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

BOOK OF AUTHORITIES OF THE RESPONDENT
(Opposing Application to Appoint a Receiver returnable July 6, 2016)

June 30, 2016

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TAB 1

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 collection 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 2

2006 CarswellOnt 6365
Ontario Master

Adelaide Capital Corp. v. 412259 Ontario Ltd.

2006 CarswellOnt 6365, [2006] O.J. No. 4175, 155 A.C.W.S. (3d) 439, 35 C.P.C. (6th) 389

ADELAIDE CAPITAL CORPORATION v. 412259 ONTARIO LIMITED, FRANK SPADAFORA, NICODEMO SCALI, DOMENIC VACCARO and NICODEMO BRUZZESSE

Master R. Dash

Heard: October 11, 2006
Judgment: October 18, 2006
Docket: 92-CQ-24637

Counsel: Michael J. Reid for Plaintiff
Nicodemo Scali, Defendant for himself

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

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

Debtors and creditors

III Garnishment
III.3 Practice and procedure
III.3.m Miscellaneous

Headnote

Debtors and creditors --- Garnishment — Practice and procedure — Miscellaneous issues

In 1992, original plaintiff CGT Co. obtained default judgment against defendant for $69,000 and filed writ of seizure and sale — CGT Co. went bankrupt and AC Co. took assignment of CGT Co.'s receivables, including defendant's debt — AC Co. made contact with defendant and then took no further action for 12 years, during which time writ of seizure and sale expired — In 2006 AC Co. obtained order to continue under Rule 11.02 of Rules of Civil Procedure and then brought motion to renew writ of seizure and sale — Motion dismissed — AC Co. had failed to explain entirety of delay or whether it had acquiesced in non-payment or otherwise waived its rights under original judgment — When AC Co. took over thousands of files from CGT Co., it had to decide which debts to enforce immediately — It was clear that there was initial deliberate decision not to undertake immediate enforcement of this judgment debt, but it was unclear whether enforcement was not revived for another twelve years as result of deliberate decision or inadvertence — Defendant had proven that he had relied to his detriment on AC Co.'s perceived acquiescence.

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Table of Authorities

Cases considered by *Master R. Dash*:

Ballentine v. Ballentine (1999), 45 O.R. (3d) 706, 50 R.F.L. (4th) 211, 1999 CarswellOnt 2591 (Ont. S.C.J.) — considered

Canada (Attorney General) v. Palmer-Virgo (2003), 2003 CarswellOnt 1409 (Ont. S.C.J.) — considered

Colombe v. Caughell (1985), 52 O.R. (2d) 767, 6 C.P.C. (2d) 314, 1985 CarswellOnt 647 (Ont. Dist. Ct.) — considered

Fong v. Chan (1999), 1999 CarswellOnt 3955, 181 D.L.R. (4th) 614, 128 O.A.C. 2, 46 O.R. (3d) 330 (Ont. C.A.) — considered

Lax v. Lax (2004), 2004 CarswellOnt 1633, 50 C.P.C. (5th) 266, 3 R.F.L. (6th) 387, 70 O.R. (3d) 520, 239 D.L.R. (4th) 683, 186 O.A.C. 20 (Ont. C.A.) — considered

Royal Bank v. Correia (2006), 2006 CarswellOnt 4823 (Ont. Master) — followed

Statutes considered:

Limitations Act, R.S.O. 1990, c. L.15
s. 45(1)(c) — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

s. 15(1) — referred to

s. 15(2) — referred to

s. 16(1)(b) — referred to

s. 24(4) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 11.02 — referred to

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R. 39.01(4) — referred to

R. 60.07(1) — referred to

R. 60.07(2) — considered

R. 60.07(6) — referred to

R. 60.07(8) — referred to

R. 60.08(2) — referred to

MOTION by plaintiff to renew writ of seizure and sale that had expired six years earlier.

***Master R. Dash*:**

1 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

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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 (Ont. Dist. Ct.); *Canada (Attorney General) v. Palmer-Virgo*, [2003] O.J. No. 1238 (Ont. 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 v. Correia*, [2006] O.J. No. 3206 (Ont. Master) 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

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fact *Royal Bank v. Correia* was based on a decision under rule 60.07(2): *Ballentine v. Ballentine* (1999), 45 O.R. (3d) 706 (Ont. 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 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 (Ont. 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 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 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

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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

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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 (Ont. 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.

Motion dismissed.

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TAB 3

2007 CarswellOnt 5908
Ontario Superior Court of Justice (Divisional Court)

Adelaide Capital Corp. v. Minott

2007 CarswellOnt 5908, 160 A.C.W.S. (3d) 588, 229 O.A.C. 300, 87 O.R. (3d) 469

Adelaide Capital Corporation (Plaintiff / Appellant) v. Kestner James Minott, Laura Leonie Alexandra Minott, Pauline Patricia Minott and Sheila Minott (Defendants / Respondents in Appeal)

Coats J., Gans J., and Jennings J.

Heard: September 17, 2007
Judgment: September 20, 2007
Docket: 429/06

Counsel: Lee Guarino for Plaintiff / Appellant
Chris Bowman for Defendants / Respondents in Appeal, Pauline Minott, Sheila Minott

Subject: Civil Practice and Procedure; Family

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

Civil practice and procedure

XXII Judgments and orders
XXII.21 Effect of recovery and enforcement of judgment

Headnote

Civil practice and procedure --- Judgments and orders — Effect of recovery and enforcement of judgment

Defendants were guarantors on mortgage entered into by their brother-in-law which was placed on his residence — Upon default, property was sold under power of sale and deficiency of $34,555.38 remained owing — Principal debtor went into bankruptcy — Defendants were aware of debt and their liability for it but no steps were ever taken to enforce judgment — Amount of judgment currently stood at about $95,000 — Plaintiff's application under r. 60.07(2) of Rules of Civil Procedure to issue writ of seizure and sale, and under r. 60.08(2) to issue notices of garnishment was dismissed — Plaintiff failed to explain its reason for 14 year delay between judgment and application to enforce — Plaintiff appealed — Appeal dismissed — Consideration of unexplained delay was proper exercise of judicial officer's discretion contained in rule — Rule did not take away from legal and substantive right of action to sue on judgment within limitation period.

Table of Authorities

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Cases considered:

Adelaide Capital Corp. v. Minott (2006), 2006 CarswellOnt 6544 (Ont. S.C.J.) — referred to

Adelaide Capital Corp. v. 412259 Ontario Ltd. (2006), 2006 CarswellOnt 6365, 35 C.P.C. (6th) 389 (Ont. Master) — referred to

Ballentine v. Ballentine (1999), 45 O.R. (3d) 706, 50 R.F.L. (4th) 211, 1999 CarswellOnt 2591 (Ont. S.C.J.) — referred to

Royal Bank v. Correia (2006), 2006 CarswellOnt 4823, 36 C.P.C. (6th) 284 (Ont. Master) — referred to

Shmegilsky v. Slobodzian (1964), [1964] 1 O.R. 633, 1964 CarswellOnt 473 (Ont. Master) — considered

South Holly Holdings Ltd. v. Nguyen (December 28, 2006), Doc. C17742/92 (Ont. S.C.J.) — referred to

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
s. 45(1)(c) — considered

Succession Law Reform Act, R.S.O. 1990, c. S.26
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 60.07(2) — referred to

R. 60.08(2) — referred to

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APPEAL by plaintiff from judgment dismissing its application to issue writ of seizure and sale, and to issue notices of garnishment in attempt to enforce judgment.

The Court:

1 The narrow issue upon which leave to appeal was granted from the decision of Paisley J. dated July 13, 2006, [2006 CarswellOnt 6544 (Ont. S.C.J.)] is as follows:

> In matters other than proceedings under the *Divorce Act*, the *Family Law Act* and the *Succession Law Reform Act*, does a judge have a discretion under Rule 60.07(2) and Rule 60.08(2) to refuse leave solely on the basis of delay, when having regard to s. 45(1)(c) of the *Limitations Act*?

2 For the reasons which follow we conclude the answer to the question posed is yes.

3 The respondents were guarantors on a mortgage entered into by their brother-in-law which was placed on his residence. Upon default, the property was sold under Power of Sale and a deficiency of $34,555.38 remained owing. The principal debtor went into bankruptcy. The respondents were aware of the debt and their liability for it but no steps were ever taken to enforce the judgment. The judgment bears interest at 12% and the amount of the judgment now stands at about $95,000.

4 The appellant brought an application under rule 60.07(2) to issue a writ of seizure and sale, and under rule 60.08(2) to issue notices of garnishment. Although these motions were properly heard by the Master, they came on for hearing before Paisley J. No evidence was placed before Paisley J. to address the issue of the extraordinary delay of over 14 years that had elapsed between the judgment and the motion before him. Apparently no law was cited to Justice Paisley. In a brief endorsement he held:

> [8] The applicant has failed to explain its reason for delaying enforcement of its judgment
>
> [9] I am not persuaded on this record that leave should be granted. The motion is dismissed.

5 Before us, the appellant argued that it was entitled as of right to have a writ of execution issued, regardless of the leave requirements under the rule, so long as the motion for leave to issue the writ is made within 20 years of the date of the judgment. Section 45(1)(c) of the *Limitations Act*, R.S.O. 1990, c.L.15, which is applicable to this matter provides that an action upon a judgment shall be commenced within 20 years after the cause of action arose.

6 The appellant relied upon the decision of Senior Master Marriott in *Shmegilsky v. Slobodzian*, [1964] 1 O.R. 633 (Ont. Master) where the Senior Master held at p.634:

> Once it is established that the judgment was obtained within the limitation period, that the judgment is unsatisfied, and that a writ of execution may properly be enforced against a judgment debtor personally there appears to be no authority that supports the proposition that the court has jurisdiction to refuse an order on equitable grounds. ... if the court were to grant relief on the ground of delay it would in effect be shortening the period of limitation prescribed by the statute. This of course would be clearly wrong.

7 The reasoning in *Shmegilsky* appears to have been applied by Mossip J. in*Adelaide Capital Corporation v. Panetta et al.*, an unreported endorsement released July 24, 2006, and in which she declined to follow the judgment of Paisley J. now under appeal.

8 The recent cases of *Adelaide Capital Corp. v. 412259 Ontario Ltd.*, [2006] O.J. No. 4175 (Ont. Master), *Royal Bank v.*

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Correia, [2006] O.J. No. 3206 (Ont. Master), both decisions of Master Dash, and *Ballentine v. Ballentine* (1999), 45 O.R. (3d) 706 (Ont. S.C.J.), a decision of Cullity J., have declined to apply *Shmegilsky* , holding instead that unexplained delay could be taken into account in determining whether the discretion provided in rule 60.07(2) and 60.08(2) should be exercised. These decisions are helpfully reviewed by Baltman J. in her decision in *South Holly Holdings Ltd. v. Nguyen*, [2006] O.J. No. 5225 (Ont. S.C.J.) (Dec. 22, 2006) in which she held that delay must be explained as a pre-condition to the exercise of the discretion.

9 We are of the opinion that a consideration of unexplained delay is a proper exercise of the judicial officer's discretion contained in the rule. The rule is procedural and is designed to permit the Court to control its own process. It does not take away from the legal and substantive right of action to sue on a judgment within the limitation period to which we have referred. Requiring the appellant to sue on its judgment may not speak well for the efficient use of judicial resources, but the appellant has invited this result by refusing to put before Paisley J. some explanation to account for the 14 year delay so as to trigger the exercise of the discretion. The threshold imposed is not a high one.

10 To the extent that these reasons may be taken to modify the judgment of Senior Master Mariott in *Shmegilsky* , we point out that before the Senior Master there was evidence to explain the delay which in our opinion would have met any reasonable threshold necessary to trigger the exercise of the discretion.

11 Having regard to the agreement between the parties, costs are payable by the appellant to the respondent fixed at $700, inclusive.

Appeal dismissed.

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TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Carnival National Leasing Ltd. | 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79 | (Ont. S.C.J., Feb 15, 2011)

1997 CarswellOnt 988
Ontario Court of Justice, General Division

Royal Bank v. Chongsim Investments Ltd.

1997 CarswellOnt 988, [1997] O.J. No. 1391, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 70 A.C.W.S. (3d) 72

Royal Bank of Canada, Plaintiff v. Chongsim Investments Ltd. and ESC Recreation Development Corporation, carrying on business as WWK Partnership, Chongsim Investments (Canada) Ltd. and Wild Water Kingdom Ltd., Defendants

Epstein J.

Heard: January 30 and 31, 1997
Judgment: April 4, 1997
Docket: 96-CU-103033

Counsel: *George Vegh* and *Debora Steggles*, for plaintiff.
John D. Campbell, for defendants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

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

Debtors and creditors

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

Headnote

Receivers --- Appointment — Application for appointment — General

Defendant companies and partnership, which carried on water park business, were guarantors of credit facility granted by plaintiff bank to related company and also had credit facility with plaintiff secured by debenture and general security agreement — Related company's facility structured as demand loan which plaintiff agreed not to call absent default — Plaintiff established practice respecting facility interest payments whereby funds would be transferred from loan account to cover payment in event of deficiency in operating account and related company would be notified so that it could make

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deposit, the plaintiff not treating overdrafts as defaults — Plaintiff later departed from established practice, reversed interest payments on several occasions when overdrafts occurred, failed to provide specific notification of non-payment of interest — Plaintiff then wrote indicating arrears, and in response to request for particulars of arrears, called loan thereafter refusing to accept payment and commencing proceedings against related company and guarantors — Plaintiff moved to appoint receiver and manager of water park business on basis that partnership had failed to honour guarantee — Motion dismissed — Neither just nor equitable to appoint receiver in circumstances — Appointment could have serious, permanent adverse affect on business, deprive defendants of right to defend action — Plaintiff had adequate security for amount owed — Plaintiff did not act in good faith in departing, without notice, from established practice relied on by defendant, to create default with view to forcing restructuring of credit facilities to its benefit — Plaintiff failed to meet obligation to provide particulars of arrears and opportunity to make correction — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

The defendants CI Ltd. and ESC Co. carried on a water park business as WWK partnership and WWK Ltd. The partnership had a credit facility with the plaintiff bank. It was secured by a debenture and a general security agreement, with both contracts binding the partnership and WKK Ltd., and both containing cross-default provisions. While it was structured as a demand loan, the parties agreed that the loan would not be called absent default. In terms of the value of the security, in 1992 the plaintiff had received an appraisal in the amount of $11.3 million. Since 1992, a first mortgage had been paid down from $1.7 million to $.9 million.

The defendant C.I. (Can.) Ltd., also had a credit facility with the plaintiff, structured in the same way as that of the partnership, and guaranteed by CI Ltd., ESC Co. and the partnership.

Between 1992 and 1995 the plaintiff established a practice respecting interest payments on the latter facility. Payment was made from the operating account by automatic transfer. If there were insufficient funds in that account to cover the payment, the plaintiff would make up the deficiency by transfer from the loan account. If the loan account were fully drawn, the plaintiff would allow the operating account to go into overdraft and notify CI (Can.) Ltd., which would then make a deposit. In accordance with that practice, the plaintiff did not return any of CI (Can.) Ltd.'s cheques on the basis of insufficient funds nor did it treat the temporary overdrafts as defaults under the facility.

In early 1995, however, when an interest payment created an overdraft, the new account manager, in a manner contrary to established practice, reversed the payment and failed to contact CI (Can.) Ltd. about the non-payment. The next month, the plaintiff temporarily returned to past practice, but again in March and April reversed interest payments without contacting CI (Can.) Ltd. During this time and into May, the account manager further intervened, again without specifically notifying his customer, by causing various amounts to be deducted from the operating account and credited to interest interest on the loan facility, and returned one of CI (Can.) Ltd.'s cheques NSF for the first time.

In June, the account manager wrote to CI (Can.) Ltd. indicating interest arrears in excess of $12 000. C, the principal of the defendant companies, requested particulars as to how the arrears had accumulated. The plaintiff responded by demanding payment in full of the facility by C.I. (Can.) Ltd., C.I. Ltd., and ESC Co.. CI (Can.) Ltd. then offered to pay the arrears, even though the plaintiff had not clarified the accounting behind the amount claimed. The plaintiff refused to accept payment, and commenced proceedings. It moved for an order appointing a receiver and manager of the water park business, alleging that such an order would be just an equitable as the partnership had failed to honour its guarantee on the loan in question.

Held: The motion was dismissed.

Section 101 of the *Courts of Justice Act* provides that a receiver may be appointed where it is just and convenient. As the appointment of a receiver is particularly intrusive, it is relief which should only be granted sparingly. In the exercise of its

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discretion, the court should consider the effect of such an order on the parties. Since it is an equitable remedy, the conduct of the parties is also a relevant factor.

Appointment a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations.The plaintiff intended to attempt to sell the water park; a sale under these circumstances frequently results in a lower price and always in substantial receivership fees. In the interim, the receivership might well damage the park's good relations with its landlord, employees, suppliers and customers.

The damage to the defendants must be compared to the position of the plaintiff were receivership not granted. The principal amount outstanding on its current first mortgage had been reduced substantially since 1992, there was no evidence of any problems with creditors, and the plaintiff had more than adequate security for what it was owed.

The order sought would effectively result in a loss to the defendants of some of their investment and of their right to defend the bank's action on the loan. If it were not granted, an acceptable *status quo*, protecting the interests of all parties, could be maintained. Given these observations, it would not be just to appoint a receiver.

Nor would it be equitable having regard to the conduct of the parties.

The worst that could be said about the representatives of CI (Can.) Ltd. was that they failed to notice irregularities in the bank statements indicating the plaintiff's departure from past practice, and perhaps that C had not pressed the plaintiff aggressively enough for particulars of the arrears.

The plaintiff, on the other hand, had been less than straightforward in its handling of the CI (Can.) Ltd. account. Its account manager departed from past practice in reversing loan payments and effectively caused a default, and this knowing that it was reasonable for his customer to assume that the plaintiff would not change its practice without some direct notification. Also notable was the precipitous nature of the demand as well as the plaintiff's failure to provide specific details of the default, to explain what was required for correction and to establish a reasonable timetable for correction.

Given the agreement that the plaintiff would not call the loan unless C were in default, the plaintiff set out to do whatever was necessary to create a default, with a view to forcing C to restructure his credit facilities to its advantage. Parties to a contract have an obligation to deal with each other in good faith toward fulfillment of the agreement. The agreement between the plaintiff and CI (Can.) Ltd. had been modified by established practice, which modification, to the plaintiff's knowledge, was relied on by CI (Can.) Ltd. The plaintiff had a legal obligation to support the defendants so long as they were honouring their obligations under the agreement. However, rather than trying to fulfill its obligations, it was deliberately trying to sabotage the relationship. Against this background it would be neither just nor equitable to grant relief sought.

Table of Authorities

Statutes considered:

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

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s. 101 — considered

MOTION by creditor for appointment of receiver.

Epstein J.:

1 This is a motion brought by the plaintiff the Royal Bank of Canada (the "bank") for an order appointing a receiver and manager of the property of the defendants Chongsim Investments Ltd. ("Chongsim Investments") and ESC Recreation Development Corporation ("ECS") carrying on business as WWK Partnership (the "partnership") and Wild Water Kingdom Ltd. ("WWK Ltd.").

2 The partnership owns and operates a water park on premises just north of Toronto. These premises are owned by the government and are leased to WWK Ltd. as bare trustee for, and on behalf of, the partnership.

3 The bank's position is that such an order would be just and equitable in the circumstances of this case based on the allegation that the partnership failed to honour the guarantee it provided to the bank in respect of a loan given by the bank to the defendant Chongsim Investments (Canada) Ltd. ("Chongsim Canada").

4 The primary position of the defendants is that the equitable jurisdiction of this court should not be available to the bank. It is their submission that the bank orchestrated the default upon which it attempts to rely in requesting that a receiver be appointed. Secondly, the defendants argue that the partnership did not, in fact, guarantee the obligations of Chongsim Canada. Accordingly, the demand upon the partnership is invalid.

5 Shortly after the matter was argued, I advised counsel of my decision to dismiss the bank's motion. The following is a brief summary of the reasons for this decision.

6 By commitment letter of May 22, 1992, the bank granted a $1.1 million credit facility to the partnership that was secured by a debenture (the "debenture") executed by WWK Ltd. The partnership agreed to be bound by the terms of the debenture. The bank also had a general security agreement in place (the "GSA") as a result of an earlier credit facility. The GSA was granted by the partnership and was consented to by WWK Ltd. These contracts contain cross-default provisions. A default of the partnership is also a default under the security agreements. The debenture and GSA are the only potential *contractual* sources of the bank's entitlement to a receiver.

7 The Wild Water Kingdom credit facility was structured as a demand loan. However, the parties agreed that the bank would not call for payment on the loan as long as the credit facility was kept in good standing.

8 The bank has considerable security in respect of this credit facility. The commitment letter required "receipt by the bank of an appraisal ... reflecting replacement cost of not less than $11 million ..." The bank received an appraisal dated March 31, 1992, in the amount of $11.3 million. The bank has not disputed this value. I also note that the bank's security has improved through the pay down of a first mortgage from $1.7 million to approximately $900,000.

9 Chongsim Canada is a holding company with several interests. It also has a credit facility with the bank. This facility is reflected in a commitment letter dated August 18, 1992. Again, the parties agreed that the loan would not be called absent default. Chongsim Investments and ESC Recreation guaranteed this facility. I find, based on the evidence, including the wording of the loan documentation, that the obligations of Chongsim Canada were also guaranteed by the partnership.

10 I now turn to the events leading up to the default upon which the bank relies in its efforts to put in a receiver.

11 The monthly payments of the Chongsim Canada credit facility were made from the operating account on the 26th day of each month by automatic transfer. If there were insufficient funds in the operating account to cover the interest payment,

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the bank would transfer the necessary amount to cover the deficiency from the loan account. If the loan account were fully drawn, the bank would allow the operating account to go into overdraft and would then notify Chongsim Canada's office. Chongsim Canada would then make a deposit to bring the operating account into a positive balance. Prior to May 29, 1995, the bank at no time returned any of Chongsim Canada's cheques on the basis of insufficient funds. Similarly, at no time prior to that date did the bank treat these temporary overdrafts as defaults under the Chongsim Canada credit facility.

12 It was therefore not unusual when on January 26, 1995, Chongsim Canada's interest payment of $7,378.64 created an overdraft. Contrary to the manner in which the bank had historically dealt with such a situation, the then new manager of the account, Mr. Smith, caused the interest payment to be reversed. Further contrary to established practice, the bank did not contact Chongsim Canada about the non-payment of interest.

13 On February 27, 1995, the bank returned to established practice. The automatic withdrawal was made to pay interest. An overdraft was thereby created. The bank still had not tried to contact its customer about the default that had taken place in January as a result of the bank's unprecedented reversal of the interest payment.

14 Again, in March and in April, the bank reversed the interest payments without contacting Chongsim Canada. During this time and into May 1995, Mr. Smith further intervened by causing various amounts to be deducted from the operating account and to be credited to interest on the loan facility. He also, for the first time, returned a Chongsim Canada cheque as "NSF." Again, Mr. Smith did not specifically notify anyone at Chongsim Canada of the nonpayment of interest, of the other transfers or of his decision to refuse to honour one of his customer's cheques.

15 Then, on June 5, 1995, Mr. Smith sent a letter to Chongsim Canada indicating interest arrears of $12,222.04. Dr. Chong, the principal of these various companies, expressed surprise and asked for particulars as to how these arrears could have accumulated.

16 Instead of providing any type of meaningful response, the bank, by letter dated June 22, 1995, demanded payment in full of the Chongsim Canada credit facility from Chongsim Canada, Chongsim Investments and ESC Recreation. Shortly thereafter, Chongsim Canada offered to pay any interest arrears even though the bank still had not clarified the accounting behind the amount claimed to be due. The bank refused to accept any payment, taking the position that the default could not be cured.

17 Technically, Chongsim Canada defaulted on its loan by failing to maintain its obligation to pay interest. However, is this default, having regard to all of the circumstances, one that warrants the exercise of the court's discretion to put a receiver in charge of the affairs of the operation?

18 The jurisdiction to order a receiver is found in section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

19 As far as the impact of the order sought, there can be no doubt but that the effect of installing a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations. The bank has indicated that it intends to attempt to sell the water park. A sale under these circumstances frequently results in a lower price and always results in substantial receivership fees (estimated by the bank at $400,000). In the meantime, the receivership may well damage the park's apparently good relations with its landlord, employees, suppliers and customers.

20 This damage to the defendants in the form of added expense and reduction of value must be compared to the position of the bank if the receivership is not granted. The first mortgage is current. In fact, the principal amount outstanding has been reduced from $1.7 million in 1992 to $900,000 today. There is no evidence of any problems with creditors. The bank has more than adequate security for the $2 million it is owed.

21 If a receiver is ordered, then the park will be sold, the bank will be paid, and the litigation in which the bank's right to call the loan is in dispute will be rendered academic. There will be a loss to the defendants not only of some of their

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investment but also of their right to defend the bank's action. If the order is not granted, an acceptable *status quo* can be maintained in which the investment and interests of all parties are protected.

22 In the face of these observations, it would certainly not be "just" to put in a receiver.

23 Nor would it be equitable having regard to the conduct of the parties. The worst that can be said of the conduct of the representatives of Chongsim Canada is that they failed to notice the irregularities that appeared in the monthly bank statements that would have alerted them to the fact that the bank had deviated from established practice and interest payments were therefore not being made. Secondly, perhaps Dr. Chong can be faulted for not pressing the bank aggressively enough for particulars of the arrears in response to a clear demand for payment.

24 However, the conduct of Chongsim Canada must again be compared with that of the bank. The bank has a recognized obligation to treat its customers fairly, meaning in an honest, straightforward fashion. While the evidence is not sufficient for me to make a finding that the bank was dishonest in its dealings with the defendants, there is certainly ample evidence suggesting that Mr. Smith was being less than straightforward in his handling of the Chongsim Canada account. By reversing the loan payments for January and March 1995, Mr. Smith effectively caused a default. He did this knowing that it was reasonable for his customer to assume that the bank would not change its practice in relation to the account at least without some direct notification. In fact, the evidence shows that Mr. Smith actually met with Dr. Chong during the critical period when the defaults were being created and said nothing to him about this serious state of affairs.

25 Then there was the precipitous nature of the demand. If the bank intended formally to demand, it had an obligation in the circumstances of this case to provide specific details of the default, what was required for correction and establish a reasonable timetable for such correction. This it did not do.

26 The bank relies almost exclusively on the evidence of Mr. Smith in support of the order sought. I find certain aspects of Mr. Smith's evidence troublesome. For example, the record shows regular communication between Mr. Smith and his superior, Mr. Brown, about the Chongsim Canada situation throughout December 1994 and January 1995. Then, curiously, on January 29, 1995 (the same day as Mr. Smith first reverses an interest payment) all communication of this nature stops until after Mr. Brown decided to call the loan. Further, Mr. Smith claims to have been unaware of the default that he created until he requested a computer summary of the Chongsim Canada account on May 31, 1995. Mr. Smith gave this evidence in the face of other evidence that he regularly reviewed weekly computer printouts throughout this time period that showed, among other things, interest arrears. I also note that Mr. Smith, in an effort to explain his deviation from the bank's practice of allowing the Chongsim Canada operating line to go into overdraft, testified that he had authority to permit an overdraft only "up to $5,000." However, in November 1994, he permitted a $9,338 overdraft in the Chongsim Canada account.

27 The conclusion is inescapable that the bank was determined to force Dr. Chong to agree to restructure his credit facilities with the bank to the bank's advantage. Given the agreement that the bank would not call the loan unless Dr. Chong was in default, the bank only had one option — to do whatever was necessary to create a default. The bank was successful — technically, but against this background it would neither be just nor equitable to grant the interlocutory relief requested by the bank and put in a receiver.

28 Parties to a contract have an obligation to deal with each other in good faith toward the fulfilment of the agreement. The agreement between the bank and Chongsim Canada had been modified by established practice. To the bank's knowledge, Chongsim Canada relied on this modification. In this case, the bank had a legal obligation to support the defendants as long as they were honouring their obligations to the bank. On the facts, I find that rather than trying to fulfill its obligations to its customers, the bank was deliberately trying to sabotage the relationship.

29 The motion is dismissed. If the parties are unable to agree as to costs they may make submissions in writing by facsimile. The defendant's submissions should be sent to the plaintiff's solicitors and my office by April 18, 1997, and the plaintiff's submissions should be sent to me and the defendant's solicitors by April 28, 1997.

Motion dismissed.

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GOLD CANDLE LTD.	- and -	**GSR MINING CORPORATION and AJ PERRON GOLD CORP.**
Applicant		Respondents

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BOOK OF AUTHORITIES OF THE RESPONDENT
(Opposing Application to Appoint a Receiver returnable July 6, 2016)

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