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 July 6, 2016)

June 29, 2016

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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.	*Business Development Bank of Canada v Pine Tree Resorts Inc., 2013 ONSC 1911 (Ont. S.C.J. [Commercial List])*
7.	*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])
8.	*King (Township) v Rolex Equipment Co., [1992] OJ No 810 (Ont Gen Div)*
9.	*Canada (Attorney General) v. Reliance Insurance Co.*, 2007 CarswellOnt 6391 (Ont. S.C.J.)
10.	*Royal Bank of Canada v. Correia*, [2006] O.J. No. 3206 (Ont. S.C.J.)
11.	*Adelaide Capital Corp. v. 412259 Ontario Ltd. et al*, [2006] O.J. No. 4175 (Ont. S.C.J.)

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: Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONSC 1911
COURT FILE NO.: CV-13-9991-00CL
DATE: 20130402

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: BUSINESS DEVELOPMENT BANK OF CANADA, Applicant

A N D:

PINE TREE RESORTS INC. and 1212360 ONTARIO LIMITED, Respondents

BEFORE: MESBUR J.

COUNSEL: *George Benchetrit*, for the Applicant

Milton Davis, for the Respondents

David Preger, for Romspen Investment Corporation

HEARD: March 27, 3013

E N D O R S E M E N T

The application:

[1] Business Development Bank of Canada (BDC) applies for the appointment of a Receiver over the assets of the respondents. The respondents own and operate the Delawana Inn in Honey Harbour Ontario. The Inn has experienced financial difficulties over the years, particularly since the economic downturn of 2008.

[2] BDC has lent the respondents just over $3.3 million advanced in two loans, the first for $3 million and the second for $325,000. The two loans are secured by first mortgages against the bulk of the properties forming the Inn's premises. In addition, BDC holds additional security by way of general security agreements granted by each of the respondents over all of their assets. Mr. Fischtein, the principal of the respondents, has also provided his personal guarantee of 15% of the outstanding balance on the larger loan. Both the mortgages and the GSAs give the bank the right to appoint a receiver if the respondents default.

[3] The respondents' ongoing financial difficulties resulted in their loans being transferred to the bank's special accounts department in April of 2011. The

respondents then failed to make the scheduled principal and interest payments due in July and August, 2011. They also failed to pay realty taxes. They were thus in default under their loan agreements and the mortgages.

[4] The bank demanded payment of the outstanding arrears in August 2011. The respondents failed to pay. In October of 2011, the bank demanded payment of the outstanding balances of the loan. The loan agreements and mortgages provide for acceleration of payment in the event of default. At the same time, the bank issued a notice of intention to enforce security (NITES) under s. 244 of the *Bankruptcy and Insolvency Act*.

[5] The respondents then asked BDC to postpone principal payments due under the loans, so they could put forward a turnaround proposal. The bank agreed, and the parties worked toward a forbearance agreement. They did not reach an agreement, but the respondents did pay all principal and interest arrears under the loans in January 2012.

[6] Under the loans, the respondents were required to make a large principal payment in July 2012. Just before the payment was due, the respondents advised BDC they would not make the payment. BDC then issued a demand for payment of the loan arrears.

[7] The respondents asked BDC to restructure the loan, since they were hoping to redevelop the Inn into a condominium/time-share resort.

[8] The respondents and BDC then entered into a letter agreement in September of 2012 amending the loan agreement. This amendment stretched principal payments, and the term of the loans, out to October of 2031. Even though the loan was restructured in this way, the respondents still did not pay. They requested further extensions.

[9] Finally, BDC reached the end of its patience. It issued a demand letter on November 23, 2012 declaring the balances of the loans were immediately due and payable. BDC also sent a NITES pursuant to the *BIA*.

[10] A few days later, BDC wrote the respondents advising that if and only if they paid all loan principal arrears together with all loan interest arrears and outstanding fees by January 7, 2013, BDC would withdraw the demand for payment and would then confirm that the repayment terms under the amendment letter would continue to apply.

[11] The respondents asked for more time, and sought an extension to January 31, 2013. BDC agreed to an extension to January 31 for principal payments,

but only if the respondents paid the outstanding interest arrears, fees and legal fees by January 11, 2013.

[12] On January 11 the respondents advised BDC the money would not be available until the following week. BDC then requested the payment be received on January 16, 2013.

[13] January 16 came and went. The respondents never paid. In sum, they have paid nothing on account of the BDC loans since June of last year, a period of over nine months. As of January 31, 2013 the respondents owed BDC a total of $2,583,257.45 for principal, interest, additional interest, costs, disbursements and expenses, being the total amount of the debt secured under the mortgages and GSAs.

[14] There is no question the respondents are in default under the BDC mortgages and GSAs. Both the mortgages and the GSAs give BDC the right to appoint a receiver pursuant to its security. It could appoint a private receiver if it wished. Instead, BDC moves for a court appointed receiver to sell the security. BDC takes the position this is the most transparent, cost effective and sensible way to proceed. While it could have pursued power of sale proceedings under the terms of its mortgages, it views a receivership as a better, more just and convenient way to maximize value for all stakeholders.

[15] Both the respondents and second mortgagee, Romspen Investment Corporation oppose the application. Romspen holds the second mortgage on the property secured by BDC's first mortgage. It also holds additional security on some of the respondents' other properties. Romspen is owed about $4.3 million. The respondents are also in default under the Romspen mortgages. Romspen wishes to pay the current arrears under the BDC mortgages, along with arrears of taxes and costs, and then take control of the sale of the Inn under the notices of sale it has already delivered pursuant to its mortgages.

[16] Romspen takes the position that under s. 22 of the *Mortgages Act*[1] it is entitled to put the BDC mortgages into good standing, and relieve against acceleration of the full amounts due under the mortgages. This is what it proposes to do, while pursuing its rights to sell the properties under the power of sale provisions of its own mortgages.

[17] Romspen says that under these circumstances it would not be just or convenient to appoint a receiver. It suggests that a receivership will be a more expensive and time consuming process than simply letting it put BDC's mortgages into good standing and maintain them in good standing while it sells the properties.

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[1] R.S.O.1990, c. M.40, as amended

[18] The respondents support Romspen's position. They agree the Inn should be sold to satisfy the outstanding debts. Mr. Fischtein, the principal of the respondents, and guarantor, says he is at the greatest risk of loss, and has a particular interest in obtaining the highest and best price for all the properties as a whole. He says the entire property should be sold, not just the portion over which BDC holds security. He says with his many years of operating the Inn, he can assist in ensuring the sales process is operated effectively and efficiently. He goes even further and says that if Romspen sells the property (with his cooperation, presumably) he would have no objection to a Monitor, acceptable to both mortgagees, reporting to BDC on the progress of a sales process.

The law:

[19] BDC asks the court to appoint a receiver under both s. 101 of the *Courts of Justice Act* and s. 243(1) of the *Bankruptcy and Insolvency Act.* Both statutes provide the court may do so if it is "just or convenient".

[20] In general the parties do not disagree on the appropriate legal principles to apply here. All agree that the overarching criterion in considering whether to appoint a receiver is whether it is "just and convenient" to do so.[2]

[21] While appointing a receiver is generally viewed as an "extraordinary remedy", it is less so when, as is the case here, a debtor has expressly agreed to the appointment of a receiver in the event of default.[3]

[22] In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.[4] In order to answer the question the court must consider all the circumstances of the case, particularly:

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

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[2] S. 101, *Courts of Justice Act*

[3] See, for example, *United Savings Credit Union v. F&R Brokers Inc.* (2003) 15 B.C.L.R. (4th) 347 (B.C.S.C.); *Chung v. MTCC 1067,* 2011 ONSCC 3187 (S.C.J.)

[4] *Bank of Nova Scotia v. Freure Village on Clair Creek,* 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (S.C.J.)

c) The nature of the property and the rights and interests of all parties in relation to it.[5]

[23] The *Mortgages Act* also has an impact on this case. Romspen wishes to avail itself of the provisions of section 22(1) of the *Mortgages Act* which says:

> Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> a) At any time before sale under the mortgage; or
>
> b) Before the commencement of an action for the enforcement of the rights of
>
> the mortgagee or of any person claiming through or under the mortgagee, the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

[24] Section 1 of the *Mortgages Act* defines "mortgagor" as including "any person deriving title under the original mortgagor or entitled to redeem a mortgage." Thus Romspen, as second mortgagee is, by definition, a "mortgagor" entitled to the benefits of section 22(1).

[25] Simply put, Romspen says that since BDC has not brought an action to enforce its mortgage within the meaning of the *Mortgages Act* it has an unequivocal right to put the BDC mortgage into good standing under s. 22.

[26] It is against this legal framework I turn to the facts of the case to decide whether in these circumstances it would be just and equitable to appoint a receiver, or whether, if Romspen exercises its rights under s. 22 of the *Mortgages Act,* it would not be just and equitable to do so.

Discussion:

[27] What is unusual about this application is that all the interested parties before the court support an immediate sale of the property. Each, particularly Mr.

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[5] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007 (CanLII)

Fischtein, has an interest in obtaining the highest and best price for the property. They disagree, however, on who should manage the process, and what the process should be.

[28] With that in mind, I will consider each party's plan, and determine what would be most just and convenient in all the circumstances, having regard to the criteria set out above.

BDC's plan

[29] BDC proposes to appoint Ernst & Young (E&Y) as receiver. The rates E&Y quotes for its services range from $200 or $225 per hour for support staff, to $350 per hour for managers, up to $475 per hour for the partner who will manage the file. BDC says E&Y would market the property itself, without using a real estate agent. The receiver does not propose to open and operate the Inn, but rather to attempt to sell it before it would otherwise open in June. Because BDC holds security over the real estate and the respondents' personal property, all the Inn's non-real estate assets could also be sold in the receivership.

[30] The respondents and Romspen suggest BDC's plan is flawed because BDC does not hold mortgage security over the entire property and could therefore not sell it *en bloc*. BDC's mortgage covers all but Royal Island (which Mr. Fischtein is already marketing separately as a residential family property), and three very small cottages. With the respondents' consent, these properties could be included in a sale. Even without these properties, the receiver would still be able to sell what appears to be more than 90% of the Inn's holdings.

[31] BDC also points out that a receivership would provide the added benefits of a stay of proceedings, as well a vesting order in favour of any purchaser. It also suggests this is a case where the court's overall supervision of the process, coupled with the receiver's obligations as the court's officer, would be in the best interests of all stakeholders.

Romspen's plan

[32] Romspen tells me that pursuant to s. 22 of the *Mortgages Act,* it will pay the principal arrears under the BDC mortgage forthwith, (i.e., within a day), and will bring all interest payments up to date, including interest on interest, together with BDC's costs and expenses, and outstanding realty taxes. It undertakes to continue to make all payments of principal and interest due under the mortgage as amended by the September 2012 agreement between the respondents and BDC. It does not, however, propose to pay outstanding HST.

[33] Romspen says it will market the whole of the property quickly with a view to selling all of it, within a reasonable period of time. It is prepared to keep BDC apprised of its efforts on an ongoing basis. It also agrees that if I dismiss the receivership application, it could be without prejudice to BDC's renewing the application at a later date.

[34] Romspen is quite candid that by using s. 22 of the *Mortgages Act* it can reap the benefit of the very favourable terms of the respondents' mortgages with BDC, and particularly the terms of the September 2012 amending agreement. It says BDC will not be prejudiced, because it will have received exactly what it bargained for in its agreements with the respondents, particularly the letter agreement amending the mortgage terms in September of 2012.

[35] Romspen argues that under its plan, BDC will be in the same position it would have been had the respondents' not defaulted. Under those circumstances, it argues it would not be just and convenient to appoint a receiver.

The respondents' plan

[36] The respondents prefer the Romspen plan. That said, they acknowledge the Inn must be sold, and Mr. Fischtein says he is "prepared to cooperate with the secured lenders in having the Delawana marketed and sold in an orderly fashion, through the appointment of an agreed upon agent, and, if necessary, with the supervision of a monitor who is acceptable to both lenders."[6] He says he can assist in ensuring that the sale process is operated effectively and efficiently.

[37] From these statements I infer that Mr. Fischtein, and thus the respondents, would cooperate with either mortgagee on a sale, and would do his utmost to see that value is maximized.

The risks and benefits of the proposed plans.

[38] Everyone agrees the Inn must be sold. They simply disagree on how the sale should be accomplished.

[39] The respondents suggest that this is a case like *Chung v. MTCC 1067* [7] where I denied a mortgagee's application for the appointment of a receiver. In my view, this is not a case like *Chung.* There, the real estate was a simple parking garage, without cross collateralized debt from different creditors. There, unlike here, there was no specific provision for a receiver in any security document.

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[6] Debtors' factum at paragraph 32
[7] 2011 ONSC 3187 (S.C.J.)

[40] The respondents argue that appointing a receiver now will affect the 165 reservations that have been made for the Inn this summer. They say this represents 830 room nights. Fifteen family reunions have been booked. The Inn provides 110 summer jobs, which the respondents say will be imperilled if a receiver is appointed.

[41] The respondents want the Inn to open in June, and be listed for sale without the "stigma" of a receivership. It seems to me that selling the property under power of sale is just as much of a stigma as having a receivership sale. If Romspen is candid in its stated intention to sell the property immediately, I fail to see how opening in June bears on the issue one way or the other. BDC suggests that since the Inn does not operate in the winter months, a receiver would be in a good position to conduct a quick sales process now that could result in a going concern sale. That outcome would provide the respondents' existing employees with employment with the Inn's purchaser in time for the 2013 season.[8]

[42] If the property can be sold quickly, new owners may honour the reservations and take on the employees. If the property is put on the market now, but not sold quickly, those who have reservations can be advised so they can make other arrangements, since the receiver has no plans to open and operate the Inn this season.

[43] With a power of sale (Romspen's plan), the properties will be sold. I am told there is sufficient equity to pay out BDC regardless of who sells it. The difficulty with Romspen's plan, however, is that its interests may run contrary to those of BDC and other creditors and stakeholders. For example, a sale that other stakeholders might support could be unacceptable to Romspen for any number of reasons. The advantage of a receivership is that the process will be subject to the court's supervision, coupled with the receiver's obligations to act in the interests of all creditors and stakeholders.

[44] I must consider the interests of all stakeholders. Although Romspen's plan could put the BDC mortgage into good standing, it does not remedy the default under the GSAs. For example, Romspen has no intention of paying the HST arrears. These alone come to about $250,000 for 2011 and 2012. The existence of those arrears constitutes a default under the GSA. The respondents are in default under the Romspen mortgages. That, too, constitutes default under the BDC GSAs.

[45] BDC points out that since Romspen holds security over more of the properties than does BDC, it is not unlikely that if Romspen sold the properties, there could be conflicts over allocation of the purchase price among the properties. BDC is not the only other creditor. There are third party equipment lessors, arrears of realty

[8] See paragraph 46 of the affidavit of Ruth Thomson, Senior Account Manager, Special Accounts, with BDC, sworn February 4, 2013, filed in support of the application

taxes, outstanding HST obligations, and the usual unsecured creditors. Mr. Fischtein himself, through companies he controls, also holds mortgages over all the properties. All have an interest in maximizing value, and having some input in the allocation of any global purchase price.

[46] I recognize that as a mortgagee, Romspen has an obligation in power of sale proceedings to sell at market value. I am not satisfied that that obligation alone is sufficient to protect the interests of all stakeholders.

[47] What about cost? Romspen and the respondents suggest that a receivership will be much more costly and cumbersome than a simple sale with an agent. They also say that only Romspen is in a position to sell all the land *en bloc.* I am not persuaded these considerations are sufficient to carry the day.

[48] I do not know how or when Romspen actually intends to market the Inn. I do not know how it will arrive at a listing price, nor do I know what rate of commission it will incur, or what the listing terms might be. I also have no idea of the likely time frame for soliciting offers. All I know is that Romspen intends to sell the property using a commercial agent, with whom I assume there would be the usual commission arrangement.

[49] Mr. Fischtein already has the island portion of the property, Royal Island, up for sale, along with a couple of the cottage properties. Royal Island is being marketed as a "family property", rather than as part of the Inn. It is listed on MLS as a residential property with commission payable at 5%. Although I have no real indicator of value for the property covered by the BDC mortgage, its MPAC value is stated to be more than $4 million. If it sold at this price, a commission of $200,000 or more would likely be payable.

[50] When I look at Romspen's plan as a whole, they would propose to incur immediate costs to put the BDC mortgage into good standing,[9] and then spend another $200,000 on commission and other expenses. Their plan is hardly inexpensive.

[51] I am told the receiver would market the property itself, without the interposition of an agent. BDC's counsel suggests that any marketing process would be court approved prior to the receiver embarking on it. In this way, the court could monitor the cost issue. The court would also have to approve any proposed sale, thus providing an open and transparent forum to protect the interests of all stakeholders.

[52] I find it interesting that Mr. Fischtein suggests the supervision of a monitor as an alternative to appointing a receiver. I do not see that as providing any

[9] Romspen has offered to pay $164,634.94 to BDC to put the mortgage into good standing. BDC takes the position that payment would not represent all the money BDC is owed.

cost savings. The advantage of a receiver, of course, is that the receiver is the court's officer, with duties and obligations to both the court and to all the stakeholders. If stakeholders disagree about the appropriate marketing process, the court can determine what is in the interests of all of them. Similarly, if allocation issues arise concerning how sales proceeds should be allocated among assets, each with different security against them, this is something a receiver can explore, and on which it can make recommendations to the court. Ultimately, the court can decide the issue if necessary.

[53] Other advantages of a receiver's sale include both a stay of proceedings, and the fact that any purchaser will obtain a vesting order, thus protecting it against any potential claims from other creditors. In a receivership, the receiver can also sell the other assets over which BDC holds security. This includes all the contents and equipment in the Inn.

[54] Courts have held that in circumstances where there was disagreement among stakeholders about how the property should be marketed, it was appropriate to appoint a receiver.[10] The same concern arises here.

[55] BDC has the right under both its GSAs and mortgages to appoint a receiver. Even if Romspen were to invoke the provisions of s. 22 of the *Mortgages Act* the respondents would still be in default under the BDC GSAs. They are in arrears of HST, which Romspen does not propose to pay. They are also in default under the Romspen mortgage and Romspen is pursuing a power of sale. All of these constitute default under the BDC security. Under those circumstances, BDC is still contractually entitled to the appointment of a receiver.

[56] If I appoint a receiver, Romspen will not be put to the immediate expense of paying the arrears of principal, interest and other costs (as well as the ongoing obligations) under the BDC mortgages. As I see it, a receivership will benefit Romspen overall.

[57] A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all. I therefore exercise my discretion and grant the application to appoint a receiver.

[58] I note that the proposed receivership order has a borrowing power for the receiver of up to $250,000. First, I am not obliged to approve borrowings at that level, and second, I do not know what the receiver will really need in order to conduct its duties. I am not prepared to approve the borrowing provisions in the draft order BDC has provided. This receivership should be conducted efficiently and quickly. For that

[10] *Bank of Nova Scotia v. Freure Village on Clair Creek,* (1996), 40 C.B.R. (3d) 274 (S.C.J.)

reason, I will reduce the receiver's borrowing powers to $175,000 without further order. Given the receiver's hourly rates for the partner, managers and support staff it would assign (none of which exceed $475 per hour), this amount should be ample. If it is not, the receiver can return to court to seek an increase. If it does, it will have to justify an increase to the court's satisfaction.

[59] In that regard, if the receiver moves to increase the receiver's borrowings, the court hearing the motion should be made aware that one of the reasons I have made the receivership order is because of the submissions BDC has made that the receiver can accomplish the sale quickly, efficiently, and without the need to incur the cost of commission that would be attendant to a listing arrangement for the properties.

Conclusion:

[60] The application is therefore granted, and a receivership order will issue in terms of the draft order submitted, with the exception of the amount of $250,000 referred to in paragraph 20 of the draft order. The figure of $250,000 will be replaced with the figure of $175,000.

[61] Given my disposition of the application, I assume there is no necessity to deal with any issue of costs, other than as set out in the draft receivership order. If I am incorrect, I invite counsel to provide me with brief written costs submissions (no more than 2 pages long), within two weeks of the release of these reasons, failing which there will be no further order as to costs.

MESBUR J.

Released: 20130402

tab 7

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:

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[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 8

Indexed as:

King (Township) v. Rolex Equipment Co.

Corp. of the Township of King v. Rolex Equipment Co., Daily Disposal Services Inc., Carmine, Petriglia, Beltrame, Petriglia, Petriglia, Titan Excavating Ltd., Petrison Corp., Blue Mountain Masonry Inc., Caranci and Petrex Equipment Co.

[1992] O.J. No. 810

8 O.R. (3d) 457

90 D.L.R. (4th) 442

9 C.E.L.R. (N.S.) 1

23 R.P.R. (2d) 313

32 A.C.W.S. (3d) 1172

Action No. 60101/90Q

Ontario Court (General Division),

B. Wright J.

April 22, 1992

Counsel:

C.M. Loopstra, Q.C., for the Township of King, plaintiff.

Julian D. Heller, for Roger Wood and Diane Wood, interveners.

Frances J. Carnerie, for the Ministry of the Environment, intervener.

1 **BLENUS WRIGHT J.**:--Residents of King Township complain that an illegal garbage dump in their midst is depreciating the value of their properties. A local property owner has allowed solid waste to be dumped on his land and the community wants the waste removed.

2 King Township requests that the court appoint a receiver with authority to remove the waste and sell the land. The township also asks for an order that costs of the removal and sale be "a first lien or charge upon the subject lands, in priority to all other liens and encumbrances affecting the subject lands". All secured creditors have received notice of the request for a receivership. The first mortgagee opposes the appointment of a receiver.

3 Comprised of construction site garbage, the waste is non- hazardous. The estimated cost of removal of the waste is $275,000. The township previously obtained a mandatory order requiring the owner of the land to remove the waste. The order stated that if the owner failed to remove the waste, he was ordered to provide security to the township in the sum of $275,000 and the township was at liberty to enter the lands and remove the waste. In default of providing the security, the township was entitled to judgment in the amount of $275,000.

4 The owner failed to remove the waste and did not provide any security. He has defaulted on a vendor take-back mortgage with a judgment against him for approximately $1.4 million. He has abandoned the property.

5 The mortgagee has not taken possession of the property. The mortgagee maintains that the removal of the waste is the responsibility of either the township under the Municipal Act, R.S.O. 1990, c. M.45, or the Ministry of the Environment under the Environmental Protection Act, R.S.O. 1990, c. E.19.

6 King Township admits that it has authority under the Municipal Act to remove the waste and collect the expenses of removal as municipal taxes. But the township claims it does not have the financial resources to effect the removal of the waste. The parties believe that the township's expenses of removal under the Municipal Act would not take priority over the mortgagee's interest. The result of a sale of the property in a recessionary market would not satisfy the mortgagee's default judgment and, therefore, the township claims it would be burdened with the expenses of the waste removal. The township maintains that its taxpayers should not bear the burden of paying for the waste removal, hence the request for the appointment of a receiver whose costs would take priority over the mortgagee's interest.

7 The township submits that the property cannot be sold until the waste is removed; that the removal benefits the mortgagee; and, that in the end result, whether the waste is removed by the mortgagee or a receiver, or the Ministry of the Environment, it is the mortgagee who will ultimately bear the cost of removal. Since the mortgagee refuses to take possession of the property and remove the waste, and since the persons affected most by the non-removal of the waste are the residents of King Township, the township urges the court to appoint a receiver to remove the waste.

8 The Ministry of the Environment concedes that the Environmental Protection Act gives the director authority to have the waste removed and to collect the expenses of removal as municipal taxes. The township argues that the wording of the Environmental Protection Act gives the Ministry of the Environment priority for its costs over the mortgagee's interest. The mortgagee disputes the township's interpretation. Counsel for the Ministry of the Environment was not able to advise the court what position it takes on the question of priority.

9 Officials of the Ministry of the Environment have investigated the waste and concluded that it contains all solid waste which is non-hazardous and is of no danger to the public. The Ministry of the Environment has decided that the removal of the waste has only an aesthetic value. The Ministry maintains that its funding is limited to the removal of illegally dumped waste where there is a hazard to the public. It argues that it cannot fund the removal of non-hazardous waste from numerous sites where waste has been dumped illegally because it does not have sufficient funds. It contends that its waste removal program must concentrate on removing hazardous waste. In this case, it has decided that it is not in the public interest that it utilize its funds to remove this waste which is not a public hazard.

10 There is no lack of legislative authority to remove the waste. Both King Township and the Ministry of the Environment are empowered by legislation to remove the waste. The problem is not the removal of the waste, but who pays for its removal. The uncertainty in the legislation as to payment of the expenses of removal in priority to the interests of secured creditors is deterring both authorities from exercising their discretion to remove the waste.

11 A question arises under both the Municipal Act and the Environmental Protection Act whether clean-up costs take priority over secured creditors. I am not convinced, on the authorities provided to me by counsel, that under the Municipal Act costs of removal of waste do not take priority.

12 I am perplexed that the director under the Environmental Protection Act is exercising a discretion not to remove the waste, alleging that funds are not available to do so, when the Ministry apparently has not considered whether its legislation provides it with priority as to costs expended. It may well be that the director is acting on a faulty premise.

13 The question of priority for the authorities' expenses is not before me. But, because of the uncertainty surrounding the question, I suggest the legislation should be reviewed. Authority to carry out a task is of little value if part of the arsenal, namely, the costs of performing the task, is missing. The legislation has proven ineffective in this case as evidenced by the reluctance of either authority to act in a situation which involves a public interest.

14 It may be that in matters between private parties, interests of secured creditors should take precedence. But, in situations like the present, where the interests of the public outweigh private interests, and a secured creditor refuses to take any initiative in seeing that the waste is removed, it may be appropriate that public authorities' costs take priority over secured creditors' interests.

15 Or, where as in this case, the secured creditor is an innocent vendor who took back a mortgage and the real culprit is the purchaser whose illegal acts caused the problem, it may be that the burden of the cost should be spread to all the taxpayers. These are matters for consideration by legislators and require clarification.

Does the township have status?

16 Section 101(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, provides:

> 101.(1) In the . . . Ontario Court (General Division) . . . a receiver . . . may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

17 Usually, the applicant for the appointment of a receiver is a secured creditor. The township is not a secured creditor. In his book Receiverships (Toronto: Carswell, 1985), Frank Bennett states at p. 91:

> The jurisdiction under section 114 of the Courts of Justice Act will most often be invoked by a security holder. However, there are no restrictions as to the type of case wherein a receiver may be appointed. Apart from enforcement under a security instrument, the jurisdiction can be employed in a partnership dispute, by an execution creditor for the appointment of an equitable receiver, by shareholders of a corporation which is mismanaged or simply by a party to an action where it is necessary to preserve and protect the property that is in dispute pending a declaration or a judgment. In these situations, the court will consider whether the property is in peril or wasting, whether there are irreparable damages and the costs of the receivership if an appointment is made.

18 The township is an execution creditor. Rule 60.02(1)(d) of the Rules of Civil Procedure, O. Reg. 560/84, states:

> 60.02(1) In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by . . . . .
>
> (d) the appointment of a receiver.

19 The township's counsel did not refer to this rule and did not ask specifically for the appointment of an equitable receiver in aid of execution on the township's judgment of $275,000. The township may consider that the property is an asset of the owner against whom the township has a judgment and as an execution creditor it has a right to apply for the appointment of a receiver to deal with that asset to satisfy its judgment. However, the evidence discloses that the owner has no equity in the land since the mortgagee has a judgment against the owner which is in excess of the market value of the land. The appointment of an equitable receiver will not garner any part of the township's judgment from the debtor's interest in the land. There is some evidence that other defendants may have assets which a receiver could call in and realize upon in satisfaction of all or part of the judgment. King Township's draft order references the owner's property but does not refer to any other assets of any of the defendants.

20 In the event that a receiver is appointed, I suggest counsel for the township should consider whether it would be worthwhile for the receiver to pursue any assets of the defendants for the purpose of paying the costs of the waste removal. If any of the defendants who were responsible for the dumping of the waste have assets of any value, they should be sold to help defray the removal costs and lessen the costs to the mortgagee. The defendants John and Anthony Petriglia are represented by A. Riswick, who chose not to participate in this aspect of the proceedings.

21 The township appears not to be asking that an equitable receiver be appointed in aid of execution on its judgment. The township requests that, in the public interest, a receiver be appointed to oversee the removal of the waste and to ensure that the expenses of removal are charged against the value of the land and not to the residents of the township.

22 In my view, where anyone can demonstrate a sufficient interest in a matter, they have a right to apply to the court pursuant to s. 101 of the Courts of Justice Act for the appointment of a receiver. In this case, the township has demonstrated that, on behalf of the residents of the township, it has a sufficient interest in having the waste removed. Is this an appropriate case for the appointment of a receiver? As the legislation provides, is it just and convenient to do so?

Just or convenient?

23 To determine whether the appointment of a receiver is just and convenient on the facts of this case, I must decide whether receivership costs can take priority over the interests of a secured creditor who opposes the receivership. In Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, the Court of Appeal adopted the general rules of receivership and accepted the exceptions to the rules as set out in Ralph Ewing Clark, Clark on Receivers, 3rd ed., vol. 1, s. 22, p. 25, and vol. 2, ss. 638, 640, pp. 1070-71, 1078. The court recognized that the list of exceptions is not exhaustive. The general rule is: receivership property cannot be used in such a way as to subject the mortgagee to the expenses of the receivership; a court has no power to authorize expenses to the property at the expense of prior mortgagees without the sanction of the mortgagees.

24 One of the exceptions is: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. Without the removal of the waste from this property, it is worthless because it cannot be sold. Therefore, money must be expended to improve the property by the removal of the waste in order to preserve the property's market value. Without such improvement by removal of the waste, the property has no market value. I conclude that the facts of this case fall within this exception; it is necessary for a receiver to expend money on the property for its improvement and preservation.

25 The facts of this case give rise to a further exception to the general rule. This is not a dispute between private parties, but an issue which concerns the public interest. Although a receivership will benefit all interested parties in that the waste will be removed, the benefit to the public, the residents of King Township, outweighs the detriment to the mortgagee in having the receivership expenses take priority over the mortgagee's interest. If a receiver is not appointed, the garbage dump will remain a blight on the landscape of the township. It is against the public interest that a community must continue to contend with a garbage dump in their midst because a secured creditor with the greatest interest in the property refuses to take any action to deal with the property.

26 The mortgagee argues that it should not be responsible for expenses which will decrease its return from the sale of the property in a depressed market. But the fact that the current market is depressed is irrelevant. Anyone with investments in real estate is subject to a fluctuating market and the risk of depreciating land values. Without the presence of the waste on the land, the mortgagee on a power of sale in the current depressed market would suffer a loss from the original sale price.

27 It is inevitable that the mortgagee will pay the cost of removal of the waste whether a receiver is appointed or the mortgagee removes the waste on its own. Neither the township nor the Ministry of the Environment intends to remove the waste. The public has a right to have the waste removed. I conclude that if the mortgagee decides not to remove the waste, it is just and convenient to appoint a receiver to remove the waste and that the receivership costs of removal should be paid in priority to the interests of the mortgagee.

28 I suggest there are at least two reasons why the mortgagee may prefer to take responsibility to remove the waste rather than have a receiver appointed. The cost of a receivership will likely be more expensive than if the mortgagee arranged to have the waste removed. The mortgagee may also be concerned with the timing of the sale of the property. If a receiver is appointed, the receiver would proceed to remove the waste and sell the property as soon as the waste is removed. Since the market is depressed, the mortgagee could proceed to remove the waste and sell the property on its own timetable when the market improves.

29 This case requires that the mortgagee be given some time to decide whether to remove the waste. The mortgagee will be given 30 days from the date of this judgment to advise counsel for King Township whether the mortgagee will remove the waste within a reasonable time period. If the mortgagee decides not to remove the waste, an order will go appointing a receiver whose expenses of removal will take priority over the mortgagee's interest. I may be spoken to if counsel are unable to agree on a reasonable time period for removal of the waste, or on the terms of an order for the appointment of a receiver, or on costs.

Order accordingly.

tab 9

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 10

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 11

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

cp/e/qw/qlmxd/qlbxs/qlkjg

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

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