royalton Residence.)

[67] Some of the Investment Commitments produced by 729285 were signed by the individual investors; some were not. Some were dated; others were not. 729285 also produced a large number of cheques from investors to it.

[68] Most of the cheques from investors are dated in 2007 or 2008. The Trustee observed that the interest of Liberty in the Peterborough Project was not acquired until November 13, 2009. From this the Trustee argued that the Terms and Conditions must post-date the investments in the Royalton Residences through 729285 (which appear to have occurred in 2007 and 2008), raising a question as to whether the purported investor trusts were properly settled. That said, from Declarations of Trust concerning the interests of the 800 Series of Companies in the Royalton Residences, it appears that the interests of 729285 in those residences dated back to 2005 and 2006.

[69] As noted, in section 3 of the Terms and Conditions Liberty agreed to hold 50% of its ownership interest in each of the Royalton Projects in trust for the investors. In his June 21 undertaking answers Mr. Goutis revealed for the first time that:

> The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects. (emphasis added)

[70] The Liberty Group Respondents produced three Declarations of Trust – one for each Royalton Residence - to support that statement. The Declarations were dated in 2005 and 2006. Under each 729285 was named as the Trustee. Each declaration recited that 729285 owned certain common shares in each of the Royalton Companies (i.e. the level of ownership in which Coram held the other 50%) and that it had acquired half of those shares "as bare trustee and nominee for" one of the 800 Series Companies. The same beneficial interest of each of the 800 Series Companies in the trust shares was recorded in each Declaration of Trust: 50% for 870898 Ontario Limited; 45% for 842501 Ontario Limited; and 5% for 870865 Ontario Limited. Section 3 of each Declaration of Trust provided:

> The Beneficiaries have, as of and from the Effective Date, owned and continued to own the Trust Shares beneficially in the manner set out in paragraph 2 above, which beneficial ownership includes all rights, obligations, losses and liabilities arising or emanating from the Trust Shares.

[71] As was revealed by the Liberty Group Respondents in the June 21 answers to advisements given on the May 27 examination of Mr. Goutis, from the net Royalton Proceeds payments were made on May 26 to the three 800 Series Companies: (i) $1.5 million to 870898 Ontario; (ii) $1.35 million to 842501 Ontario and, (iii) $150,000 to 870865 Ontario.

C.2 Position of the Liberty Group Respondents

[72] The Liberty Group Respondents submitted that the trust documentation they disclosed clearly showed that 729285 did not have any beneficial interest in the Royalton Residences or any entitlement to the Royalton Proceeds.

D. Disbursement of Royalton Proceeds

D.1 Concerns of the Trustee

[73] On his May 27 Examination Mr. Goutis testified that Cassels was holding the net Royalton Proceeds in its trust account. Later that day Trustee's counsel wrote to Cassels requesting an undertaking that the Royalton Proceeds held in trust by Cassels not be disbursed without 10 days' prior notice being provided to the Trustee. Gowlings received no response to that letter.

[74] On the morning of June 14, 2011 Cassels sent Gowlings an e-mail stating: "I am advised that the Royalton proceeds have all been disbursed". As mentioned above, I included that apparent state of affairs in my endorsement of June 14.

[75] That information provided by Cassels was not accurate.

[76] On June 21, 2011, in answers to advisements, the Trustee was informed that, contrary to the June 14, 2011 email, "there remains the sum of $931,212.97 held in trust for Royalton Retirement Residence Inc. and Royalton Retirement Residence (Kanata) Inc. Additional fees payable are being satisfied out of these funds."

[77] Those answers to advisements also stated that $1.5 million of the Royalton Proceeds had been paid to 1424800 Ontario Inc. The Liberty Group Respondents had not previously identified 142800 as a beneficiary of any trust in respect of the Royalton Residences, or to otherwise be entitled to any of the Royalton Proceeds. A corporate search conducted by the Trustee revealed that Mr. Bhaloo was the sole director of 142 and the company had been dissolved in 2007 for non-payment of taxes.

D.2 Concerns of GE

[78] Amir Kassam is an officer and director of all the Bankrupt Respondents and is an officer and director of 729285, Liberty Assisted, and 729282.

[79] On June 18, 2007, Amir Kassam provided to Column Financial, in support of the Bankrupt Respondents' application for a loan, a Certification of Borrower/Principal Financial Statement which included Kassam's Net Assets which were shown to total $26.010 million. Kassam also signed three indemnities in support of each loan to the Bankrupt Respondents.

[80] On his cross-examination conducted April 21, 2001, Kassam admitted that he did not own $23.4 million of his reported net assets, but stated the assets were owned by 729282, of which he was not a shareholder. His explained was that he was trying to secure a mortgage so he was presenting the best picture he could by including his family's assets.

[81] On April 28, 2011, GE's counsel corresponded with Kassam's counsel referring to the answers given on cross-examination, and advised that GE was taking the position that Kassam had obtained the financing from Column Financial under false pretences and that Kassam, accordingly, was responsible in law for the full indebtedness owed to GE, being $19,806,137.14.

[82] On his cross-examination Kassam indicated that the Kassam family company, 729982, owned a $5 million interest in the Royalton Residences as of the date of his 2007 net worth statement and continued to own that interest.

[83] 729982 owns shares of 729285 and would thereby be entitled to share in any of the Royalton Proceeds in which 729285 had a beneficial interest.

D.2 Position of the Liberty Group Respondents

[84] Mr. Bhaloo sought to address the concerns of the Trustee regarding the disbursement of the Royalton Proceeds in his June 23 affidavit in which he deposed that:

(a) "The 1.5 million paid to [142] was done so at the direction of [the 800 Series Companies] out of proceeds to which they were entitled for use in other projects".

(b) He was "unaware that 142 had been dissolved"; and,

(c) He "did not realize that counsel and the court could take 'disbursed' [as stated in the June 14 Cassels email to Gowlings] to mean 'paid out of Cassels Brock' when

> in fact what had happened was that some of the Royalton Proceeds had been transferred from one trust account at Cassels Brock into another.

[85] Mr. Bhaloo deposed that of the $931,212.97 remaining in the Cassels Brock trust account, Coram was entitled to $333,226.09, and most of the balance was earmarked to pay legal accounts rendered by Cassels Brock. (Coram already had received $4.5 million from the Royalton Proceeds on May 26, 2011.) Mr. Bhaloo reiterated that 729285 "has no beneficial interest in the proceeds of the Royalton sales and received none of the proceeds."

[86] The Trustee stated that it was not aware of any documentary evidence offered by the Liberty Group Respondents to support Mr. Bhaloo's assertion that the $1.5 million paid to the dissolved company, 1424800, was done so at the direction of the 800 Series Companies "out of proceeds to which they were entitled for use in other projects." The Trustee also observed that this assertion was inconsistent with the evidence given by Mr. Bhaloo on his April 21 Examination that he was not a director of any company with an investment interest in the Royalton Residences. The Trustee further noted that Mr. Bhaloo's explanation did not address the issue of how funds could be disbursed to a dissolved corporation.

[87] The Trustee takes the position that this apparent confusion over the dispersal of the Royalton Proceeds, together with the late appearance of the 800 Series Companies and 1424800 as recipients of Royalton Proceeds, requires a better understanding before any potential claim of the Bankrupt Companies to the Royalton Proceeds could be evaluated and quantified.

IV. Legal principles governing the appointment of investigative receivers

[88] Last year, in his decision in *Anderson v. Hunking*,[5] Strathy J. comprehensively summarized the principles concerning the appointment of a receiver. I can do no better than to reproduce his summary in its entirety:

> 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

[5] 2010 ONSC 4008.

plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (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 Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (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 of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);

(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 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(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* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (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 Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, 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.)].

[89] In that case Strathy J. declined to appoint a receiver, concluding that the plaintiffs had not demonstrated a strong case that the defendant had misappropriated certain funds, that other defendants might be liable to the plaintiff, and that the plaintiff enjoyed some existing protection by reason of the registration of a certificate of pending litigation against property.

[90] Counsel drew my attention to several cases where this Court had appointed a receiver, in part for the purposes of investigating the affairs of a company or reviewing certain transactions. In one such case, *WestLB AG v. Rosseau Resort Developments Inc.,*[6] Pepall J. described some of the key principles applicable to the appointment of a receiver:

> 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 Limited and I King West Inc. v. Stinson Hospitality Inc. et al.* That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W.Waste Inc. v. EX-L Sweeping and Flushing Ltd.*

In that case Pepall J. appointed a receiver of all the rights of an entity to certain contracts in order to break a deadlock amongst stakeholders and thereby facilitate the work of another receiver in realizing on a resort development.

[91] In *Stroh v. Millers Cove Resources Inc.*[7], Farley J. appointed a receiver in the context of an oppression proceeding under section 248 of the *OBCA* on the basis that evidence existed of self-dealing transactions by the major shareholder of a company, of which the Board members

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[6] [2009] O.J. No. 4285 (S.C.J.)

[7] 1995 CarswellOnt 3551 (Gen. Div.); affirmed (1995), 85 O.A.C. 26 (Div. Ct.).

were not aware, and that the appointment of a receiver was necessary to protect the interests of the minority shareholders: "A continuation of the pattern of self-dealing without adequate shareholder protection cannot continue to be tolerated."[8] The Divisional Court upheld the appointment stating:

> 7 On the basis of our review of the evidence and the submissions made by counsel, we are not persuaded that he was wrong to appoint a receiver. We can find no error in principle or any injustice to a party. *We do not consider the remedy to be as drastic as suggested by counsel for the appellants in the circumstances of this case. 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.* This should not, in our view, be any matter that Mr. Keady or his colleagues should fear based on the submissions that they made to us in this hearing. (emphasis added)

[92] Finally, in *Loblaw Brands Ltd. v. Thornton*,[9] I appointed an investigatory receiver holding:

> 14 An interim receiver may be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in cases where the plaintiff can demonstrate a strong case that the defendant has engaged in fraud and that without the appointment of a receiver the plaintiff's right to recovery would be in serious jeopardy…
>
> 15 This court has appointed receivers whose main function was to monitor and investigate the assets and affairs of a defendant: *Century Services Inc. v. New World Engineering Corporation* (unreported decision of Morawetz J., July 28, 2006; File 06-CL-6558); *Udayan Pandya v. Courtney Wallis Simpson* (unreported decision of Ground J., November 17, 2005; File 05-CL-6159). In his endorsement in *Century Services* Morawetz J. concluded that the plaintiff had satisfied the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) and that the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation can be undertaken".
>
> 16 In my endorsement of March 6, 2009, I found that Loblaw had demonstrated a very strong *prima facie* case of fraud against Paul Thornton. The evidence filed by Loblaw on this motion only reinforces the strength of its case. Given the huge disparity between the

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[8] *Ibid.*, Gen. Div., para. 9.

[9] [2009] O.J. No. 1228 (S.C.J.).

amount of money that Loblaw has discovered was diverted to IBL and the value of the known assets of the defendants, as well as the failure of Paul Thornton to respond to these proceedings, I am satisfied that without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized. The balance of convenience overwhelmingly favours granting the appointment of a receiver.

V. Analysis

A. Motion to appoint investigative receiver over 729285

[93] As Strathy J. observed in *Anderson v. Hunking, supra.*, in deciding whether to appoint a receiver the court must have regard to all the circumstances of the case. Let me consider first the request of the Trustee to appoint an investigative receiver over 729285.

[94] The Trustee alleges that it has preference or debt claims against 729285 and that an investigative receiver is required for two basic reasons: (i) to review the financial records of 729285 in respect of transactions the Bankrupt Companies had with it, and (ii) to gain a clearer, more accurate understanding about whether 729285 enjoys any beneficial interest in the Royalton Proceeds which could be available to satisfy any claim by the Trustee against 729285.

[95] Turning first to consider the strength of the Trustee's case against 729285, the Trustee has established that as of the date of bankruptcy two of the Bankrupt Companies, Beach Arms and Liberty Place, were creditors of 729285 and that during the preceding year all three Bankrupt Companies had made numerous payments to 729285. The Trustee points to section 95(1)(b) of the *BIA* to argue that such payments had the effect of giving 729285 preference over other creditors – realty taxes and wages were in arrears – thereby rendering such payments void against the Trustee as preferences.

[96] In response the Liberty Group Respondents took the position that any presumption of a preferential intention under *BIA* section 95 was rebutted by extensive evidence to the contrary – i.e. that the Bankrupt Companies had made such payments as ordinary course transactions.[10] The Trustee took issue with the availability of such a defence, pointing to the following portion of the transcript of the examination of Mr. Bhaloo as showing there was nothing "ordinary course" about the way in which intercompany transactions were made between 729285 and the Bankrupt Companies:

Q. 271: Liberty. Why then start 729285 for that?

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[10] Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Press, 2009), p. 195.

A. I don't know what the rationale was, to be honest. I can tell you that in trying to make ends meet, monies were flowing from – you know, these companies were needing funds. So we would advance monies to cover items, and that's why you have transfers --

Q. 281: Well, it went all around the group of companies. I think we can safely assume that, right?

A. Yes.

Q. 219: Absolutely.

A. It needed cash. People needed to get paid and whoever had money would, you know, try to make ends meet.

Q. 220: I'm going to borrow a phrase I used with Mr. Kassam. You borrowed from Peter to pay Paul frequently?

A. Yes.

Q. 221. And vice versa at times?

A. Yes. We always advanced -- yes.

[97] The Liberty Group Respondents further argued that the evidence provided by Mr. Goutis that no monies passing from the Bankrupt Companies to 729285 ever found their way into investments in the Royalton Projects stands uncontradicted, thereby removing any basis to appoint a receiver to preserve some notional entitlement on the part of the Bankrupt Companies to any of the Royalton Proceeds.

[98] I think the simple answer to these arguments by the Liberty Group Respondents is that their own failure to provide straight answers to simple questions raises serious concerns about the accuracy of any information which they have provided, in their affidavits or on section 163 examinations, about the flows of money between the Bankrupt Companies and 729285, as well as the use the latter company made of those funds.

[99] There is no doubt that monies flowed around the Liberty Group of companies on a regular basis. There is no doubt that in the year prior to the date of bankruptcy the Bankrupt Companies made payments to a non-arm's length company, 729285. A strong case exists that some of those payments were made at times when the Bankrupt Companies were insolvent, although the Liberty Group Respondents dispute that the insolvent period reached back to January 1, 2010. There is evidence that such inter-company payments were made at times when the Bankrupt Companies were not paying other creditors, such as municipalities to whom they owed taxes. Certainly the evidence demonstrates the existence of a serious question to be tried that such payments constituted preferences under section 95 of the *BIA*.

[100] To accept the Liberty Group Respondents' assertion that they have provided full explanations about these transactions as ones occurring in the ordinary course would require accepting the reliability of the evidence they have proffered about the affairs of 729285 and the other Liberty Group of companies. However, I do not accept that such information necessarily is reliable. In their first batch of undertaking responses the Liberty Group Respondents purported to provide a complete list of investors in the Royalton Companies for whom 729285 was acting as trustee. Then, following my order of June 14 putting in place a mechanism to require the answering of questions taken under advisement or refusals, it turns out that four additional "investors" existed for whom 729285 acted as trustee – the three 800 Series Companies and the dissolved company, 1424800 Ontario Inc., paid as the nominee of one of the 800 Series Companies. All these companies were linked to the principals of the Bankrupt Companies.

[101] As this information was slowly trickling out, under the pressure of orders of this court, the Royalton Proceeds were dissipating, with $4.5 million flowing out to those four related companies on May 26 and June 6, 2011. Whether those payments infringed the April 26 order of Mesbur J. is not a matter I need to decide and would require a better understanding of the actual facts. Suffice it to say that the non-disclosure of such related-party recipients – one of which was dissolved! – until after the funds had been disbursed raises more questions than answers.

[102] Further, the Liberty Group Respondents were less than candid with me when on June 14 they informed me that the Royalton net sales proceeds had been released from Cassels Brock. That representation to the court was incorrect. I do not accept Mr. Bahloo's explanation in his June 23 affidavit that he "did not realize that counsel and the court could take 'disbursed' to mean 'paid out of Cassels Brock'. That statement makes no sense whatsoever.

[103] In sum, what tips the scales in the circumstances of this case is the combination of (i) the inconsistent information put forth by the Liberty Group Respondents during *BIA* section 163 examinations about the affairs of 729285, including its role in investments in the Royalton Residences, (ii) the incremental manner in which they disclosed information about what was actually happening to the Royalton Proceeds, ***after*** those proceeds had been disbursed to companies in which the principals of the Bankrupt Companies have an interest, and (iii) the misrepresentations made to me about the true state of the Royalton Proceeds held in the Cassels Brock trust accounts. Those factors point to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729285's interest in any of the Royalton Proceeds – whether they were in trust for others or whether the company enjoyed a beneficial interest in them – and, (c) to figure out the true state of affairs regarding those to whom the Royalton Proceeds were paid. Where a party has provided inconsistent information on *BIA* section 163 examinations and then misrepresents matters to the court, it is very difficult for that party to argue that the factors of irreparable harm and balance of convenience should be decided in its favour.

[104] Accordingly, I grant the Trustee's motion to appoint an investigative receiver into the affairs of 729285.

B. Motion to appoint an investigative receiver over Liberty Assisted Living

[105] I do not grant the Trustee's motion to appoint an investigative receiver over Liberty Assisted Living for two reasons. First, the evidence disclosed that Liberty Assisted acted as manager for the Bankrupt Companies. Accordingly some contract-based reason for the payments to and from the Bankrupt Companies might exist. Second, apart from placing before me evidence about the flows of money between Liberty Assisted and the Bankrupt Companies, the Trustee really focused its evidentiary attention on the affairs of 729285 and the confusion surrounding the Royalton Proceeds, not on Liberty Assisted. Whereas the Trustee adduced evidence about the Liberty Group Respondents providing inconsistent information about the affairs of 729285 and misstatements to the court about what was happening with the Royalton Proceeds, no similar evidence was placed before me about Liberty Assisted. Consequently, I am not satisfied on the evidence adduced that the Trustee has satisfied the *RJR-Macdonald* criteria in respect of its request to appoint an investigative receiver over Liberty Assisted.

VI. Conclusion

[106] By way of summary, I grant the motion of the Trustee to appoint Albert Gelman Inc. as the investigative receiver, without security, into the affairs of 729285 Ontario Limited. I dismiss the motion of the Trustee to appoint such a receiver over Liberty Assisted Living Inc., but without prejudice to its right to re-apply for such relief on better evidence.

[107] At the hearing Trustee's counsel provided me with a draft form of order. Mr. Pinos had not seen it before, so I afforded him an opportunity following the hearing to review it and email me his comments, which he did. Mr. Prophet then responded by email stating that the differences between the parties about the form of order were so significant that an attendance before me would be required.

[108] I am out of town on vacation for the next three weeks. I will resume sitting on July 25. I therefore propose to provide the following guidance to counsel for drafting the appropriate order:

> 1/ The order shall refer to 729285 Ontario Limited by its corporate name, not by the term "debtor";
>
> 2/ The term of appointment of Albert Gelman Inc. shall be for 120 days. The receiver shall report to the court about its investigation prior to the expiry of its term of appointment. Its appointment is quite focused – to monitor and to obtain information about the affairs of 729285. Given that focused mandate, I see no need to make the appointment an indefinite one;
>
> 3/ The language of appointment must reflect the investigative and monitoring nature of the receiver's role. The receiver must have full access to, and control over, all the books, records, and business documents of 729285, but must exercise that access and control in such a way that the company can continue to carry on its business with minimal interference;

4/ While the powers enumerated in paragraphs 6(a), (b) and (c) of the Trustee's draft order are reasonable, the receiver shall not have the power to file an assignment in bankruptcy on behalf of 729285;

5/ I do not accept the comments made by Mr. Pinos about paragraphs 7 and 8 of the draft order. I regard those provisions as necessarily incidental to the receiver's investigative role;

6/ Draft paragraph 10 is reasonable. I do not accept Mr. Pinos' submission that access by the receiver should be limited to business hours;

7/ I reject Mr. Pinos' criticism of draft paragraph 11. I regard it as a necessary provision to ensure that the receiver obtains the information it has been appointed to secure;

8/ I accept Mr. Pinos' criticism of paragraph 13. It risks intruding into solicitor-client privileged communications. That said, as the client 729285 is entitled to such information and must produce it;

9/ I accept Mr. Pinos' criticism of paragraphs 15, 16, 18, and 19. They should be deleted;

10/ I do not accept the revision proposed by Mr. Pinos to paragraph 20. The proposed language is consistent with that contained in the Commercial List Model Receiver Order;

11/ I do not accept Mr. Pinos' criticism of paragraphs 21 through to 25. Although the receiver is not a possessory receiver, it is entitled to the same charge to secure its fees and disbursements as a standard receiver; and,

12/ I accept Mr. Pinos' criticism of paragraph 27.

I trust with these directions the parties can settle the form of the order.

[109] If they cannot, then by next Wednesday, July 6, 2011, they shall email me their proposed forms of order, together with reasons supporting their versions. The attachments containing the proposed orders must be in Word format, not in PDF. I will review the orders and inform counsel of the final form. I strongly encourage counsel to attempt to settle the order without resorting to further submissions.

[110] One additional paragraph should be included in the order. At the present time the sum of $931,212.97 from the Royalton Proceeds remains held in the trust accounts of Cassels Brock. That amount is close to the Trustee's current understanding of the amount of potential preference and debt claims it may have against 729285. In view of the inconsistent information provided by the Liberty Group Respondents about those entitled to the Royalton Proceeds, and its misrepresentation to me about whether all funds had been disbursed, I order that Cassels Brock

not disburse or otherwise deal with such remaining Royalton Proceeds until further order of this court following the report of the receiver which I have directed.

VII. Costs

[111] I would encourage the parties to try to settle the costs of this motion. If they cannot, the Trustee and GE may serve and file with my office written cost submissions, together with a Bill of Costs, by July 13, 2011. The Liberty Group Respondents may serve and file with my office responding written cost submissions by July 22, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

D. M. Brown J.

Date: June 30, 2011

CITATION: GE Real Estate v. Liberty Assisted Living, 2011 ONSC 4136
COURT FILE NO.: CV-11-9169-00CL
DATE: 20110926

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: General Electric Canada Real Estate Financing Holding Company and General Electric Capital 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

BEFORE: D. M. Brown J.

COUNSEL: C. Prophet and N. Kluge, for the Receiver

L. Brzezinski, D. Magisano and G. Kim, for the Applicants

T. Pinos, for the Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, and Rahim Bhaloo

S. Mitra, for Albert Gelman Inc., the proposed receiver

R. Macklin, for 2068308 Ontario Inc.

HEARD: June 27, 2011; subsequent written cost submissions.

SUPPLEMENTARY REASONS FOR DECISION - COSTS

I. Positions of parties on costs

[1] By Reasons dated June 30, 2011, I granted the motion of the Trustee, MNP Ltd., formerly Meyers Norris Penny Limited ("MNP"), to appoint Albert Gelman Inc. ("AGI") as the investigative receiver, without security, into the affairs of 729285 Ontario Limited. I dismissed the motion of the Trustee to appoint such a receiver over Liberty Assisted Living Inc., but without prejudice to its right to re-apply for such relief on better evidence.

A. The Trustee

[2] The Trustee seeks costs of the motion in the amount of $109,445.22. For the attendances on April 20, June 14 and June 23, 2011, the Trustee seeks substantial indemnity costs to the extent of an additional $5,000.00 over its partial indemnity costs for each of those attendances; for the balance of its work in respect of the motion the Trustee seeks partial indemnity costs.

[3] The Trustee seeks substantial indemnity costs of the three attendances on the basis that the conduct of Liberty caused unnecessary attendances: (i) April 21: the unreasonable refusal of Liberty to produce the financial statements for 729285; (ii) June 14: the provision of inaccurate information by Liberty about the status of the Royalton proceeds; and (iii) June 23: the provision of contradictory evidence about what amount of the Royalton proceeds remained in its counsel's trust accounts.

[4] Unfortunately the Bill of Costs submitted by the Trustee did not group the work performed by each timekeeper by event – e.g. examination, case conference, attendance at motion hearing. Attached dockets revealed that the time claim by the Trustee for its counsel covered the period April 5, 2011 to July 7, 2011 (the taking out of my order of June 30).

B. The applicant, General Electric Canada Real Estate Financial Holding Company

[5] GE seeks its costs on a substantial indemnity basis of $188,208.18 or, alternatively, partial indemnity costs in the amount of $133,814.62. GE's requested costs do not include its costs for attending on the *BIA* s. 163 examinations of Messrs. Goutis, Bhaloo and Kassam.

[6] GE submitted that it filed material on the initial application, at the April 14 case conference before Mesbur J., and the June 14th attendance, as well as making oral and written submissions at the June 27 hearing. Counsel for GE has attended all hearings.

[7] The Bill of Costs of GE disclosed that it seeks to recover its costs not only of the Trustee's motion to appoint an investigative receiver, but also it costs incurred to date in its application.

C. The respondent, 729285 Ontario Limited

C.1 Position on claim by Trustee for costs

[8] 729285 opposes the Trustee's request for substantial indemnity costs because the conduct of the respondent in this case did not rise to the level of "egregious and reprehensible conduct".

[9] 729 noted that a considerable amount of the time spent on the motion involved a review of transactions between Liberty Assisted Living and other members of the Liberty Group, but the Trustee did not succeed in its effort to appoint an investigative receiver over LAL. 729 submitted that this should result in a 10% reduction in claimed costs.

[10] 729 further submitted that the issue on the motion was a narrow one – the entitlement of 729 to any proceeds from the sale of the Royalton residences and any potential claim in debt or preference in the bankruptcy as against 729. Such a claim would not exceed $1 million. 729 argues that the amount of that preference claim was "a far cry from the initial allegation of $5 million in 'asset stripping' made against the Liberty group and its principals." 729 contends that many allegations explored during the examinations ultimately were not pursued on the motion and, accordingly, the costs claimed should be reduced by 60%.

[11] 729 questioned the need for the Trustee's counsel to use three lawyers on the motion; in its view only one senior lawyer was required. It also submitted that the time of Mr. Kluge (a 10-year lawyer) should be excluded.

[12] In sum, 729 submitted that a fair and reasonable award of costs to the Trustee would be $40,000.00, inclusive of taxes and disbursements.

C.2 Position on claim by GE

[13] 729 submits that GE should not receive an award of any costs because the motion was brought by the Trustee, not GE. While noting that Mesbur J. permitted counsel for GE to attend the various examinations, Her Honour specified that GE's counsel could not participate in the examinations. 729 argued that GE did not file any material on the motion, and the factum it filed duplicated the points made by the Trustee. 729 also observed that GE was seeking costs for work performed on matters unrelated to the motion and for work which pre-dated the initiation of the Trustee's motion on April 26.

[14] In sum, 729 contended that GE should not receive any costs or, alternatively, it should only receiver nominal costs in the range of $5,000 to $10,000.

II. Analysis

A. General principles

[15] In fixing the costs of a motion, a court must consider the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant. Further, a court must take into the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1).

[16] In the *Davies* case the Court of Appeal identified the circumstances when elevated – i.e. substantial or full indemnity – costs may be awarded by a court:

> 28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.
>
> ...
>
> 40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

B. Costs claimed by the Trustee

[17] The Trustee enjoyed substantial success on the motion and is entitled to an award of costs.

[18] The Trustee's motion was complex in three respects. First, the operational and financial relationships amongst the Liberty Assisted group of companies were complicated and detailed, injecting a level of factual complexity into the motion.

[19] Second, the Trustee was required to expend considerable efforts in order to obtain information about the relationship between the Bankrupt Companies and 729 through its examination of officers of the Bankrupt Companies and the Liberty Assisted Group. Court attendances were required to prompt the delivery of answers to undertakings and the determination of the proper scope of refusals.

[20] Third, as detailed in section II.F.3 of my June 30 Reasons, the conflicting information provided by the Liberty Assisted Group about the status and location of the remaining proceeds from the sale of the Royalton Residences also necessitated further court attendances. Lederman J. noted, in his August 10, 2011 reasons denying leave to appeal from my June 30 order, the "less than candid disclosure by the respondents" about their financial affairs.[11]

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[11] 2011 ONSC 4704 (Div. Ct.), para. 6.

[21] While I am not satisfied that the conduct of the respondents on this motion rose to the level of justifying an award of substantial indemnity costs, I think a healthy award of partial indemnity costs is merited in the circumstances. Although the issue on the motion was a narrow one, I have no doubt that the Trustee's counsel had to perform much work in reviewing the information obtained about the complex financial relationships amongst the respondents in order to identify the specific evidence required in support of its motion. Given the amount of review work required, I do not accept the Respondents' submissions that it was unreasonable for the Trustee to use the three counsel it did to prepare the motion.

[22] Taking into account all the applicable factors, I conclude that a fair and reasonable award of partial indemnity costs to the Trustee would be $80,000.00, inclusive of disbursements and H.S.T., and I order 729285 Ontario Limited to pay such costs within 30 days of the date of this order.

C. Costs claimed by GE

[23] I agree with the submissions of 729 that no significant award of costs should be made to GE. The motion was brought by the Trustee, not GE. Although GE filed a factum on the motion, its role was largely one of simply supporting the positions advanced and argued by the Trustee. Moreover, the Bill of Costs submitted by GE reflects a misunderstanding of the costs relevant to the motion – there was no basis for GE Canada to seek to recover on this motion costs related to the larger application it brought.

[24] Taking into account all the applicable factors, including the award of costs already made to the moving party, the Trustee, I conclude that a fair and reasonable award of partial indemnity costs to GE for this motion would be $5,000.00, inclusive of disbursements and H.S.T. I order 729285 Ontario Limited to pay such costs within 30 days of the date of this order.

D. M. Brown J.

Date: September 26, 2011

CITATION: General Electric Real Estate v. Liberty Assisted Living Inc., 2011 ONSC 4704
Court File No: 348/11
Date: 20110810

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT

Re: 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

Before: The Honourable Mr. Justice S.N. Lederman

Counsel: *Timothy Pinos,* for the Moving Party, 729285 Ontario Limited

Clifton Prophet & Nicholas Kluge, for the 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 the Applicants

S. Mitra & D. Reiter, for the Receiver, Albert Gelman Inc.

Heard at Toronto: August 4, 2011

ENDORSEMENT

[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 (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: *West Lbag v. Rosseau Resort Developments Inc.,* [2009] O.J. No. 4285 (S.C.J.).

[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 OAC26 (Div Court).

[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.

Lederman J.

Released: August 10, 2011

tab 7

The Attorney General of Canada v. Reliance Insurance Co. [Indexed as: Canada (Attorney General) v. Reliance Insurance Co.]

87 O.R. (3d) 42

Ontario Superior Court of Justice,

Pepall J.

October 5, 2007

Corporations -- Winding-up -- Orders being granted for winding-up of insurance company and appointment of liquidator -- Order and s. 21 of Winding-up and Restructuring Act imposing stay of proceedings against company and liquidator -- Liquidator moving for order directing that reinsurance amounts owed by moving parties to company be paid to liquidator without any reduction on account of set-off -- Moving parties taking position that reinsurance treaties provided for arbitration of issue of set-off and bringing motion to stay or dismiss liquidator's motion and to refer issue of set-off to arbitration -- Motion dismissed -- Arbitration constituting "proceeding" against company and liquidator -- Arbitration proceedings being stayed by s. 21 of Act and by court order -- Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 21.

RC carried on business in Canada as a branch of a foreign insurance company, RI. After RI became insolvent and was ordered to be liquidated by a Pennsylvania court, the Superintendent of Financial Institutions took control of the assets of RC in Canada and sought orders for the winding-up of RC and the appointment of a liquidator. The orders were granted. The order appointing the liquidator imposed a stay of proceedings against RC and the liquidator except with leave of the court. The moving parties had entered into reinsurance agreements or treaties with RI (the "Treaties"). It was the liquidator's position that it was required by Canadian law to take custody and control of all amounts receivable in respect of RC's insurance business, including reinsurance receivables, and that amounts were owed by the moving parties to RC. The moving parties sought to set-off those amounts against amounts owed to them by RI. The liquidator moved for directions, including a request for an order declaring and directing that the reinsurance amounts be paid to the liquidator without any reduction on account of set-off. The moving parties brought motions seeking to stay or dismiss the liquidator's motion and to refer the issue of set-off to arbitration in accordance with the Treaties. [page43]

Held, the motions should be dismissed.

Section 21 of the Winding-up and Restructuring Act ("WURA") and the order appointing the liquidator stayed the arbitration proceedings. "Proceedings" includes extra-judicial proceedings such as arbitration. The moving parties had framed their motion as a request for a stay of the liquidator's set-off motion on the basis that the Treaties and the arbitration agreements contained therein should be enforced. This amounted to a proceeding against RC, RI and the liquidator. The moving parties were not precluded from advancing their arguments on set-off, but they were precluded from proceeding with arbitration. In the face of the winding-up and the stay, the agreements to arbitrate ceased to have effect for the future and were inoperative.

It would not be appropriate to lift the stay and grant leave to the moving parties so that the arbitrations could proceed. The object of the ("WURA") is the expeditious and inexpensive winding-up of companies to which it applies. A multiplicity of litigation that adds unnecessary costs and depletes what would otherwise be available to distribute to creditors should be discouraged. It made no sense to have a number of separate adjudicative bodies addressing the issue of set-off, and establishing the arbitral tribunals and obtaining an adjudication of the issue of set-off would involve delay.

Cases referred to

Breakwater Co. (Re), [1914] O.J. No. 5, 33 O.L.R. 65 (H.C.); Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois, [1996] 1 S.C.R. 900, [1996] S.C.J. No. 44, 133 D.L.R. (4th) 643, 196 N.R. 81, 39 C.B.R. (3d) 253; Dalimpex Ltd. v. Janicki (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094, 228 D.L.R. (4th) 179, 35 B.L.R. (3d) 41, 35 C.P.C. (5th) 55,(C.A.), supp. reasons [2003] O.J. No. 3301 (C.A.); Dominion Trust Co. (Liquidator of) v. LePage (1916), 53 S.C.R. 337, [1916] S.C.J. No. 29; Eagle River International Ltd. (Re), [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 207 D.L.R. (4th) 385, 2001 CarswellQue 2725; J. McCarthy & Sons Co. of Prescott Ltd. (Re), [1916] O.J. No. 4, 38 O.L.R. 3, 32 D.L.R. 441 (Div. Ct.); Kortev v. Deloitte Haskins & Sells, [1996] A.J. No. 1062, 46 Alta. L.R. (3d) 16, 29 B.L.R. (2d) 78, 44 C.B.R. (3d) 259, 32 C.C.L.T. (2d) 265, 15 E.T.R. (2d) 296 (Q.B.); Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676, 1999 ABCA 179; Meridian Developments Inc. v. Toronto-Dominion Bank, [1984] A.J. No. 986, 52 C.B.R. (N.S.) 109 (Q.B.); Prince George (City) v. McElhanney Engineering Services Ltd., [1995] B.C.J. No. 1474, [1995] 9 W.W.R. 503 (C.A.); Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 2497, 51 B.C.L.R. (2d) 105, 2 C.B.R. (3d) 303 (C.A.); Smoky River Coal Ltd. (Re), [1999] A.J. No. 272, 1999 ABQB 202; Suidair International Airways Ltd (Re), [1951] 1 Ch 165, [1950] 2 All E.R. 920; Wood Gundy Inc. v. Northland Bank, [1989] M.J. No. 175, 73 C.B.R. (N.S.) 297, 60 Man. R. (2d) 29 (Q.B.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106
Insurance Companies Act, S.C. 1991, c. 47, Part XIII
International Commercial Arbitration Act, R.S.O. 1990, c. I.9, ss. 2(2), 8
Uncitral Model Law on International Commercial Arbitration, C. Gaz., 1986. I, vol. 120 (International Commercial Arbitration Act), Art. 8
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, as am., ss. 10.1, 21, 73, 134, 161(7), (8)

Authorities referred to

Casey, J. Brian and Janet Mills, Arbitration Law of Canada: Practice and Procedure (New York: Juris Publishing, Inc., 2005) [page44]

McElcheran, Kevin, Commercial Insolvency in Canada (Markham, Ont.: LexisNexis Butterworths, 2005)
Mustill, M.J. and S.C. Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed. (London: Butterworths, 1989)

MOTIONS for an order staying a motion by a Liquidator for directions on the issue of set-off and the referring issue of set-off for arbitration.

Paul Bates and Robert Grain, for moving parties Swiss Re Frankona Ruckversicherungs AG and Swiss Re Germany AG.

Thomas Donnelly, for moving parties Lloyd's of London Syndicates 340, 2341, 53 and 1121.

Graham Smith, for KPMG, the Liquidator of Reliance Canada.

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[1] **PEPALL J.**: -- This case addresses the winding-up and restructuring statutory regime and related court orders and agreements to arbitrate contained in certain reinsurance agreements that are known as treaties.

Facts

[2] Reliance Insurance Company ("Reliance") is a property and casualty insurer that was incorporated in Pennsylvania, U.S.A. It established a branch office in Toronto to carry on insurance business in Canada. This branch is known as Reliance Canada.

[3] By the fall of 2001, Reliance was insolvent. At the request of the Insurance Commissioner for the Commonwealth of Pennsylvania, on October 3, 2001, the Commonwealth Court of Pennsylvania ordered that Reliance be liquidated. That court also appointed a U.S. Liquidator.

[4] In Canada, Reliance Canada carried on business in Canada as a branch of a foreign insurance company pursuant to the federal Insurance Companies Act[1] and its predecessor statute. Together with other federal legislation, that Act provides a specific regime for a Canadian insurance branch such as Reliance Canada.

[5] Acting pursuant to the provisions of that Act, the Superintendent of Financial Institutions took control of the assets of Reliance Canada in Canada. In November 2001, it sought orders from this court for the winding-up of Reliance Canada and the appointment of a liquidator. In the materials filed in support of those applications, the Office of the Superintendent of Financial Institutions ("OSFI") described certain reinsurance contracts or treaties entered into by Reliance that reinsured Reliance Canada's liabilities [page45]and those of Reliance and other affiliates. OSFI described how Reliance Canada had been experiencing difficulties and delay in collecting reinsurance proceeds under such treaties and that some reinsurers had claimed set-off for amounts owing to Reliance Canada against amounts they claimed were owed to them by Reliance. On December 3, 2001, Farley J. ordered that, effective November 8, 2001, the insurance business in Canada of the respondent Reliance was to be wound-up and that no suit, action or other proceeding was to be proceeded with or commenced against Reliance Canada or Reliance, except with leave of the court.[2]

Every judgment, sequestration, distress, execution or like process put into force against Reliance Canada or Reliance, or the estate or effects thereof, after the commencement of the winding-up was declared to be void and of no effect. Farley J. also appointed KPMG as the Liquidator "of the insurance business in Canada of the respondent including the assets in Canada of the respondent together with its other assets held in Canada under the control of its chief agent, including, without limitation, all amounts received or receivable in respect of its insurance business in Canada ('Reliance Canada')".[3]

[6] The appointment order went on to say that "the amount recoverable from, due or owed by any reinsurer to Reliance Canada shall be paid to the Liquidator and shall not be reduced as a result of this Order or the winding-up order, notwithstanding any terms or contractual agreement to the contrary, and that any payment made directly by a reinsurer to an insured or other creditor or claimant of Reliance Canada or Reliance Insurance Company shall not diminish or reduce or affect such reinsurer's obligation to Reliance Canada".[4] Farley J. also appointed the US Liquidator of Reliance as an inspector to assist and advise KPMG in the winding-up of Reliance Canada. Paragraphs 26 and 28 of the order imposed a stay of proceedings against Reliance Canada and against KPMG as Liquidator except with leave of the court. They stated:

> This Court orders that, without limiting the generality of the foregoing, and except upon further order of this Court having been obtained on at least 7 days' notice to the Liquidator . . .
>
> (e) all Claimants are restrained from exercising any extra judicial remedies against Reliance Canada including, without limitation . . . any right of distress, repossession, or consolidation of accounts in relation to amounts due or accruing due in respect of [page46]or arising from any indebtedness or obligation of Reliance Canada as of the date thereof.
>
> . . . . .
>
> This Court orders that no suit, action or other proceeding shall be proceeded with or commenced against the Liquidator . . . except with leave of this Court and subject to such terms as this Court may impose.

[7] Paragraph 29 addressed the powers of the Liquidator which included, taking control of the estate and effects of Reliance Canada and bringing or defending any action, suit or prosecution or other legal proceeding, civil or criminal, in the Liquidator's own name as Liquidator or in the name or on behalf of Reliance Canada. Paragraph 39 provided that interested parties could apply to the court for advice and directions on seven day's notice to the Liquidator and the Inspectors, and that the Liquidator could at any time apply to the court for advice and directions.

[8] Swiss Re Frankona Ruckversicherungs AG and Swiss Re Germany (collectively referred to as "Swiss Re") and Lloyd's of London Syndicates 340, 2341, 53 and 1121 (collectively referred to as "Lloyd's Underwriters") (the "Moving Parties") had entered into reinsurance agreements or treaties with Reliance and others (the "Treaties"). It is KPMG's position that it is required by Canadian law to take custody and control of all amounts receivable in respect of Reliance Canada's insurance business including reinsurance receivables and that amounts are owed by the Moving Parties to Re-

liance Canada. The Moving Parties seek to set-off these amounts against amounts owed to them by Reliance. The Moving Parties take the position that the set-off provisions contained in the Treaties provide for this set-off and that this is standard practice.

[9] In the face of this disagreement, KPMG has brought a motion for directions including a request for an order declaring and directing that the reinsurance amounts be paid to the Liquidator without any reduction on account of set-off. It also requests facilitative enforcement orders. That motion is scheduled to be heard on October 19, 2007. Both KPMG and the U.S. Liquidator take the position that any amounts owing to the reinsurers by Reliance cannot be set-off against amounts owed by the Moving Parties to Reliance Canada.

[10] On being served with KPMG's motion, Swiss Re and Lloyd's Underwriters both brought motions seeking orders to stay or dismiss the motion and to refer the issue of set-off which is the subject matter of KPMG's motion to arbitration in Philadelphia and London, respectively, in accordance with the Treaties. With the exception of the governing law provisions, the Swiss Re and Lloyd's Underwriters' Treaties are substantially [page47]similar insofar as they relate to the issues on these motions. The Moving Parties state that the Treaties contain clauses that address set-off and that permit them to reduce the amounts owed to Reliance Canada by the amounts Reliance owes to them. They have choice of law provisions, Pennsylvania in the case of Swiss Re and the law of England in the case of Lloyd's Underwriters. The Treaties also contain arbitration clauses. In the case of Swiss Re, the arbitration clause states:

> Any and all disputes between Company and Reinsurer arising out of, relating to, or concerning this Agreement, whether sounding in contract or tort and whether arising during or after termination of this Agreement, will be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire ("Board") meeting at a site in Philadelphia, Pennsylvania. The arbitration will be conducted under the Federal Arbitration Act . . .

Company is defined to include Reliance.

[11] In the case of Lloyd's Underwriters, the arbitration clause states:

> All matters in difference between the parties arising under, out of or in connection with this Contract, including formation and validity, and whether arising during or after the period of this Contract, shall be referred to an arbitration tribunal in the manner hereinafter set out . . .

The arbitration clause then goes on to specify that the arbitration is to be conducted in London, England. In both arbitration agreements, arbitrators with insurance industry expertise are to be appointed.

[12] It was agreed that no steps taken in this proceeding would constitute an attornment by the Moving Parties to the jurisdiction of Ontario or a waiver of their rights, if any, to rely on the law, jurisdiction and arbitration clauses contained in the Treaties. Lloyd's Underwriters have served a demand for arbitration upon KPMG. Swiss Re has not, but reserves its right to do so.

Issues

[13] The issues to be considered are:

(a) Do the provisions of the WURA and the related court orders stay the arbitration proceedings?
(b) If so, should leave be granted to the Moving Parties so that the arbitrations may proceed?

All counsel stressed that I should only deal with the issue of the arbitration proceedings. The issue of set-off is not to be addressed at this time. [page48]

Statutes

[14] There are a number of statutory provisions that are relevant to this motion. Section 21 of the Winding-up and Restructuring Act ("WURA")[5] states:

> 21. After a winding up order is made in respect of a company, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

[15] Section 73 of the WURA states:

> 73(1) The law of set-off, as administered by the courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.

Section 134 of WURA states:

> 134. A liquidator is subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction, and the liquidator may be compelled to perform his duties by order of the court.

[16] Section 2(2) of the International Commercial Arbitration Act[6] ("ICAA") provides that the Model Law applies to international commercial arbitrations and awards. The Model Law on International Commercial Arbitration was adopted by the UN Commission on International Trade Law on June 21, 1985 ("Model Law"). The Model Law is attached as a schedule to the ICAA.

[17] Article 8 of the Model Law provides,

> 8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[18] Section 8 of the ICAA states:

> 8. Where, pursuant to article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates. [page49]

[19] Section 106 of the Courts of Justice Act[7] provides for a stay of proceedings. It states:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Positions of the Parties

[20] In brief, it is the position of the Moving Parties that the issue of the amounts owing under the Treaties is subject to arbitration in Pennsylvania and London respectively, and that this court does not have jurisdiction to hear KPMG's motion of October 19, 2007, and it should be stayed insofar as it relates to them. They rely on ss. 2 and 8 of the ICAA, Art. 8 of the Model Law, and s. 106 of the Courts of Justice Act. They rely on Dalimpex Ltd. v. Janicki[8] and state that s. 8 of the ICAA and Art. 8 of the Model Law are mandatory and that this court is obliged to refer the matter to arbitration and to stay the court proceedings. Furthermore, these provisions are consistent with the winding-up legislation in that the court may continue to maintain its supervisory role and make the appropriate order based on the results of the arbitration.

[21] KPMG's position is that, as Liquidator, it is mandated by the WURA to take control of property to which Reliance Canada is, or appears to be, entitled and this obligation is reflected in the winding-up and appointment orders. Its October motion flows from that obligation. Furthermore, and consistent with the winding-up regime, the WURA and the court orders impose a stay of proceedings and the stay extends to include arbitration proceedings. KPMG states that quite apart from that argument, the Moving Parties have failed to establish that the preconditions associated with the ICAA have been met. The subject matter of the arbitration agreement does not extend to a motion for advice and directions of this court; there is no action that can be referred to arbitration; and the arbitration agreement is inoperative or incapable of being performed as a result of the winding-up. Lastly, the order requested by the Moving Parties would result in three distinct proceedings to determine the issues rather than the one proceeding available under the WURA. There would be an arbitration in Pennsylvania and one in London and the October motion would have to proceed as against other reinsurers not involved in this motion. This would cause delay and additional [page50]expense for the Reliance Canada estate and there could be inconsistent decisions.

[22] No one challenged the description of the arbitration as being international and commercial in nature and I do not propose to examine that issue in any detail. It should be noted that no one takes the position that the constitutional validity or constitutional applicability of the WURA, the ICAA or the Model Law is in question such that notice of a constitutional question was required. All counsel take the position that the statutes may co-exist. This issue was canvassed with counsel prior to proceeding with argument of the motion.

Discussion

(a) Stay of proceedings

[23] Turning firstly to the issue of the stay, the proceedings before me are brought in the matter of Reliance, the WURA and the Insurance Companies Act. Reliance Canada carried on business in Canada as a branch of a foreign insurance company under the Insurance Companies Act and its predecessor legislation. As such, to insure risks, it required an order of the Superintendent of Financial Institutions and pursuant to Part XIII of the Insurance Companies Act, as a branch, Reliance Canada was required to, amongst other things, maintain an adequate margin of assets in Canada over liabilities in Canada, vest in trust, in Canada, assets of a prescribed value, and maintain records for each customer in Canada, or claimant under a policy in Canada, the amount owing to the insurer and the nature of its liabilities to the customer or claimant. Reliance Canada's assets were therefore held in Canada and were available to back its liabilities under its insurance policies. Records were maintained by Reliance Canada in this regard.

[24] By November 8, 2001, two liquidation estates were created, one in the U.S. and one in Canada. The WURA specifically provides for a winding-up order in respect of the "insurance business in Canada of the foreign insurance company if the court is of the opinion that for any reason it is just and equitable".[9] There is, therefore, no issue that there was jurisdiction to make the winding up and appointment orders. As noted in Re Breakwater Co.,[10] the jurisdiction of the court to wind-up a company is not defeated because a winding-up order has already been made in the [page51]company's foreign country of origin. The court then administers the assets of the company that are within its jurisdiction: Re Suidair International Airways Ltd.[11]

[25] It is clear that under the WURA, the Liquidator is obliged to take into his or her custody property to which a company being wound-up is or appears to be entitled. The court orders in this case reflect this responsibility. In a wind-up of a Canadian branch, assets are defined as including amounts receivable in respect of an insurance business in Canada.[12] In s. 73 the WURA addresses the issue of set-off. The WURA also imposes a stay of proceedings except with leave of the court.[13] The court orders also impose this restriction. The appointment order stated that absent leave, all claimants were restrained from exercising any extra-judicial remedies against Reliance Canada including consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of Reliance Canada as of the date of the order.[14] No suit, action or other proceeding was to be proceeded with or commenced against Reliance Canada or Reliance except with leave of the court.[15]

[26] In Commercial Insolvency in Canada, Kevin McElcheran describes the purpose of the stay of proceedings in the context of commercial insolvency:

> The primary statutory and judicial tool used to preserve value and promote order in the insolvency process is the stay of proceedings to suspend the exercise of individual creditor rights. Stays of proceedings are necessary to achieve many of the objectives of commercial insolvency law. Even in the context of a liquidation of the debtor's assets for distribution to its unsecured creditors under the BIA or the WURA, the statutory stay of proceedings permits the orderly and efficient realization of the debtor's assets, the judicial determination of creditor claims and priorities and the fair distribution of proceeds to creditors by reference to their legal rights.[16]

[27] Although dealing with the CCAA, numerous cases have interpreted "proceedings" broadly and to include extra-judicial proceedings such as arbitration: Luscar Ltd. v. Smoky River Coal Ltd.,[17] [page52]Meridian Developments Inc. v. Toronto-Dominion Bank,[18] Quintette Coal Ltd. v. Nippon Steel Corp.[19]

[28] Section 134 of the WURA provides that the liquidator is subject to the summary jurisdiction of the Superior Court of Justice and the Liquidator acts as the officer of this court and subject to its approval and authorization. There is no other body that provides advice and directions to the Liquidator. Again these features are reflected in the court orders.

[29] In the face of these provisions, I am hard-pressed to see how this court does not have jurisdiction or is obliged to refer the issues that are the subject matter of KPMG's October motion as it relates to the Moving Parties to Pennsylvania and London for arbitration. The Moving Parties have framed their motion as a request for a stay of the Liquidator's set-off motion on the basis that the Treaties and the arbitration agreement contained therein should be enforced. In substance, this amounts to a proceeding against Reliance Canada, Reliance and the Liquidator and hence is encompassed by the court orders. The Treaties in which the arbitration agreement are contained are not invalidated, but arbitration proceedings are stayed as a result of s. 21 of the WURA and this court's orders. There is a sound basis for this. In Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois,[20] the Supreme Court described the purpose of the WURA [at para. 37]:

> The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act. The mechanism provided consists in requiring the court's leave for proceedings by the creditors (ss. 21 and 22) and giving responsibility for the company's affairs to a court-appointed liquidator, who acts as an officer of the court, under its control and in accordance with its directives (s. 19). The court and the liquidator must respect and give effect to the creditors' rights as much as possible, taking their nature into account and not disregarding the other interests involved. As Galipeault C.J.Q. stated in Maranda-Desaulniers v. Peckham, [1953] B.R. 163, at p. 172, the court has a discretionary power in this regard.

In a winding up proceeding as noted in Re J. McCarthy & Sons Co. of Prescott Ltd.,[21] there may be numerous stakeholders [at paras. 29 and 34]:

> [A]s far as possible, all proceedings affecting the winding up of a company shall be taken in the winding up matter, and the bringing of an action should not be permitted unless some special circumstances make such an additional legal proceeding necessary or advisable for some very substantial reason . . .
>
> The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action and all that may follow upon that right, such as mode of trial, right of appeal, etc. and all are confined to the remedies which the Act provides or permits.[22]

[30] The merits of the public policy that favours "single control" or a single proceeding have been referred to by the Supreme Court in Dominion Trust Co. (Liquidator of) v. LePage[23] in the context of a winding-up and in Re Eagle River International Ltd.[24] in the context of bankruptcy. The Moving Parties are not precluded from advancing their arguments on set-off; they are simply precluded from proceeding with arbitration.

[31] There is also an issue as to whether the Moving Parties meet the requisite thresholds in the ICAA and more specifically, the Model Law. There is no need to address all of the thresholds as the agreements to arbitrate are inoperative or incapable of being performed. As noted by J. Brian Casey and Janet Mills in Arbitration Law of Canada: Practice and Procedure:[25]

> If a party is bankrupt or insolvent and under court protection then the arbitration agreement, as any other commercial contract, is affected. It becomes inoperative.

[32] In Re Smoky River Coal Ltd.,[26] the court considered whether an agreement to arbitrate was "void, inoperative or incapable of being performed". Lovecchio J. determined that it was incapable of being performed as the debtor company lacked capacity in that it was being suspended by the court under the Companies' Creditors Arrangement Act. Although it took a different approach, the Alberta Court of Appeal did not overrule his decision in this regard. Prince George (City) v. McElhanney Engineering Services Ltd.[27] did not deal with a winding-up [page54]order, but the BC Court of Appeal examined the meaning of "null and void, inoperative or incapable of being performed". Although the court did not accept the motion judge's treatment of this provision, the court did refer to M.J. Mustill and S.C. Boyd, The Law and Practice of Commercial Arbitration in England[28] where the authors wrote:

> The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future.

In the case before me, in the face of the winding up and the stay, the agreements to arbitrate cease to have effect for the future and may not be enforced. They are inoperative. Put differently, consistent with Re J. McCarthy & Sons Co. of Prescott Ltd., the Moving Parties are deprived of the opportunity to proceed by way of arbitration.

(b) Leave

[33] Turning to the second issue, I must then consider whether the stay should be lifted and leave granted to the Moving Parties so that arbitrations may proceed in Pennsylvania and London. Firstly, as a matter of procedure, the notices of motion do not request leave nor a lifting of the stay. It is not enough to simply make this request as part of one's oral argument or in a factum. The same is true with respect to the suggestion contained in the Swiss Re factum that Farley J.'s appointment order should be amended.

[34] Secondly, and more substantively, even if leave had been properly requested, I would not have granted it. The object of the WURA is the expeditious and inexpensive winding-up of companies to which it applies: Kortev v. Deloitte Haskins & Sells.[29] A multiplicity of litigation that adds unnecessary costs and depletes what would otherwise be available to distribute to creditors should be discouraged: Wood Gundy Inc. v. Northland Bank.[30] It makes no sense to have three separate adjudicative bodies addressing the issue of set-off. The October motion must proceed in any event as

there are reinsurer respondents other than the Moving Parties. Referral to arbitration would result in three separate adjudications on the issue of set-off with the attendant danger of inconsistent rulings. Participation in the arbitrations would involve [page55]tremendous expense for the Liquidator and hence for the estate. The arbitration agreements call for arbitral tribunals consisting of three arbitrators. While it is the case that the arbitral tribunal would be comprised of members with insurance industry experience, no persuasive argument was advanced that would suggest that this was material with respect to the issue of set-off.

[35] There is also the delay that would be associated with establishing the arbitral tribunals and obtaining an adjudication of the issue of set-off. The stay was imposed in 2001, and the Liquidator's motion was served some time ago and is ready to be argued in October in a summary fashion as prescribed by the WURA. There are no compelling reasons or special circumstances that justify granting leave. In all of the circumstances, had the request for leave properly been made, I have concluded that it would not have been granted. The Moving Parties' motions are dismissed. If the parties are unable to agree, they are to make written submissions on costs.

Motions dismissed.

Notes

1 S.C. 1991, c. 47.

2 Para. 5 of the Winding-up Order dated December 3, 2001.

3 Para. 2 of the Appointment Order dated December 3, 2001.

4 Para. 6 of the Appointment Order dated December 3, 2001.

5 R.S.C. 1985, c. W-11, as amended.

6 R.S.O. 1990, c. I.9.

7 R.S.O. 1990, c. C. 43.

8 (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094 (C.A.).

9 Section 10.1 of WURA.

10 [1914] O.J. No. 5, 33 O.L.R. 65 (H.C.).

11 [1951] 1 Ch 165, [1950] 2 All E.R. 920, at p.173 Ch.

12 Sections 161(7) and (8) of WURA.

13 Section 21 of WURA.

14 Paragraph 26(c) of the Appointment Order dated December 3, 2001.

15 Paragraph 5 of the Winding-up Order dated December 3, 2001.

16 (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 4.

17 [1999] A.J. No. 676, 1999 ABCA 179.

18 [1984] A.J. No. 986, [1984] 52 C.B.R. (N.S.) 109 (Q.B.).

19 [1990] B.C.J. No. 2497, 2 C.B.R. (3d) 303 (C.A.).

20 [1996] 1 S.C.R. 900, [1996] S.C.J. No. 44.

21 [1916] O.J. No. 4, 38 O.L.R. 3 (Div. Ct.).

22 Ibid, at pp. 8-9 O.L.R.

23 (1916), 53 S.C.R. 337, [1916] S.C.J. No. 29, at p. 351 S.C.R.

24 [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 2001 CarswellQue 2725, at p. 20 (QL).

25 (New York: Juris Publishing, Inc., 2005) at p. 69.

26 [1999] A.J. No. 272, 1999 ABQB 202.

27 [1995] B.C.J. No. 1474, [1995] 9 W.W.R. 503 (C.A.).

28 2nd ed. (London: Butterworths, 1989) at 465.

29 [1996] A.J. No. 1062, 46 Alta. L.R. (3d) 16 (Q.B.) at para. 16.

30 [1989] M.J. No. 175, 73 C.B.R. (N.S.) 297 (Q.B.).

tab 8

Case Name:

Royal Bank of Canada v. Correia

Between
Royal Bank of Canada, and
Richard Correia

[2006] O.J. No. 3206

36 C.P.C. (6th) 284

150 A.C.W.S. (3d) 621

Court File No. 98-CV-157007SR

Ontario Superior Court of Justice

Master R. Dash

Heard: August 3, 2006.
Judgment: August 8, 2006.

(18 paras.)

Counsel:

Sukanta Saha, for the plaintiff

James A. Kay, for the defendant

ENDORSEMENT

1 **MASTER R. DASH** (endorsement):-- The plaintiff seeks leave under rule 60.08(2) to issue a notice of garnishment since more than six years have elapsed from the date of judgment. Too often plaintiffs seek leave with little or no evidentiary foundation or explanation of the delay since the date of judgment. Leave requires the exercise of judicial discretion and is not granted as of right. This motion concerns the evidentiary requirements that a plaintiff must meet to obtain such leave.

THE HISTORY OF THE MOTION

2 The plaintiff obtained default judgment on November 17, 1998 for the balance owing on a Visa account for $13,546.04 plus $375 costs with post-judgment interest running at 17.5% on the judgment debt and 7% on the costs. A motion for leave to issue a notice of garnishment was initially brought in writing but was rejected by Master Peterson on November 29, 2005 who determined, in my view correctly, that it must be brought on notice: *Zacks v. Glazier*, [1945] O.W.N. 205 (Master). The motion was then served on the defendant and made returnable before a judge. On March 10, 2006 Pepall J. determined that this motion was within the jurisdiction of a master and adjourned it to a master.

3 The motion then came before me on April 20, 2006. The only supporting evidence was an affidavit from a legal assistant in the office of plaintiff's solicitor. She recited that judgment was obtained, that the plaintiff had made "several demands for payment" of the outstanding balance and that the defendant "either failed or refused to make payments". The only exhibits attached were the default judgment and the rejection slip signed by Master Peterson. I held that "there is no evidence before me that would provide grounds for the court to exercise its judicial discretion under rule 60.08(2)." I granted an adjournment to allow the plaintiff to file a supplementary affidavit and allow the defendant to cross-examine thereon and file any responding material. The plaintiff filed a supplementary affidavit of Raquel Andrade, a team leader in the plaintiff's collection department. There has been no cross-examination thereon and no responding material. The motion was heard on August 3, 2006.

THE TEST FOR GRANTING LEAVE UNDER RULE 60.08(2)

4 Rule 60.08(2) provides as follows:

> If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a notice of garnishment shall not be issued unless leave of the court is first obtained.

5 Counsel were unable to find any case law on the test under rule 60.08(2), however in *Ballentine v. Ballentine* (1999), 45 O.R. (3d) 706 (S.C.J.), Cullity J. considered the test under rule 60.07(2) for granting leave to issue a writ of seizure and sale more than six years after a judgment was obtained. Since the wording of rule 60.07(2) is essentially identical to rule 60.08(2), the same test should apply. Although *Ballentine* was concerned with enforcement of arrears under a support order made more than six years earlier and whether there was a rule of thumb restricting the extent of enforceable arrears, the following comments by Cullity J. would in my view apply to all requests for leave to issue enforcement proceedings more than six years after judgment:

> I am not suggesting that lapse of time should have no relevance on an application for leave under rule 60.07(2). The question whether delay will justify a refusal to grant leave to issue the writ should, in my view, be governed by the same principles of equity that apply to the enforcement of legal and equitable remedies generally. It should be relevant only where, and to the extent that, it supports a finding of waiver or acquiescence or a finding that it would otherwise be inequitable to enforce the claim. Delay is only a factor to be considered along with others including evidence of detrimental reliance or change of position.

6 Therefore, when a plaintiff seeks leave under rule 60.08(2) to issue a notice of garnishment more than six years after the date of judgment, he must adduce evidence explaining the delay such

the court may conclude that the plaintiff has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The defendant may raise other grounds to convince the court that it would be inequitable to enforce the claim. For example the defendant could demonstrate that he has relied to his detriment or changed his financial position in reliance on reasonably *perceived* acquiescence resulting from the delay. Of course the onus would be on the defendant to adduce evidence of such reliance and detriment.

THE EVIDENCE

7 In her supplementary affidavit Ms. Andrade advises of the following events since the judgment was obtained on November 17, 1998. On February 19, 1999 the plaintiff proceeded to garnish the plaintiff's wages, but lifted the garnishment following an agreement with the defendant to remit monthly payments. The defendant failed to make the required payments and a new notice of garnishment was issued "during 2000". Payments were received of $1278 on April 18, 2000 and $2042 on October 10, 2000. On June 21, 2001 the garnishee advised the plaintiff that the defendant was no longer working for them. Payment of $399.88 was received in September 2001. During March 2003 the matter was "referred" to a collection agency. There is no explanation of what the collection agency did or what steps the plaintiff took to follow-up with the agency. A year later, on March 19, 2004 the defendant contacted the agency to enquire as to the outstanding balance but no payments were made. On November 26, 2004 the plaintiff referred the matter to a second collection agency and the defendant has been making payments of $10 per month since then. Plaintiff's counsel states that the plaintiff was not content with that arrangement and as such sought leave to issue a new notice of garnishment. Ms. Andrade avers that the outstanding balance with interest is $16,918.22, but without providing any breakdown.

8 The defendant did not cross-examine Ms. Andrade and did not file any responding material. Mr. Kay however provided the court with copies of three letters written between counsel. By letter of June 7, 2006 Mr. Kay asked for a copy of the statement giving rise to the purported outstanding balance of $16,918.22 and refers to alleged factual errors in Ms. Andrade's affidavit. As the defendant's version of the facts has not been supported by affidavit evidence I give these statements no weight. He also complained that various records were not provided. By letter of June 28, 2006 Mr. Saha stated that no statement existed but the calculation of the outstanding balance was accurate and could be provided if requested, as could documents proving the agreement and the alleged contacts. In my view it would have more expedient for Mr. Saha to simply send the documents and calculations. In his letter of July 11 Mr. Kay stated that the additional material should have been exhibits in the plaintiff's affidavits. The plaintiff did not serve a further affidavit and the defendant served no affidavit whatsoever.

HAS THE PLAINTIFF SATISFIED THE TEST?

9 The time between the judgment and the first motion for leave before Master Peterson was seven years. Had a new notice of garnishment been sought by November 2004, leave would not have been required. The motion for leave was first brought one year after that deadline. Based on the *evidence* before me I am of the view that despite some gaps in the explanation for the seven-year delay since the judgment the plaintiff has not waived its rights to enforce the judgment not has it acquiesced in the defendant's non-payment. The plaintiff's uncontradicted evidence is that it issued a garnishment in January 1999, entered into a voluntary payment agreement with the defendant a month later, issued a second garnishment in 2000 resulting in several payments, was notified in June 2001 that the defendant's employment had ended and turned the matter over to two col-

lection agencies in March 2003 and November 2004. The defendant has been informed at various stages throughout this period that the plaintiff was seeking to enforce its judgment. The defendant was in contact with the first agency and has been making minimal payments to the second. In these circumstances it cannot be said that the plaintiff has acquiesced or waived its rights. The plaintiff has satisfied its onus for leave to issue a notice of garnishment. The defendant has failed to provide evidence of detrimental reliance arising from the delay or any other grounds to show that it would be inequitable to enforce the claim.

10 The defendant also complains that the plaintiff has failed to set out in its affidavit sufficient details to allow for a proper calculation of the outstanding balance and as a result leave should not be granted. He refers to rule 60.08(4) which provides that to obtain a garnishment the creditor must file an affidavit which includes, inter alia:

> (a) the date and amount of any payment received since the order was made;
> (b) the amount owing, including postjudgment interest;
> (c) details of how the amount owing and the postjudgment interest are calculated.

In my view the defendant has misconstrued the nature of the relief sought on this motion. Rule 60.08(2) states that if six years have elapsed since the judgment, a garnishment shall not be issued unless leave of the court is first obtained. My order herein simply grants leave to obtain a notice of garnishment but does not set out the amount of the garnishment. In most situations it will not require calculation of the balance outstanding.[1] Once leave is obtained, the actual notice of garnishment is issued by the registrar of the court upon the plaintiff filing a requisition and the affidavit contemplated by rule 60.08(4). This affidavit must contain the calculations sought by the defendant. Pursuant to rule 60.08(7)(a) the notice of garnishment must be served on the debtor together with the affidavit required by rule 60.08(4). If the calculations are in error the defendant's remedy is to move under rule 60.08(16) for a garnishment hearing to determine the quantum of liability of the debtor.

11 The plaintiff is hereby granted leave to issue a notice of garnishment.

SHOULD INTEREST BE WAIVED AS A TERM OF RELIEF?

12 The defendant suggests that as a term of granting leave I disallow post judgment interest for periods of unreasonable delay pursuant to section 130(1) of the *Courts of Justice Act*. Rule 1.05 provides that "when making an order under these rules the court may impose such terms and give such directions as are just" and rule 37.13 provides that "on the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms." The relevant portion of section 130(1) of the *Courts of Justice Act* states as follows:

> The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
> (b) allow interest at a rate higher or lower than that provided in either section;
> (c) allow interest for a period other than that provided in either section.

13 In *Eastwalsh Homes Ltd. v. Anatal Development Corp.* (1995), 26 O.R. (3d) 528 (O.C.G.D.) at p. 531, Trafford J. determined that a judge other than the trial judge has jurisdiction to vary the post-judgment interest rate under section 130, but no variation should be ordered "in the absence of exceptional circumstances." He held that "changes in circumstances can occur unforeseeably and those changes can materially impact on the fairness of an otherwise proper order." Absent such change in circumstances, only the trial judge or the court hearing an appeal from the trial judgment can vary the rate. In my view, if the judgment giving rise to post-judgment interest is a default judgment signed by the registrar and not a trial judgment, an order to vary post-judgment interest can be made by a master, since it does not involve variation of an order made by a judge. Post-judgment interest rates awarded under section 129 of the *Courts of Justice Act* are calculated in accordance with a formula under section 127. The rates are recalculated every three months and the rate applied is dependant on the date that the judgment was signed. In accordance with rule 129(5) post-judgment interest is not awarded at the statutory rate if interest is payable by a right other than under section 129, for example a rate agreed by contract. In *Eastwalsh* Trafford J. was asked to reduce the statutory rate of 15% awarded at the time of judgment to 9.47%, the average rate since the date of judgment. He held at p. 532 that "the material change in interest rates is not, in itself, an exceptional change sufficient to justify the intervention of the court."

14 This judgment accrues interest at 17.5%, whereas the current statutory rate is 6%. It appears however that the 17.5% interest rate was not the rate awarded under section 129 of the *Courts of Justice Act* (since the statutory post-judgment rate in November 1998 was 7%), but was rather the contractual rate under the Visa agreement.

15 The defendant herein has not brought a motion to vary the post-judgment interest rate, but rather seeks to suspend the running of interest during periods of inactive enforcement as a term of any order the court may make granting leave to issue a notice of garnishment more than six years after judgment. The basis of that relief is the delay by the plaintiff in enforcing its judgment causing interest to accumulate. A dramatic drop in post-judgment interest rates may also be a factor that the court can consider, but as stated in *Eastwalsh*, it is not sufficient by itself to justify a variation. In my view, it should also be less of a factor where the post-judgment rate is an agreed contractual rate. Suspending interest as a term of relief is an exceptional remedy. A plaintiff should not be required to continually expend funds in an effort to collect on its judgment. In my view, interest should not be disallowed as a term of relief on a rule 60.08(2) motion unless the evidence indicates that the delay was excessive or that the plaintiff took no steps to enforce its judgment at a time when it would have been reasonable to take such steps (for example it knew where the defendant was working) or that it held off enforcement for the purpose of allowing its judgment to increase dramatically as a result of accumulating interest.

16 In this case the plaintiff may not have been as proactive as it could have been, and there is a lack of specificity as to steps taken between September 2001 and November 2004, but there is some evidence of ongoing attempts to enforce its judgment for most of the time since the judgment was obtained and evidence that the defendant was aware of the judgment and the plaintiff's attempts to collect. The delay was not excessive. The defendant could have ended the accumulation of interest by paying the judgment. I have no evidence whether the defendant could have borrowed the money at rates far below the 17.5% accumulating on the judgment. Finally, the interest herein was payable pursuant to contract and not under the *Courts of Justice Act*. In my view, the circumstances herein are not so exceptional as to disallow interest for any period as a term of the order granting leave to issue a notice of garnishment.

COSTS

17 On April 20, 2006 I awarded to the defendant costs thrown away of $1200 respecting the attendances on March 10 before Pepall J. and myself on April 20. On both dates adjournments were necessary because of the plaintiff's default. On March 10 the plaintiff brought a master's motion before a judge and on April 20 the plaintiff's materials were insufficient to allow the relief requested and an adjournment was granted to file supplementary material. Those costs have been paid. I am therefore now concerned only with the costs of preparation of the motion materials and of preparation for and attendance at the motion on August 3, 2006.

18 I have considered the factors under rule 57.01 to determine what is a fair and reasonable disposition of costs. The plaintiff was entirely successful on the motion. The plaintiff's defaults as indicated unnecessarily lengthened the proceeding, however the defendant has been compensated for those costs in my order of April 20. The motion was not particularly complex, but there was a paucity of case law. The plaintiff's supplementary affidavit material was not as detailed as it should have been, but the defendant attempted to contradict the factual assertions without cross-examining thereon or filing his own affidavit setting out his version of events. The plaintiff failed to respond to a reasonable request by the defendant for certain documents and for the basis of the calculation of the outstanding balance. Although I have determined that had no effect on the outcome, it may have resulted in a settlement of this motion. I also bear in mind that the relief herein was required partially because of plaintiff's enforcement delays and required the exercise of the court's discretion in granting leave. The plaintiff would have been required to bring the motion to obtain leave in any event. The plaintiff failed to bring to the hearing a Costs Outline as mandated by rule 57.01(6): see *Beneficial Investment (1990) Inc. v. HongKong Bank of Canada*, [2006] O.J. No. 1428 at paragraphs 3 to 5. The plaintiff failed to even bring any reliable information about the time spent by him in preparation for the motion. In all the circumstances there shall be no costs of the motion.

MASTER R. DASH

cp/e/qlbxm/qlpwb

1 A calculation may be required by the court if the ground to oppose leave is that the judgment has been paid in full, but that is not the case here. It may also be required if there is clear and compelling evidence that the plaintiff has failed to account for a payment or has miscalculated the balance outstanding, in which case the court could issue directions or set terms as to the quantum when granting leave. If the evidence is contradictory, determination of the correct balance should be left to the garnishee hearing. In any event, in this case, the defendant has presented no evidence whatsoever as to the outstanding balance.

tab 9

Case Name:

Adelaide Capital Corp. v. 412259 Ontario Ltd.

Between
Adelaide Capital Corporation, and
412259 Ontario Limited, Frank Spadafora, Nicodemo Scali, Domenic Vaccaro and Nicodemo Bruzzesse

[2006] O.J. No. 4175

35 C.P.C. (6th) 389

155 A.C.W.S. (3d) 439

2006 CarswellOnt 6365

Court File No. 92-CQ-24637

Ontario Superior Court of Justice

Master R. Dash

Heard: October 11, 2006.
Judgment: October 18, 2006.

(21 paras.)

Counsel:

Michael J. Reid, for the plaintiff.

Nicodemo Scali, defendant in person.

ENDORSEMENT

1 **MASTER R. DASH**:-- This is a motion under rule 60.07(2) for leave to issue a writ of seizure and sale to enforce a judgment dated September 22, 1992. The plaintiff went bankrupt shortly after it obtained judgment. The assignee corporation took no steps to enforce the judgment after

February 1994 and allowed the original writ of seizure and sale to expire. The motion is resisted by the defendant Nicodemo Scali ("Scali").

BACKGROUND

2 The factual background is set out in two affidavits from Valerie McMullen, described as the plaintiff's agent, and from material filed by the defendant Scali. Although Scali's information is not provided in affidavit form, the plaintiff's solicitor has agreed that the court consider the information as if it were sworn, given that Scali is an unrepresented litigant.

3 On September 22, 1992 the original plaintiff, Central Guaranty Trust Company ("Central Guaranty") obtained default judgment on a mortgage debt against the defendants for $69,603.71 inclusive of costs with postjudgment interest at 11.75% and filed a writ of seizure and sale. On November 19, 1992 the mortgaged premises were sold under power of sale leaving a deficiency on the judgment debt of $16,328.47. In or about December 1992, Central Guaranty went bankrupt and, although the exact circumstances were never explained, Adelaide Capital Corporation ("Adelaide") took an assignment of Central Guaranty's receivables, including this judgment debt. There were "thousands of files to be worked on" and a reduced staff. Two employees of Adelaide, including Richard Mellor, went through the files and determined "which should be proceeded upon for enforcement forthwith. The remaining files were to be diarised to be proceeded upon at a later date." A recovery officer of Adelaide sent a letter to Scali on March 4, 2003 advising of Adelaide's involvement and of the outstanding balance (which was then $18,013.55) and presenting settlement options. This was followed by two letters from Richard Mellor, the manager of Adelaide's recovery department, dated January 5, 1994 and February 10, 1994 requesting a proposal failing which an examination in aid of execution would be conducted.

4 Nothing further was done by Adelaide to enforce the judgment for 12 years. The writ of seizure and sale filed by Central Guaranty expired in 1998 and had never been renewed. Although files not sent to immediate enforcement were diarised to proceed at a later date, Adelaide cannot explain why this did not happen other than the volume of files. Mr. Mellor is no longer employed at Adelaide. The only explanation given by Ms. McMullen is her statement: "I do not know why Richard Mellor did not renew the Writ or Writs of Seizure and Sale in this matter." She concludes with the bald assertion, but without explanation, that from conversations with John Richards, an officer of Adelaide, "the Plaintiff did not ever intend to abandon this matter."

5 In January 2006 Ms. McMullen did a credit check revealing that Scali became one of the owners of 5255 Marcel Crescent, Niagara Falls (the "Marcel property"). A title search revealed that the Marcel property was purchased in September 2005 for $227,500 subject only to a $150,000 charge to the Bank of Nova Scotia. Title was taken in the name of Nick John Scali and his wife Sarah Scali. Nick John Scali is admittedly the same person as the defendant Nicodemo Scali. In February 2006 Adelaide obtained an order to continue under rule 11.02 and Adelaide's solicitor filed a notice of change of solicitors. On February 14, 2006 the solicitor for Adelaide wrote to Mr. Scali inviting settlement discussions. The judgment with postjudgment interest had by now more than doubled to $42,183.31. The plaintiff then brought this motion for leave to issue a writ of seizure and sale (and to amend the title of proceedings to include Scali's alternate names). The motion was adjourned several times to allow for settlement discussions upon Scali's undertaking before Master Peterson on April 6, 2006 not to sell or encumber the Marcel property pending disposition of the motion.

6 Scali admits that he was served with the statement of claim in or about September 1992 and that he likely received the letters in January and February 1994 from Mr. Mellor which referred to a judgment debt. He heard nothing more about the judgment until Mr. Reid's letter to him in February 2006, some 12 years later. In February 2005 Scali and his wife borrowed $35,000 from CIBC to cover mortgage arrears on their previous home at 6424 January Drive, Niagara Falls ("the "January property"). It was repaid with a funds provided by the Scalis' daughter, Kara Scali in May 2005. The January property was sold in September 2005. It resulted in a surplus of $14,166, but this does not take into account the advance of money from Kara, which would result in a "net loss". The Marcel property was purchased at the same time for $227,500 using the following funds: $99,930 from the Bank of Nova Scotia, $11,722 net sale proceeds from the sale of the January property and $118,863 certified funds. The certified funds allegedly include money from Kara ($10,006 from a GIC, $67,181 from her bank account), from his son Jonathan Scali ($9,464 from a GIC) and from his mother-in-law Maria Grazia Biamonte ($30,000 from a GIC). Scali has provided bank records to document the source of the funds. Scali therefore claims that he has no "beneficial interest" in the property. I take that to mean that once the monies loaned to him by his children and mother-in-law are taken into account there is no equity left in the property. No charge was registered on title to protect any interest these "lenders" may have as a result of their "loans" and no declaration of trust was registered.

7 Scali has produced the sheriff's execution certificate obtained by his real estate solicitor at the time of closing showing no executions registered against Nick John Scali. Scali claims in his submissions that he relied on the fact that no executions were registered against him to take title in his name jointly with his wife. There is no specific evidence to that effect in Scali's written materials, however it is obvious that if the execution searches had revealed any writ of seizure and sale registered against Scali he would not have taken title in his name or he would have taken other steps to secure the family's "loans." If this motion is allowed and a writ of seizure and sale filed, the plaintiff will take priority over any unsecured interest of the family members subject to any determination that they have a beneficial interest held in trust by the registered owners.

THE LAW

8 Rule 60.07(1) provides that a judgment creditor may obtain one or more writs of seizure and sale without court order, however pursuant to rule 60.07(2) leave of the court must be obtained if the writ is sought more than six years after judgment. Rule 60.07(2) provides:

> (2) If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of seizure and sale shall not be issued unless leave of the court is first obtained.

9 The writ itself is in force for six years from the date of its issue: rule 60.07(6). The writ may be renewed without court order if a requisition is forwarded to the sheriff before its expiration: rule 60.07(8). If the plaintiff fails to renew with the sheriff before the expiration of the writ the plaintiff may seek leave of the court under rule 60.07(2) to issue the writ: *Colombe v. Caughell* (1985), 52 O.R. (2d) 767 (D.C.O.); *Canada (Attorney General) v. Palmer-Virgo*, [2003] O.J. No. 1238 (S.C.J.). This is sometimes referred to as an "alias writ" and such writ would be in effect only from the date of its issuance so as not to affect intervening rights of third parties. The criteria for the exercise of the court's discretion to issue the writ is "the interests of justice": *Colombe*, supra, at p. 770.

10 In *Royal Bank of Canada v. Correia*, [2006] O.J. No. 3206 I set out the test for granting leave to issue a notice of garnishment under rule 60.08(2) more than six years after judgment. The section is almost identical to rule 60.07(2) and in fact *Royal Bank of Canada v. Correia* was based on a decision under rule 60.07(2): *Ballentine v. Ballentine* (1999), 45 O.R. (3d) 706 (S.C.J). In my view the test for the exercise of the court's discretion is the same under rules 60.07(2) and 60.08(2) and is set out in paragraph 6 of *Royal Bank of Canada v. Correia* as follows:

> Therefore, when a plaintiff seeks leave under rule 60.08(2) to issue a notice of garnishment more than six years after the date of judgment, he must adduce evidence explaining the delay such the court may conclude that the plaintiff has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The defendant may raise other grounds to convince the court that it would be inequitable to enforce the claim. For example the defendant could demonstrate that he has relied to his detriment or changed his financial position in reliance on reasonably *perceived* acquiescence resulting from the delay. Of course the onus would be on the defendant to adduce evidence of such reliance and detriment.

11 The plaintiff argues that the judgment itself remains valid and it should not be denied the fruits of its judgment by denying it an enforcement mechanism. The judgment, at the time it was granted, was subject to the former *Limitations Act*, R.S.O. 1990, c. L.15 section 45(1)(c) which provided a limitation period of twenty years for actions on a judgment. Under the new *Limitations Act 2002*, S.O. 2002, c. 24 Schedule B section 16(1)(b) there is no limitation period to enforce an order of the court. Pursuant to section 24(4) the new "no limitation" provision applies provided that the earlier limitation period had not expired as of the date that the new act came into force. On the other hand, it appears that sections 15(1) and (2) of the new *Limitations Act* applies and there is an ultimate limitation period of 15 years despite any other limitation period established by the new act. It is not necessary for me to decide whether the limitation period is 15 years or 20 years or if there is no limitation period since it has been less than 15 years since the judgment. The limitation period for action on this judgment has not expired. This means that even if the judgment cannot be enforced by obtaining and renewing writs of seizure and sale either without court order because more than six years have passed or alternatively by obtaining an order of the court under rule 60.07(2) because leave is refused, the plaintiff may still bring action on the judgment and obtain a fresh judgment thereon: *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.) at paragraphs 23 to 25. If a new judgment were obtained the plaintiff could then cause the issuance of a writ of seizure and sale without court order.

12 While the fact that the judgment remains in force is an important factor to consider, the court must still exercise its discretion in determining whether to grant an indulgence to the plaintiff by granting leave. As stated in *Palmer-Virgo*, supra, at paragraph 16:

> While I am still of the view that it is incongruous that the plaintiff should be seriously jeopardized in his efforts to realize the fruit of his judgments, which are in force for 20 years, because of a failure to comply with procedural requirements for enforcement, the granting of relief from procedural requirements still remains a matter of discretion.

13 The test in *Royal Bank of Canada v. Correia* therefore sets a very low evidentiary threshold for a judgment creditor to obtain leave. The plaintiff need only explain the delay such that the court may conclude that the plaintiff has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment." It would be a rare case when a plaintiff could not meet that test. If the plaintiff meets the test the onus is then on the judgment debtor to convince the court that "he has relied to his detriment or changed his financial position in reliance on reasonably *perceived* acquiescence resulting from the delay."

CONCLUSIONS

14 Mr. Reid suggests that the appropriate remedy is to grant leave but reduce the postjudgment interest rate to the average rate in the intervening years (approximately 6%). I disagree. In my view this is that rare case where the plaintiff has not met even the very low evidentiary threshold set out in *Royal Bank of Canada v. Correia.* The volume of files and reduction of staff presenting to Adelaide following the bankruptcy of Central Guaranty in or about December 1992 and the diarising of files "to be proceeded upon at a later date" is the only "explanation" proffered for its failure to enforce the judgment for over thirteen years other than a few demand letters in 1993 and early 1994. This does not amount to an explanation at all of the delay or whether Adelaide had acquiesced in non-payment or otherwise waived its rights under the judgment. At best it is an explanation as to why it cannot provide an explanation. In fact, Ms. McMullen admits in her affidavit that she is unable to explain why Adelaide failed to enforce the judgment between the last demand letter in February 1994 and the new demand some twelve years later in February 2006 or why the writ was not renewed prior to its expiry. When Adelaide took an assignment of the "thousands" of files from Central Guaranty it had decisions to make - namely which debts to enforce, which debts not to enforce and which debts upon which to delay enforcement. It is clear that there was a initial deliberate decision not to undertake immediate enforcement of this judgment debt, but it is unclear whether enforcement was not revived for another twelve years as a result of a deliberate decision or inadvertence. The bald assertion by Ms. McMullen that from conversations with John Richards, an officer of Adelaide, she was able to conclude that the plaintiff "did not ever intend to abandon this matter" is insufficient. She does explain Richards' involvement, if any, with this file, what conversations she had with Richards and what evidence Richards has to support his contention. Richards has not provided his own affidavit. Further, Ms. McMullen does not attest to her belief in Richards' assertions contrary to rule 39.01(4). I am not able to conclude on the meagre evidence before me that Adelaide has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment."

15 Even if I had determined that Adelaide had satisfied this low evidentiary threshold, I would still refuse to exercise my discretion and grant leave to issue a writ of seizure and sale since Scali has satisfied me that having heard nothing for twelve years, he clearly "relied to his detriment ... in reliance on reasonably perceived acquiescence resulting from the delay." He would never have taken title to his home in his own name had the execution search received prior to closing revealed a writ of seizure and sale against him. Further, or in the alternative, he would have taken steps to secure the interest of family members who advanced the purchase funds. It would not be in the interests of justice to now grant leave to the plaintiff to issue a writ of seizure and sale in these circumstances.

16 The plaintiff of course is not without remedy. Even though the plaintiff may be prevented from enforcing the current judgment, it may still bring action on the judgment (*Lax v. Lax*, supra)

and if a new judgment is obtained it may obtain a writ of seizure and sale without leave of the court. The defendant Scali may then raise various defences including laches and acquiescence. In the interim, given the absence of a writ of seizure and sale, Scali may take steps to undo the damage from his detrimental reliance, for example by securing the interests of his family members. If the plaintiff obtains a new judgment and challenges any transfer or encumbrance on title, for example on the basis that Scali had a beneficial interest in the funds provided by his children or that the encumbrances constitute a fraudulent preference, that will be the subject matter for another court at another time.

17 The motion for leave to issue a writ of seizure and sale is denied. Even if I had granted leave, I would have done so on the condition that no interest run from the date of expiry of the writ of seizure and sale to the date of its renewal, as was done in *Palmer-Virgo*, supra, at paragraph 5. I would have allowed interest to run on the new writ only at the postjudgment interest rate in effect for current judgments.

ANCILLARY RELIEF AND COSTS

18 The plaintiff also moves to amend the title of proceedings and the writ of seizure and sale to indicate that the defendant Nicodemo Scali is also known as Nick John Scali and Nicholas Scali. I am satisfied on the evidence of the plaintiff and of the defendant that Scali has used and is known by the name Nick John Scali and the title of proceedings will be amended accordingly. Scali does not oppose such amendment. As leave was denied to issue a writ of seizure and sale there is no writ to amend. There is no evidence that Scali has used the name Nicholas Scali.

19 The solicitor for the plaintiff submits that whether the order is granted or refused I should make an ancillary order to vacate the order of Master Peterson dated April 6, 2006. The operative part of that order is simply an order adjourning the motion. The concern of course is the recital in the preamble that the order adjourning the motion was on consent "on the undertaking" of Scali to preserve the Marcel property and "that he will not facilitate the sale or encumbrance of that home pending the disposition of this matter or further Order of the Court." The undertaking does not form part of the operative part of the order. The order was then registered on title on May 2, 2006 pursuant to an "Application to Register Court Order" presumably to give notice of Scali's undertaking to non-parties who may wish to deal with the land. In my view the appropriate disposition is to vacate registration of the order, rather than setting aside the order itself. For greater certainty I also order that Scali is now relieved from his undertaking. If a further order is required to give effect to the intent of my disposition I may be spoken to.

20 Although the defendant Scali was successful on the motion it does not appear to be an appropriate case for costs, particularly as Scali has apparently made no effort to satisfy even the principal portion of the judgment. Further, Scali was self represented on this motion. Although a self represented litigant may be awarded costs in the discretion of the court for work that would normally be done by a solicitor, he must demonstrate that he "incurred an opportunity cost by forgoing remunerative activity": *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.) at p. 339-340. Nonetheless either party should have the opportunity to make submissions. If costs cannot be agreed, I would be prepared to receive submissions from either party, supported by a Costs Outline and applicable receipts and other documentation. If submissions are not received within 14 days there shall be no costs of the motion. If costs submissions are made, any responding submissions must be received within seven days thereafter.

ORDER

21 It is hereby ordered as follows:

(1) The plaintiff's motion for leave to issue a writ of seizure and sale is dismissed.
(2) The defendant Nicodemo Scali is hereby relieved from his undertaking recited in the order of Master Peterson dated April 6, 2006.
(3) Registration of the Application to Register Court Order receipted as SN118948 on May 2, 2006 attaching the order of Master Peterson dated April 6, 2006 shall be vacated from title.
(4) The title of proceedings is amended by adding after the name of the defendant Nicodemo Scali the words "also known as Nick John Scali".
(5) Submissions as to costs may be made within 14 days and any responding submissions within seven days thereafter.

MASTER R. DASH

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tab 10

Indexed as:

Royal Bank of Canada v. Soundair Corp.

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

[1991] O.J. No. 1137

4 O.R. (3d) 1

83 D.L.R. (4th) 76

46 O.A.C. 321

7 C.B.R. (3d) 1

27 A.C.W.S. (3d) 1178

1991 CanLII 2727

Action No. 318/91

Court of Appeal for Ontario

Goodman, Mckinlay and Galligan JJ.A.

July 3, 1991

Counsel:

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

1 **GALLIGAN J.A.**:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY IN AGREEING TO SELL TO OEL?

14 Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court.

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

22 I also agree with and adopt what was said by Macdonald J.A. in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

23 On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922.

An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

39 It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids

> could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

51 The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the bal-

ance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and- client scale. I would make no order as to the costs of any of the other parties or interveners.

72 MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R.

(4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

74 GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally

superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

79 In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of

> competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

90 Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

93 In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplat-

ed by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

99 In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

101 On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

105 It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been pre-

pared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

109 In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having nego-

tiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

114 It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the interlender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

115 In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

116 In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a

> case the proper course might be to refuse approval and to ask the trustee to re-commence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a dif-

ferent process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

tab 11

Indexed as:

British Columbia v. A & A Estates Ltd.

Between
Her Majesty the Queen in Right of the Province of British Columbia, petitioner (respondent), and A & A Estates Ltd., A & A Foods Ltd., Canadian Western Bank, City of Kamloops, Giovanni Camporese, AIC International Resources Corporation, 415669 B.C. Ltd., *592123 B.C. Ltd., *Baron Enterprises Ltd., British Columbia Wilderness Tours Inc., respondents (*appellants)

[1999] B.C.J. No. 2923

71 B.C.L.R. (3d) 92

28 R.P.R. (3d) 247

93 A.C.W.S. (3d) 748

Kamloops Registry No. 22963

British Columbia Supreme Court
Kamloops, British Columbia

D.M. Smith J.

Heard: November 22 and 25, 1999.
Judgment: December 8, 1999.

(89 paras.)

Mortgages -- Statutory and contractual rights -- Sale under power of sale -- Conduct of sale -- Method of sale -- Who may purchase -- Court approval of sale -- Setting aside sale.

This was an appeal by 529123 BC and Baron Enterprises from the approval of a sale of a parcel of land. The owners of the land were in arrears of property taxes to the City of Kamloops. BC was the mortgagee of the land and foreclosed on the property. It then attempted to sell the property. One of the buildings on the land contained asbestos and would cost approximately $1.2 million to clean up. BC's $11-million mortgage took priority over the outstanding municipal taxes owed to the City of

Kamloops. The City and believed it had an agreement with BC that its interests would be protected in any sale. BC offered the parcel to the City for one dollar, if the City cleaned up the site, but the City refused the offer. In 1999, after five weeks of negotiations and about $100,000 in expenses, 529123 made an offer to purchase the property and to undertake the environmental clean-up. A court approval hearing was scheduled. The City was notified of the hearing. It sought an adjournment so that it could negotiate with BC to protect its interests. The Master was under the impression that the City sought an adjournment in order to consider whether it would make an offer to purchase. The Master decided to adjourn the matter and convert the sale into a sealed bid process. At the bidding process, the bidders were not given the opportunity to make representations. 529123's and Baron's bids were unsuccessful.

HELD: Appeal allowed. 529123's initial offer was approved. 529123 had made the first offer. Absent competing offers on the first hearing date, the Master should not have granted the City's adjournment request. The Master was misled into believing that the City's adjournment request was for the purposes of considering whether to make an offer to purchase the property. In granting the adjournment and converting the sale into a sealed bid process, the Master failed to consider 529123's interests, which had expended time and money to negotiate an offer to purchase and essentially had to begin the process again. Even if the conversion of the sale process was appropriate, the bidders were entitled to make representations when the tenders were opened and the court considered which bid to approve.

Statutes, Regulations and Rules Cited:

Municipal Act, R.S.B.C. 1996, c. 323, s. 396.

Counsel:

R.A. Chorneyko, for the appellant, 592123 B.C. Ltd.
J. Zak, for the appellant, Baron Enterprises Ltd.
B. Ross, for the respondent, City of Kamloops.
E. Harris, for the respondent, Province of B.C.
R. Cundari, for the respondent, British Columbia Wilderness Tours Inc.

[Ed. note: A Corrigendum was released by the Court December 17, 1999; the corrections have been made to the text and the Corrigendum is appended to this document.]

D.M. SMITH J.:--

INTRODUCTION

1 A well-known and unique parcel of real estate in the Kamloops area, commonly referred to as the Tranquille property ("Tranquille"), was ordered sold on October 18, 1999. The Master's order was made pursuant to an application by the first mortgagee, the Province of British Columbia ("the Province") for a court-approved sale in a foreclosure proceeding. The Province recommended to the court that a sale be approved to 592123 B.C. Ltd. ("592123 Ltd.") for $492,160 plus environmental clean-up costs estimated by the Province at $1,008,800. Those costs are associated with the removal of asbestos and underground storage tanks on site.

2 On September 27, 1999, the Province's application was adjourned and the sale of Tranquille converted to a sealed bid process. The bids were to be submitted to the Province by 4:00 p.m. on October 13, 1999. On October 4, 1999, the court directed the form of the bids be the same as the one in which the offer of 592123 Ltd. was made. On October 18, 1999, the order for sale was granted.

3 The successful and highest bidder was British Columbia Wilderness Tours Inc. ("B.C.Tours"). It submitted a bid for the sum of $1,150,000. As well, B.C. Tours agreed to assume responsibility for environmental remediation costs. The Province recommended the court approve the sale to B.C. Tours Ltd.

4 Two of the unsuccessful bidders, 592123 B.C. Ltd. and Baron Enterprises Ltd. ("Baron Enterprises") have appealed the order of October 18, 1999. 592123 Ltd. offered $1,100,000 in the sealed bid process. Baron Enterprises offered $850,000 in cash and a reversionary interest in certain parcels of the Tranquille lands to the City. It valued those lands at $470,000.

5 592123 Ltd. seeks to set aside the order for sale because of alleged misrepresentations made to the court on September 27, 1999. It submits those misrepresentations amounted to an abuse of the judicial process and caused the court to grant a three week adjournment of the Province's application in support of a court-approved sale to 592123 Ltd. 592123 Ltd. also submits the court erred in converting the application for a court-approved sale, to a sealed bid process, in the absence of any competing offers to the court on September 27, 1999, when the adjournment was granted.

6 Baron Enterprises seeks to set aside the order for sale on the basis that its bid was not considered by the court because it did not present the highest cash offer. It claims the total value of its bid was higher than that of B.C. Tours. It further claims the process was flawed for two reasons: (1) the court did not make it clear that price would be the determinative factor; and (2) the court failed to consider or hear submissions in support of its bid merely because the cash component of its offer was not the highest. It submits the court failed in its obligation to evaluate the competing offers.

7 The Respondents Province, City of Kamloops and successful bidder, B.C. Tours, apply for an order dismissing the appeals. They submit 592123 Ltd.'s complaint is with the orders of September 27, 1999, and October 4, 1999, neither of which were appealed. (Formal orders for the September 27, 1999, and October 4, 1999, appearances were never drafted or filed.) The Respondents submit that 592123 Ltd. participated in the bid process and is now estopped from making any claims against that process. In response to Baron Enterprise's claim, they further submit it was clear from the court's directions for the sealed bid process that price would be the determinative factor subject only to submissions regarding equitable factors if the Province sought approval for sale to a party other than the highest bidder.

8 Both appellants seek to introduce further affidavit evidence. Additional affidavits were also filed by the City in reply to the appellants' new affidavits. In view of the serious issues raised in these appeals, I have concluded that the test in Culbert v. Agosti (1993), 20 C.P.C. (3d) 349 (B.C.S.C.) has been met. I find the interests of justice require the introduction of this fresh evidence in the re-hearing before myself.

9 On the narrow issue of whether this Court has jurisdiction to, in effect, review the orders of September 27, 1999, and October 4, 1999, under the guise of an appeal of the order of October 18, 1999, I have concluded that it does. The appeals involve a rehearing of the application by the Province for an order for sale to 592123 Ltd. This Court has original jurisdiction to substitute its discre-

tion for that of the Master's when the order being appealed is one of the final orders a Master is permitted to make: Sun Life Savings and Mortgage Corp. v. Sampson (1991), 59 B.C.L.R. (2d) 355 (S.C.).

10 In view of the appellants' allegations of misrepresentations and irregularities in the process, the rehearing must necessarily involve an examination of the process by which the final order of October 18, 1999, was reached. A fundamental principle of law, as stated in the Canadian Encyclopedic Digest (West 3rd) at 39-124, provides that:

> Every superior court has, incident to its jurisdiction, an inherent right to inquire into and judge the regularity or abuse of its process.

BACKGROUND

11 Tranquille encompasses 188 hectares of land which have historical and recreational significance to the residents of Kamloops. Sizeable portions of land are subject to the Agricultural Land Reserve. From its inception, until the early 1980's, it was used as a public facility, including a tuberculosis sanitorium and a mental health facility. Since its closure, the Province has embarked upon a variety of processes to market the site.

12 The geographical area encompasses some unique features. The north-most parcel of the site includes Pine Valley which was mined extensively for gold by Chinese immigrants and prospectors in the mid-1800's. Ruins of mining sites, sluice boxes and artifacts of this nature are scattered throughout the valley and neighbouring properties. The southwest parcel includes Cooney Bay which is located along the northeast shore of Kamloops Lake at the confluence of the Thompson River. It is used by residents, visitors and tourists alike for picnicking, boating and water sports. It is the only public access to Kamloops Lake other than the two provincial parks located near Savona. Access to Kamloops Lake is otherwise restricted by the railway lines and accompanying rights-of-way that border the entire lakeshore, coupled with the generally steep and rough terrain that surrounds the lake.

13 In 1991, the Province sold Tranquille to A & A Estates Ltd. for $8 million. The sale price was based on a 1989 appraisal of $6.5 - $7.5 million. The Province took back a first mortgage of $7.7 million against the property. Pursuant to s. 396 of the Municipal Act, R.S.B.C. 1996, c. 323, the Province's mortgage takes priority over any outstanding municipal taxes. This provision removes the usual security a municipality has to collect its outstanding taxes before a lender recovers under its mortgage. On property where the Province holds a registered mortgage, the municipality stands behind the lender in priority for collecting outstanding taxes.

14 When Tranquille was sold to A & A Estates Ltd., the Province anticipated that private ownership of the site would lead to investment and development of the property. However, this did not happen and the expectation of a "highest and best use" assessment was eventually abandoned. In the intervening years, the asbestos-lined buildings that once housed the sanitorium have deteriorated. They now have the appearance of ramshackle and derelict buildings on unattended and unkempt farmland.

15 On July 27, 1998, the Province obtained an order nisi of foreclosure with a one day redemption period. It also obtained an order for conduct of sale. The appraised value of the property at the time of the order nisi was $2.2 million. Its value had decreased from an appraised value of $2.5 million in October 1995 when the foreclosure proceeding was commenced. The outstanding amount

owed to the Province was $9,998,252.72 and a per diem of $2,535.13. The amount now owing exceeds $11,000,000. The Province's application for judgment against the owners, A & A Estates Ltd. and its principal, Giovanni Camporese, was adjourned generally. Their liability on the mortgage was eventually settled outside the foreclosure proceeding.

16 At the time the order nisi was granted, the City of Kamloops was also added as a party. However, as an unsecured creditor it had no expectation of recovering its outstanding taxes of over $1 million in the foreclosure action. Since the Province never had the property reassessed, taxes had remained high based on an earlier assessed value that was greater than the current value of the property. Those anticipated tax revenues had remained in the City's budgets and had been spent. In the absence of any recovery of those taxes, the only way the City could recoup its losses was to raise taxes on other properties within its boundaries or to reduce expenditures.

17 To minimize its loss, the City took steps to establish a special relationship with the Province in an attempt to collect its outstanding taxes. In a letter dated August 10, 1998, the Province agreed to pay all of the City's outstanding taxes when Tranquille was sold through a court-approved sale and vesting order. The Province concluded by stating:

> If the Province's intentions change, I will let you know immediately; but I cannot imagine why there would be any change.

18 On December 31, 1998, the City of Kamloops was obliged through a tax sale to assume title to three of the five blocks of land that make up the Tranquille site. Before that occurred, the City and Province struck a deal to have the Province continue to manage the property. Mr. Walters, the Regional Manager of the Land Sales Division with the British Columbia Assets and Land Corporation, wrote to Mr. Diehl of the City's Development Services Department, that in consideration of the City retaining title to the properties, the Province would, up to April 30, 1999, continue to manage the property (e.g. pay for security, dam operation and B.C.Hydro) and pay the outstanding taxes (less penalties and interest) from any sale proceeds. The management costs amounted to approximately $20,000 each month. The City's outstanding taxes, less penalties and interest, were calculated to be about $850,000. The letter concluded:

> As discussed, we should work to reach agreement on our mutual interests if the Tranquille property does not sell during this period.

19 Since April 30, 1999, the City states it has received verbal assurances from the Province that the terms and conditions of the letter of December 24, 1998, were being extended. The Province does not deny this statement.

20 The Province actively marketed the property by listing it with a local professional realtor at a price of $3 million. The listing continued until August 1, 1999. The property was listed on the Kamloops and District Multiple Listing Service, advertised weekly in the Kamloops News Real Estate Review, advertised monthly in the Western Investor, advertised continually world wide on the RE/MAX Website, displayed on the RE/MAX Profiler System and promoted by sending information packages to potential customers around the world. The listing did not specify a minimum upset price of $850,000, to cover the City's outstanding taxes.

21 In 1998 there was some interest in the property when the Province received a significant offer. However, the offeror was unable to come up with the deposit and the proposal collapsed.

22 In addition, from October 1, 1998, onward, Mr. Walters, as agent for the Province, also actively promoted the property. His efforts included communicating with previous prospects and those parties who desired to have the confidentiality of negotiating directly with a government contact. 592123 Ltd. was one of the prospects called by Mr. Walters.

23 Independent of the foreclosure proceeding, the Province negotiated with the City regarding the sale of Tranquille. 592123 B.C. Ltd. was unaware of these negotiations and the City was unaware of the Province's discussions with 592123 B.C. Ltd.

24 In early 1999, the Province offered to sell Tranquille to the City for $1 if the City assumed the environmental remediation costs. In reply to that verbal offer, on March 11, 1999, the City wrote the Province offering to purchase the property for $1 if the Province agreed to indemnify the City for the environmental remediation costs. The City did not receive a response to its offer.

25 Following the order nisi, the communications which took place between the Province and the City were confirmed by Mr. Diehl in his affidavit filed November 25, 1999. In paragraph 3 he stated:

> Since the Province of British Columbia (hereinafter called the "Province") took the Order Nisi in this action on July 27, 1998, the City has been negotiating with the Province on many aspects of the Tranquille Lands including: ownership, taxes, contamination, maintenance, parkland dedication, Cooney Bay access, water and sewer systems, security, land use, marketing and management.

26 Also, in paragraph 6 of that affidavit, Mr. Diehl stated:

> As early as the second week of September, 1999, I met with Mr. Peter Walters on the Tranquille Lands, inspected them and continued to discuss possibilities for the resolution of the City's and Province's interests in the Tranquille Lands.

27 In the meantime, the principals of 592123 Ltd. were negotiating directly with Mr. Walters. In the five weeks between 592123 Ltd.'s first draft offer and the final Offer to Purchase Agreement signed by 592123 Ltd. and the Province on September 14, 1999, 592123 Ltd. was able to negotiate a number of cost-savings changes:

1. The completion date was set for December 1, 1999 or the 7th day following satisfaction or waiver of the Conditions Precedent; (this amendment ensured the continued management services by the Province until the end of December 1999 at $20,000 per month)
2. The deposit was decreased from $50,000 to $10,000;
3. The requirement for a park was replaced by a provision for the right of public access to the east side of Tranquille River fronting Kamloops Lake; (the estimate of these savings was a capital expenditure for a park of $60,000 and annual maintenance costs of $10,000)
4. The requirement that the remediation work be completed in 5 years was increased to 10 years and the requirement of a written report on remediation efforts was decreased from twice a year to once a year; (these savings were estimated at $30,000 per year)

5. The irrevocable letter of credit was negotiated down from $500,000 to $250,000.

28 The Province agreed to all of the above changes as part of 592123 Ltd.'s offer of $492,160 in cash and assumption of the environmental remediation costs. Included in 592123 Ltd.'s proposal was the demolition of the institutional buildings at an estimated cost of $1.2 million.

29 After more than a year of marketing efforts, 592123 Ltd.'s offer was the first one received by the Province that had progressed to the point of seeking court approval. While there had been other offers on the property, the interested purchasers had been unable to secure financing or for other reasons had been unable to proceed further with negotiations.

30 Before finalizing its offer, 592123 Ltd. had expressed a concern to Mr. Walters that when its offer was made public another party might use the offer as a bench mark to present further offers. 592123 Ltd. had spent about $100,000 in its due diligence efforts and wanted the Province's application for a court-approved sale to its company to be determined when it was first presented to the court. Mr. Walters assured the principals of 592123 Ltd. there were no other interested purchasers and that its offer would not be made public until the morning the application was heard. He assured 592123 Ltd. the Province would neither seek nor consent to an adjournment of its application unless another prospective purchaser showed up in court that day with a final offer and a deposit cheque in hand.

31 This agreement was reflected in part by the following terms of the Offer to Purchase Agreement:

2.3 The Province's obligations under this Agreement are limited to the following:

(a) on acceptance of the Purchaser's offer, to file in Court evidence in support of the motion [for an order approving the sale of the Land to the Purchaser on the terms and conditions set out in this Agreement]...and to make submissions to the Court in regard to that motion...

2.4 For greater certainty, nothing in this Agreement precludes the Province before or after accepting this offer from accepting an offer of purchase and sale from, or making submissions to the Court in favour of an order approving the sale of the Land to someone other than the Purchaser.

32 Mr. Walters' assurances to 592123 B.C. Ltd. were not completely accurate and were not, of course, binding on the court. He omitted to advise 592123 Ltd. that as the City was a respondent in the foreclosure action, it would have to be served with the application before the hearing date.

33 The City was served with the Province's application on September 21, 1999. The hearing of the application was scheduled for September 27, 1999. Immediately, 592123 Ltd.'s offer became public and other parties, who heretofore had not shown any interest in negotiating for the purchase of Tranquille, suddenly became interested.

34 Mr. Diehl was shocked by the Province's application which effectively ignored the City's hand-shake agreement with the Province for payment of the City's outstanding taxes. But for that agreement, the City had no way of recovering those taxes, given the Province was owed more than $11 million on a mortgage which took priority over the City's claim.

35 The City had a regularly scheduled council meeting for the evening of September 21, 1999. The proposed sale of Tranquille by the Province was at the top of its agenda. Not surprisingly, council members were upset the Province was able to proceed with its application and in effect leave the City holding the bag for its outstanding taxes. The City had understood from the letter of August 10, 1998, that it would be consulted by the Province if the City's outstanding taxes would not be paid from the proceeds of a court-approved sale. While the City may have been "lulled" into believing that it would be consulted by the Province on any court-approved sale of Tranquille, this assurance was not expressly reiterated in the Province's subsequent letter of December 24, 1998.

36 At the council meeting of September 21, 1999, the City solicitor advised the City against making an offer to purchase the property. The City had also earlier reached this conclusion when it rejected the Province's offer to sell the site for $1 plus remediation costs.

37 City council passed two resolutions that evening. The first instructed the City solicitor to request an adjournment of the application scheduled for hearing on September 27, 1999, to enable council to further consider its options. The second instructed its administration to immediately arrange an appointment with the Attorney-General or other appropriate Ministers and that the City's solicitor be in attendance.

38 Mr. Diehl subsequently met with the Province's officials and negotiated a tentative agreement that secured the payment, in part, of the City's outstanding taxes. He reported on the terms of the agreement at the City council meeting of October 12, 1999. That agreement was ratified by council.

39 The agreement provides that the Province will pay the City one half of any proceeds from the sale of Tranquille on the first $600,000; if the sale proceeds are greater than $600,000 but less than or equal to $1,169,000, the Province will pay $300,000 plus the difference between the total amount of the sale proceeds up to $1,169,000 and $600,000. On B.C. Tours' bid of $1,150,000, the City would recover $850,000; on 592123 Ltd.'s first proposal the CIty would recover $214,580; on 592123 Ltd.'s bid of $1,100,000 it would recover $800,000.

40 As soon as 592123 Ltd.'s offer became public, several parties expressed an interest in making offers on the property. On September 23, 1999, the City received letters from two local law firms advising of clients who had received a copy of 592123 Ltd.'s offer to purchase and now wished to make their own offers. One letter stated it would make an offer in the same format as 592123 Ltd.'s, but with an increased offer price. Both asked the City to apply for an adjournment of the hearing on September 27, 1999, to give their clients an opportunity to complete their due diligence and prepare their offers. One law firm confirmed they were holding a deposit of $10,000 in trust.

THE APPLICATION

41 At the September 27, 1999, court appearance, counsel for the City objected to the Province's application proceeding. He applied for an adjournment on the basis that the City had been taken by surprise with the application and, in particular, the lack of consultation by the Province regarding a sale of Tranquille. He stated he was also surprised by the low offer accepted by the Province when the property had been listed for sale at $3 million. He submitted the City needed time to consider whether it should make its own offer in order to protect its tax arrears of over $1 million. He also advised the court that since 592123 Ltd.'s offer had been made public, other offers had come forward which were more beneficial to both the Province and the City, depending upon their terms. The court was provided copies of the two letters from the law firms whose clients had expressed an interest in preparing offers. Counsel for the City also advised the court that he had been contacted by a local realtor who said he had several clients also wanting to put in offers. No offers were produced to the court.

42 Counsel for the Province expressed some sympathy for 592123 Ltd.'s position as it was clear by then that if the adjournment request by the City was granted, 592123 Ltd.'s offer was going to be used as a spring board for other interested parties. Although Mr. Walters had assured 592123 Ltd. the Province would not agree to any adjournment of its application unless another interested party came to court with a better offer and deposit cheque in hand, counsel for the Province effectively consented to the adjournment request. She further advised the court there were other offers "out there" and that the Province had received some themselves.

43 At the rehearing, counsel for the Province admitted her choice of words could have been better and that in fact the Province was not in receipt of any offers, but only expressions of interest. I do not find the representations by the Province or the City, that other offers had been made, to have been misleading. It was clear from the letters produced to the court by the City, that their representations referred to interested parties who wished the opportunity to make offers.

44 However, neither counsel for the City nor the Province advised the court of the negotiations which already had transpired between them over the past several months and that the Province's offer to sell the property to the City for $1 had been rejected. Additionally, the City did not advise the court of the results of the council meeting of September 21, 1999. The lack of disclosure concerning these facts, in my view, was material to the City receiving its adjournment request.

45 The City's solicitor had expressly recommended council not make an offer to purchase the property. No resolution was passed instructing administration to prepare an offer for the purchase of Tranquille. The City's interest was primarily to secure an agreement with the Province concerning the payment of its outstanding taxes. Mr. Diehl's subsequent meeting with Ministry officials was solely for the purpose of securing such an agreement.

46 By comparison, the impression left with the court was that the City had never been given the opportunity by the Province to consider whether to make an offer for the property. The City stated it had been "lulled" into believing that its outstanding taxes were protected by the verbal assurances of the Province. The City submitted that because it had over $1 million "invested" in Tranquille, which it stood to lose if 592123 Ltd.'s offer to purchase was approved, it needed the adjournment in order to determine if it should make its own offer for the property.

47 Given the several potential offers for the purchase of Tranquille which surfaced only after 592123 Ltd.'s initial offer became public, the court decided the only way to maximize the return to

the creditors was to convert the sale to a sealed bid process. Contrary to its agreement with 592123 Ltd., the Province agreed to the City's adjournment request. However, the Province was the only creditor in the foreclosure proceeding who realistically stood to collect more by a higher offer. The City's recovery of its outstanding taxes, although based on a graduated formula of the sale proceeds realized, resulted from an agreement negotiated outside the foreclosure proceeding.

48 In granting the adjournment, the court stated at page 24 of the September 27, 1999, Transcript of Proceedings:

> The present offerors, the province and the City and anybody else who makes an offer will have an opportunity to argue why their offer is better or worse than another and the price may not be the only consideration in dealing with offers that are presented.

49 Again, on page 36 of the Transcript of Proceedings, in answer to a question from counsel for the City about whether the Province would be permitted to make representations as to which offer they wished to have the court accept, the court commented:

> They'll [the Province] be in a position to make representations if they wish to. Any of the parties that have made offers will be in a position to argue about what offer should be accepted on that particular date. In other words, if the Province prefers one purchaser for what appears to be an inappropriate reason, the other purchaser, if they think their offer was better, should be in a position to argue to the contrary.
>
> The Province is in a position where, if they wish, they could simply short circuit the whole proceeding by applying for their order absolute and then they would be the owners and entitled to sell to anybody they wished on any terms that they felt they could justify. But failing that and if the court is involved, then the court has to - and has a discretion to exercise - has to do it based on some sort of evidence and try to determine that it is an appropriate offer. Whether it's the highest offer or not may not be determinative. It's an unusual method of proceeding, but it's an unusual foreclosure.

50 While the court expressly stated it would not conduct an auction, it did state that on October 18, 1999, it would listen to submissions which might include a consideration of equitable factors other than price.

51 There followed some discussion about whether the terms of the bid were variable and that issue was adjourned for a week in an attempt to see if the interested parties could agree on those terms. Eventually, on October 4, 1999, the court determined that all bids would be in the form initially submitted by 592123 Ltd., except for price, which would be variable. Again, in answer to further inquiries the court stated:

> The variable will be the price and I assume from the Province's point of view, their own view of the ability of the proposed purchaser to complete and to live up to the ongoing obligations. The price in this case isn't the only consideration that's being offered for the property.

52 The court further directed that after the sealed bids had been tendered to the Province by 4:00 p.m. on October 13, 1999, the Province was required to advise each bidder of the identities of the other bidders. The court permitted the Province to inform itself as to the price of each bid. This deviation from the usual bidding process was allowed in order for the Province to investigate the financial capacity of a party with whom it might have to be in a special relationship over the next 10 years. However, the Province was prohibited from disclosing that information to any of the other bidders.

53 On October 1, 1999, counsel for the City forwarded a letter to those parties who had expressed an interest in submitting an offer. The letter enclosed a format for the offers to be presented to the court and further stated that, "The Court has directed us to have a common offer, save for price, for all parties so that the Court would be able to compare the Offers and award the sale to the Offer with the highest price."

54 Following the hearing on October 4, 1999, counsel for the City sent out another letter in which he reported on some minor changes to the process for delivery of offers. In addition, he included the following clarifications:

> 4. At the Chambers Hearing on October 18th, the Provincial Government will be entitled to make representations as to why the highest offer should not be accepted if the Government wishes to have as the purchasing party an offeror other than the highest offeror.
> 5. Should the highest offer not be acceptable to the Provincial Government then the bidder making the highest offer would also be entitled to make representations as to why the Provincial Government should find their offer acceptable.
>
> This unusual procedure was outlined by the Court as it was recognized that the cleanup of the Tranquille Lands may take some years and the Provincial Government should be satisfied with the party undertaking the cleanup obligations. It would be wise for any bidders to include with their bid information and particulars on their expertise regarding land development and site remediation.

55 On October 18, 1999, the court was advised the City had not made a bid. The court then reviewed the bids from 592123 Ltd. and B.C. Tours. It was agreed by all that B.C. Tours had made the highest cash offer. The court received submissions as to whether the price offered for the property would be the governing factor or whether other factors would also be taken into account in its decision. The Province expressed the concern that it had only investigated the highest bidder in addition to 592123 Ltd. when it had presented its original proposal. It was only then that the parties realized the court had not received the other bids and had not reviewed them for the hearing. Counsel for the Province handed the remaining bids to the Master, in court, and the hearing was adjourned for the lunch break.

56 Upon reconvening at 2:00 p.m., the court gave its decision on the application. It did not receive submissions as to the merits of the remaining five bids which included the one from Baron Enterprises. B.C. Tours was the successful bidder based on price alone and an order for the sale of Tranquille was made in its favour.

THE LAW

57 The principles that guide the exercise of discretion on applications for court-approved sales were examined by Huddart J. (as she then was) in Sun Life Savings and Mortgage Corp. v. Sampson (1991), 59 B.C.L.R. (2d) 355 (S.C.). In that decision, Huddart J. adopted the statement of the law in Re Selkirk (1986), 58 C.B.R. (N.S.) 245 at 246 (Ont. S.C.):

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

58 She then reviewed several Court of Appeal authorities that had upheld the directions of a chambers judge who had converted a court-approved sale process to a sealed bid process: Federal Business Develpment Bank v. Mission Creek Farm Inc. (1988), 25 B.C.L.R. (2d) 188 (C.A.); Westcoast Savings Credit Union v. Wachal (1988), 32 B.C.L.R. (2d) 390 (C.A.); and, Saskatoon Credit Union Ltd. v. Creighton Holdings Ltd., [1989] B.C.J. No. 1781, (25 September 1989), Vancouver Registry, CA011368 (C.A.). In each case, there were competing signed offers presented by the date the application for a court-approved sale was scheduled to be heard. In each case, the chambers judge then permitted all interested parties to participate in a sealed bid process. Those decisions confirmed that a chambers judge exercises a broad discretion in the exercise of his or her duty to see that the best possible price is obtained for the property in question, while at the same time ensuring the integrity of the process is maintained.

59 Huddart J. reiterated that the court must consider all of the respondents' interests, even those not present, in order to ensure the best possible price for the property was obtained. Her concluding comments emphasized the need for the court to retain its discretion in deciding whether to approve an application for an order for sale. The court will not merely rubber-stamp an agreement between a party who has conduct of sale and a prospective purchaser, where such an agreement might be seen as preventing further and better offers being presented to the court. A court is not bound by such agreements.

60 Additionally, Huddart J. also commented on the second branch of the test in Re Selkirk, supra, regarding the integrity of the court-approved sale process. She stated that while the creditors are entitled to obtain the best possible price, had the mortgagee been the only person interested in the proceeds, "...I might have reached the opposite conclusion on the secondary ground. Indeed, I might not have permitted the presentation of an offer by Mr. Cooke [the new offeror]". (paragraph 39)

61 Huddart J. distinguished the facts of Sun Life from Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) where the court relied on the need to maintain the integrity of the court process in overriding the best price offered. Sun Life, supra, involved a residential foreclosure where competing offers were presented to the court at the hearing of the application for a court-approved sale. Soundair, supra, involved a complex commercial foreclosure of a regional airline. The court-appointed **receiver** applied for a court-approved sale of the business. The application was opposed by other creditors who favoured another prospective purchaser who had revised its offer making it the highest before the court. The court approved the sale to the prospective purchaser advanced by the **receiver** on the basis that the **receiver's** approval was reasonable in light of what was known at the time it accepted the first offer. The court also expressed a caution that it not

make orders which would override a recommendation of a **receiver** because of information that came to light after the **receiver** made its decision.

62 Galligan J.A., for the majority, identified four factors a court must consider in deciding whether to approve a sale:

1. Whether the **receiver** has made a sufficient effort to get the best price and has not acted improvidently;
2. The interests of all parties;
3. The efficacy and integrity of the process by which offers are obtained; and
4. Whether there has been unfairness in the working out of the process.

63 He agreed with and adopted the comments of Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87 (S.C.) at 112:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a **receiver's** function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the **Receiver** in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the **Receiver** both in the perception of **receivers** and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the **Receiver** was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed **receivers.**

64 Galligan J.A. also agreed with and adopted the comments of MacDonald J.A. in Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (C.A.) at 314:

> In my opinion if the decision of the **receiver** to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and **receivers** and purchasers would never be sure they had a binding agreement.

65 The only circumstances in which a court should consider an offer submitted after a **receiver** has agreed to a sale is: (1) where there has been a second offer of a substantially higher amount that was overlooked by the **receiver** for the substantially lower offer; and, (2) if a substantially higher bid turns up at the approval stage. In both situations the court would have to consider whether the **receiver** had carried out his function to obtain the best possible price for the property: Re Selkirk, supra; and, Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.).

66 Galligan J.A. concluded his remarks by stating that the interests of a prospective purchaser who has bargained with the **receiver,** "at some length and doubtless considerable expense" are very important. He stated at page 13:

> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a **receiver** to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a **receiver** and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the **receiver** to sell the asset to them.

67 In determining whether the process by which the order for sale was made, has been fair to all parties whose interests required consideration, the court must also examine the efficacy of the bid process itself. In Bank of Montreal v. Maitland Seafoods Ltd. (1983), 57 N.S.R. (2d) 20 (S.C.T.D.), the court dismissed an application for a court-approved sale by a **receiver.** In the circumstances of that case, the **receiver** had accepted a tender for the sale of the debtor's property. He then notified the guarantors of the tender that they were liable on the deficiency. The guarantors in turn made tenders that were slightly higher than the original one. In dismissing the application, Nunn J. stated at paragraphs 14 and 20:

> [14] If any efficacy is to be given to the tender system, then it requires that in circumstances such as these, a person whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos" in the commercial world. Not only would there be the uncertainty referred to by MacDonald J.A. but it could lead to the situation where, indeed, there might be no bidders.
>
> ...
>
> [20] One further and final point; I indicated for the same reasons as previously stated relating to the upholding of the tender system that once the tender offers are known it would be unwise and improper to direct a further tender as was requested by the **Receiver** this morning.

ANALYSIS

68 I turn now to an application of Galligan J.A.'s factors to the circumstances of this case. In so doing, I have concluded that this foreclosure involves the sale of unusual commercial property which has a number of unique features: (i) its historical development and use as a public facility for a number of years; (ii) the ongoing attempts by the Province to market the site since its closure as a public facility in the early 1980's; (iii) the environmental remediation issues; (iv) the public interest in maintaining access to Kamloops Lake; and (v) the sizeable portions of land subject to the Agricultural Land Reserve. The remediation needs alone distinguish this property from an ordinary residential foreclosure. No doubt, a combination of these features contributed to the due diligence costs for 592123 Ltd. before it signed the Offer to Purchase Agreement on September 14, 1999.

Did the Province act improvidently?

69 The history of the Province's marketing of Tranquille had not proven successful. The property was not an easy one to sell especially given the significant environmental remediation issues any purchaser of the property faced. Since the granting of the order nisi of foreclosure there had been some interest shown in the property, however nothing firm had been presented until 592123 Ltd.'s offer.

70 When 592123 Ltd. presented its offer to the Province, there was **no market** for the property. The only other offer had been the Province's offer to the City and the City's counter-offer to the Province, both for $1 in cash. While the cash component of 592123 Ltd.'s offer might in hindsight be considered low, the more significant remediation costs of about $1 million and the building demolition costs of $1.2 million also have to be considered. These additional costs clearly complicated the sale of Tranquille.

71 In the meantime, the Province was spending about $20,000 per month in management fees and had paid the municipal taxes until the City assumed ownership of three blocks of the property. As well, from the appraisals on file, the Province was faced with a declining market and little interest in this unusual property. With this background, the Province's agreement with 592123 Ltd., in light of the circumstances it faced at the time it made the agreement with 592123 Ltd., was not improvident. It was only 592123 Ltd.'s proposal, when made public, that created a renewed interest in the property and stimulated the subsequent offers.

Did the Court consider the interests of all parties?

72 The interests of the parties refers to those in the foreclosure proceedings. They include the interests of the Province and the City as creditors, the interests of A & A Estates Ltd. and Giovanni Camporese as debtors, and the interests of 592123 Ltd. as prospective purchaser. However, the only secured interest was the $11 million owed to the Province.

73 The City had no realistic possibility of recovering its outstanding taxes in the foreclosure proceeding. It would only realize its interests through a special relationship with the Province. It had a hand-shake agreement with the Province on the recovery of its outstanding taxes from the proceeds of sale of the property. However, its discussions with the Province were not finalized and it was vulnerable on a sale of the property if the Province did not consult with the City before reaching an agreement with a prospective purchaser. When the application was made, the City needed an adjournment in order to finalize its agreement with the Province. On September 27, 1999, its complaint was not with 592123 Ltd.'s offer, but with the Province's lack of consultation before it made the application for a court-approved sale.

74 The debtors had no interest in the results of the Province's application. They had apparently made their own agreement with the Province, outside of the foreclosure proceeding, and consequently there was no personal judgment against them.

75 Only the interests of 592123 Ltd. were ignored in granting the adjournment on September 27, 1999. No other offer was presented to the court at that time. The adjournment permitted 592123 Ltd.'s offer to become the bench mark for higher offers that would only benefit the Province in its recovery in the foreclosure action and the City's recovery in its separate agreement with the Province. After investing $100,000 and five weeks of negotiations with the Province, 592123 Ltd. was back to square one. None of the other bidders had invested anything in the process until 592123 Ltd.'s offer became public.

What was the efficacy and integrity of the process by which offers were obtained?

76 The marketing of Tranquille through a professional realtor as well as through the Province's proposal calls had produced a firm offer from 592123 Ltd. that was acceptable to the Province. When the Court altered that process and converted it to a sealed bid process in the absence of another offer before the court, it permitted the subsequent offers to ride on the coattails of the offer negotiated by 592123 Ltd. Even the beneficial terms 592123 Ltd. had negotiated over a five week period had been included in the court's direction on the form of the sealed bids. Those terms, especially the one relating to the environmental remediation process, were of significant value to the successful bidder.

Was there unfairness in the working out of the process?

77 592123 Ltd. was used by two levels of government to settle their own arrangements for the distribution of proceeds on the sale of Tranquille. Both the Province and the City then asked the court to place its seal of approval on those arrangements without fully informing the court of the special relationship that existed between the two.

78 Before the hearing on September 27, 1999, the City had every opportunity to make an offer for the purchase of Tranquille. In fact, it had done so on March 11, 1999, in response to the Province's offer to sell the property to the City for $1 along with the assumption of the environmental remediation costs. The City's expression of surprise by 592123 Ltd.'s cash offer of $492,160, plus the environmental clean-up costs, is inconsistent with the fact it could have acquired the property for $1 plus the same environmental clean-up costs.

79 However, the City was taken by surprise when the Province failed to consult it before making the application for the court-approved sale to 592123 Ltd. The City's surprise did not arise because of a lack of information regarding the foreclosure proceeding. It had been added as a party to the proceeding when the order nisi was granted on July 27, 1998. It had access to all of the information filed in the foreclosure action including the two appraisals which suggested a declining market for the property. The City's surprise by the Province's application arose because of its special relationship with the Province with respect to its arrangement for payment of its outstanding taxes.

80 As a party to the action, the City was in the advantageous position of having advance notice of 592123 Ltd.'s offer. In the six days before the Province's application was scheduled to be heard, it could have caused an offer to be prepared. In order to protect its interests, it could have attended court on September 27, 1998, with such an offer and a deposit cheque in hand. However, City council chose not to take those steps, but instead took steps to secure its agreement with the Province for the payment of its outstanding taxes.

81 The failure of both the Province and the City to advise the Court they had been in negotiations for the purchase of Tranquille for several months before the Province's application of September 27, 1999, misled the Court as to the real purpose of the City's adjournment request. That purpose was to secure their agreement for the payment of the City's outstanding taxes. It was not to make an offer for the purchase of Tranquille.

82 It is interesting that almost immediately after the application was served on the City on September 21, 1999, the City received letters on behalf of parties who were interested in making an offer. Similarly, after the sealed bid process was ordered by the Court on September 27, 1999, the

City wrote the interested parties advising them on how to proceed. Both actions appear to have the City assuming the role of the **receiver** in a court-approved sale process.

83 592123 Ltd. was the innocent victim in this process. The treatment received by 592123 Ltd. was manifestly unfair. The Province had invited it to make a proposal for the purchase of Tranquille. In response to that invitation, 592123 Ltd. invested $100,000 in due diligence efforts and five weeks of negotiating beneficial terms for its proposal. It was never informed of any upset price of $850,000 or of the Province's hand-shake agreement with the City regarding payment of the City's outstanding taxes.

84 Instead, 592123 Ltd. was assured by the Province that it would present and support 592123 Ltd.'s offer to the court. The Province assured 592123 Ltd. that upon its offer being disclosed, the Province would not consent to any adjournment of its application thereby allowing its offer to become a bench mark for other offers. This assurance was made subject only to a better offer being presented at the time of the application for sale to 592123 Ltd. This is a risk any participant in a court-approved sale process assumes when it makes an offer requiring court approval. 592123 Ltd. was entitled to rely on the bona fides of these representations by an agent of the Province. After the application was served on September 21, 1999, when it became apparent that the Province could obtain a higher recovery on its investment, its assurances to 592123 Ltd. were abandoned.

85 If the efficacy of the process has no boundaries, if the actions of governments are not transparent, if the interests of a bona fide offeror can be ignored or subverted in favour of the internal interests of governments, then the integrity of the court-approved sale process will be rendered meaningless. In the words of MacDonald J.A. in Cameron, supra, such a process would "literally create chaos in the commercial world and **receivers** and purchasers would never be sure they had a binding agreement."

CONCLUSION

86 With respect, in these circumstances, I exercise my discretion to set aside the order of October 18, 1999, and order that the sale of Tranquille be made to 592123 Ltd. on the terms and conditions contained in the Province's application that was before the court on September 27, 1999. In so doing, I have concluded that absent competing offers on the date for hearing of the Province's application, the court should not have granted the City's adjournment request. I have also concluded that the material misrepresentation to the court regarding the City's intention to make an offer on the property, when it had no intention of so doing, affected the integrity of the court-approved sale process. For both of these reasons, I have decided that the order of October 18, 1999 must be set aside and 592123 Ltd.'s initial offer as recommended to the court by the Province be approved.

87 In the event I am in error, and the sealed bid process is found to have been the correct process in this foreclosure, I have also concluded that the hearing of October 18, 1999, did not properly consider all the of bids submitted. In spite of the letters of October 1, 1999, and October 4, 1999, from the City's solicitor, the Master's comments at the hearings on September 27, 1999 and October 4, 1999 did not clearly specify that price was to be the determinative factor in the bid process.

88 All interested parties were invited to submit bids in a process that did not appear to limit those bids to the highest cash offer. That is not to say having price as the only variable in a sealed process is in error. For many reasons, that form is usually preferable to a court in its assessment of competing bids. However, in this case the court stated on several occasions that price would not be

the only consideration. In particular, it indicated that it would hear submissions from the various bidders and would consider any equitable factors that might relate to 592123 Ltd.'s offer.

89 In such circumstances, each of the bidders should have had the opportunity to make submissions in support of their bids as the best one, before the Court ordered the sale of the property. This opportunity was not given. Accordingly, in the alternative, if necessary, I shall seize myself with a further review of the bids currently submitted, in order to hear submissions in support of those respective bids. Only in this manner can the sealed bid process ordered by the Court on September 27, 1999, be fairly implemented.

D.M. SMITH J.

* * * * *

CORRIGENDUM

Released: December 17, 1999

[1] The reasons for judgment in this matter filed December 8, 1999, are to be amended as follows:

- The numbered company referred to as 529123 B.C. Ltd., should be changed throughout the judgment to 592123 B.C. Ltd.
- Paragraph [1], line 7, should read: ... a sale be approved to 592123 B.C. Ltd. ("592123 Ltd.") for $492,160 ...

- Paragraph [28], line 2, should read: ... 592123 Ltd.'s offer of $492,160 in cash ...

[2] There are no other amendments to these reasons for judgment.

D.M. SMITH J.

cp/i/qldrk/qltlm/qlhcs

tab 12

Case Name:

Elleway Acquisitions Ltd. v. 4358376 Canada Inc. (c.o.b. itravel2000.com)

IN THE MATTER OF an application pursuant to Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended
RE: Elleway Acquisitions Limited, Applicant, and 4358376 Canada Inc. (operating as itravel 2000.com), The Cruise Professionals Limited (operating as The Cruise Professionals) and 7500106 Canada Inc. (operating as Travelcash), Respondents

[2013] O.J. No. 5503

2013 ONSC 7009

235 A.C.W.S. (3d) 602

7 C.B.R. (6th) 25

2013 CarswellOnt 16849

Court File No. CV-13-10320-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: November 4, 2013.
Judgment: December 3, 2013.

(49 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Receivers -- Duties and powers -- Sale of assets -- Approval -- Application by receiver for orders approving assets purchase agreements allowed -- Creditor previously obtained order appoint receiver over three insolvent companies and agreed to provide funding until sales could be completed

-- Receiver made sufficient effort to obtain best price, sales process was fair and sales were in interest of all parties -- "Quick flip" sales were best way to provide recovery for creditor -- Partial payment of purchase price through reduction of indebtedness did not preclude approval -- Purchaser was related, but market thoroughly canvassed and purchase prices fair and reasonable -- Agreements contained highly sensitive commercial information.

Creditors and debtors law -- Receivers -- Court appointed receivers -- Sales by receiver -- Application by receiver for orders approving assets purchase agreements allowed -- Creditor previously obtained order appoint receiver over three insolvent companies and agreed to provide funding until sales could be completed -- Receiver made sufficient effort to obtain best price, sales process was fair and sales were in interest of all parties -- "Quick flip" sales were best way to provide recovery for creditor -- Partial payment of purchase price through reduction of indebtedness did not preclude approval -- Purchaser was related, but market thoroughly canvassed and purchase prices fair and reasonable -- Agreements contained highly sensitive commercial information.

Application by the Receiver for orders approving three asset purchase agreements and the transactions contemplated by the agreements, vesting in the purchasers the Receiver's right, title and interest in the purchased assets and sealing the agreements until the completion of the sales. The three insolvent companies, 4358376 Canada Inc ("itravel"), 7500106 Canada Inc ("Travelcash") and the Cruise Professionals ("Cruise") were in the business of the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. In 2010, their parent company was informed by its primary lender that it no longer wished to act as primary lender. As a result, the parent company attempted to find a buyer for its business. While various offers were received, no sales agreement was completed. Attempts to refinance were also unsuccessful. Ultimately, the primary lender assigned its debt and security to Elleway. The three companies were insolvent. Elleway obtained an order appointing a Receiver over their assets and agreed to provide the necessary funding until the sales could be completed. The Receiver had negotiated agreements which provided for the going-concern sale of substantially all of the assets of the three companies. The purchase prices were less than the amounts owed by the companies and were comprised of a reduction of a portion of the indebtedness owed under the credit agreement, the entire amount owed under the working capital facility agreement, and the assumption by the purchasers of certain liabilities and any indebtedness issued under receiver's certificates. Pursuant to the agreements, the purchasers were to make offers to 95 per cent of the companies' employees on substantially similar terms of their current employment. The purchasers would also assume all obligations owed to the companies' customers.

HELD: Application allowed. The Receiver made a sufficient effort to obtain the best price and did not act improvidently. The sales process was fair and the sales were in the interest of all parties. The "quick flip" sales were the best possible way to provide recovery for Elleway. The sales process was fair and reasonable and the sales transactions were the only means of providing the maximum realization of the purchased assets. Partial payment of the purchase price through a reduction of the indebtedness owed to Elleway did not preclude approval of the orders. Such a mechanism was analogous to a credit bid by a secured lender, but with the purchasers, instead of the secured lender, taking title to the purchased assets. The Receiver understood that following the closing of the transactions contemplated under the agreements, Elleway would hold an indirect equity interest in the purchasers. It was well-established in Canada insolvency law that a secured creditor was permitted to

credit bid its debt in lieu of providing cash consideration. No party was prejudiced by Elleway reducing a portion of the debt owed to it as the purchasers were assuming all claims secured by liens or encumbrances that ranked in priority to Elleway's security. While the purchaser was an existing shareholder of the parent company, approval of the sales was not precluded as the market for the assets was thoroughly canvassed and the purchase prices were fair and reasonable. As the agreements contained highly sensitive commercial information, disclosure of the agreements prior to the closing of the sales could pose a serious risk to the sales process in the event that the sales did not close. A sealing order was the only reasonable method of preventing the information from becoming publicly available.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.13(5), s. 243

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, s. 101

Counsel:

Jay Swartz and Natalie Renner, for the Applicant.

John N. Birch, for the Respondents.

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

2 On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

3 The Receiver seeks the following:

(i) an order:
(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");
(b) approving the transactions contemplated by the itravel APA;
(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

4 The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

5 The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

6 The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

7 Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

8 The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

9 In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

10 In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

11 In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

12 In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

13 The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

14 In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

15 In January 2013, discussions ended and the independent committee was disbanded.

16 In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

17 In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

18 In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

19 In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

20 In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

21 On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for Barclays

debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

22 The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

23 itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

24 The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

25 Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

26 In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;
(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;
(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and
(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

27 The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and

overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

28 The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?
B. Does the legal test for approval change in a so-called "quick flip" scenario?
C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?
D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?
E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

29 Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

30 Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

31 It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

32 In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

33 Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

> (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and
> (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

34 In the case of *Re Tool-Plas*, I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

35 Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

36 Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

37 I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

38 Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility

Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp.* (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

39 This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.*, [2012] O.J. No. 1165, (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

40 It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

41 Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

42 Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

43 Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

44 In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

45 The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

46 The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

47 The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

(a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
(b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5th) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

48 In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions

regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

49 For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

G.B. MORAWETZ J.

tab 13

Case Name:

Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.

RE: Montrose Mortgage Corporation Ltd., Applicant, and Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

[2013] O.J. No. 5055

2013 ONSC 6905

2013 CarswellOnt 15278

17 C.B.R. (6th) 169

233 A.C.W.S. (3d) 638

Court File No. CV-13-10298-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: November 5, 2013.
Judgment: November 6, 2013.

(14 paras.)

Counsel:

J. Dietrich, for the Applicant.

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited.

REASONS FOR DECISION

D.M. BROWN J.:--

I Application for approval of a "pre-pack" credit bid sale in a proposed receivership

1 Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

2 On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

3 The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013, advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

4 The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

5 As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

6 In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

7 The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

8 Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

9 In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

10 "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

11 In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in

the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

12 Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

13 Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

14 Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D.M. BROWN J.

1 *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.).

2 (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List).

3 (1991), 4 O.R. (3d) 1 (C.A.).

4 *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

tab 14

Case Name:

Tool-Plas Systems Inc. (Re)

RE: IN THE MATTER OF the Receivership of Tool-Plas Systems Inc.
AND IN THE MATTER OF Section 101 of the Courts of Justice Act, as amended

[2008] O.J. No. 4218

48 C.B.R. (5th) 91

2008 CarswellOnt 6258

172 A.C.W.S. (3d) 112

Court File No. CV-08-7746-00-CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: September 29, 2008.
Judgment: September 29, 2008.
Released: October 24, 2008.

(22 paras.)

Counsel:

D. Bish, for the Applicant, Tool-Plas.

T. Reyes, for the Receiver, RSM Richter Inc..

R. van Kessel for EDC and Comerica.

C. Staples for BDC.

M. Weinczok for Roynat.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

2 The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position - which recommends approval of the sale.

3 The transaction has the support of four Secured Lenders - EDC, Comerica, Roynat and BDC.

4 Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers - namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

5 Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

6 Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

7 The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

8 The only substantial condition to the transaction is the requirement for an approval and vesting order.

9 The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

10 The Receiver recommends the quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

11 The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opin-

ions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

12 Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

13 This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

14 Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order - specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

15 A quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip' transaction would realistically be any different if an extended sales process were followed.

16 In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally - the customers of the mould division who stand to benefit from continued supply.

17 On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

18 I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

19 I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

20 In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

21 In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

22 The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

G.B. MORAWETZ J.

GOLD CANDLE LTD.
Applicant

-and-

GSR MINING CORPORATION and AJ PERRON GOLD CORP.
Respondents

Court File No. CV-16-00011351-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE APPLICANT

Fogler, Rubinoff LLP
77 King Street West
Suite 3000
P.O. Box 95
Toronto-Dominion Centre
77 King Street West, Suite 3000
Toronto, ON M5K 1G8

Gregory R. Azeff (LSUC# 45324C)
Tel: (416) 365-3716
Fax: (416) 864-9700
Email: gazeff@foglers.com

Lawyers for the Applicant