CV-18-602774-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

NORTHERN ONTARIO HERITAGE FUND CORPORATION

Applicant

- and -

NISKA NORTH INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED

BOOK OF AUTHORITIES OF THE APPLICANT

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil
8-720 Bay Street
Toronto, ON M7A 2S9
Tel.: 416-314-2540
Fax: 416-326-4181

Antonin Pribetic, LSO No. 34843S
antonin.pribetic@ontario.ca

Ananthan Sinnadurai, LSO No. 60614G
ananthan.sinnadurai@ontario.ca

Lawyers for the Applicant,
Northern Ontario Heritage Fund Corporation

TO: **NISKA NORTH INC.**
303 Martel Road
Chapleau, ON P0M 1K0

Respondent / Debtor

I N D E X

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1	*Bank of Montreal v. Sherco Properties Inc*., 2013 ONSC 7023
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3	*CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd*., 2012 ONSC 1750 (S.C.J.)

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.

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 remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

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.

Case Name:

CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.

RE: CCM Master Qualified Fund, Ltd., Applicant, and blutip Power Technologies Ltd., Respondent

[2012] O.J. No. 1165

2012 ONSC 1750

Court File No. CV-12-9622-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: March 15, 2012.
Judgment: March 15, 2012.

(25 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Sales by receiver -- Motion by Duff & Phelps (D&P) for orders approving a sales process, bidding procedures and the priority of a Receiver's Charge and Receiver's Borrowings Charge allowed -- D&P was appointed receiver of the respondent Blutip -- D&P sought to use a stalking horse credit bid -- A quick sales process was necessary to optimize the prospects of securing the best price for the assets -- The proposed procedures would likely result in a fair, transparent and commercially efficacious process -- Furthermore, no person appeared to oppose the priority sought by the Receiver for its charges.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(6)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

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

Personal Property Security Act, R.S.O. 1990, c. P.10,

Counsel:

L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a

> business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As

explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver

now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> ...
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA*

> proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

D.M. BROWN J.

1 (1991), 7 C.B.R. (3d) 1 (C.A.).

2 *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.

3 *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.

4 *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, [2009] O.J. No. 3027, 2009 CarswellOnt 4262 (S.C.J.).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding - Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

7 *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

8 2012 ONSC 1299 (CanLII).

NORTHERN ONTARIO HERITAGE FUND CORPORATION **v** **NISKA NORTH INC.**

Applicant Respondent

Court File No.: CV-18-602774-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BOOK OF AUTHORITIES OF THE APPLICANT

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil
8-720 Bay Street
Toronto, ON M7A 2S9
Tel.: 416-314-2540
Fax: 416-326-4181

Antonin Pribetic, LSO No. 34843S
antonin.pribetic@ontario.ca

Ananthan Sinnadurai, LSO No. 60614G
ananthan.sinnadurai@ontario.ca

Lawyers for the Applicant,
Northern Ontario Heritage Fund Corporation