Court File No. CV-17-11710-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

EXPORT DEVELOPMENT CANADA

Applicant

and

AXIOS MOBILE ASSETS CORP.; AXIOS MOBILE ASSETS INC.; AXIOS MOBILE ASSETS, INC.; AXIOS LOGISTICS SOLUTIONS INC.

Respondents

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

BOOK OF AUTHORITIES OF THE APPLICANT
(Appointment of Receiver)

February 24, 2017

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D.	*Redstone Investment Corporation* (8 Aug 2014), Toronto CV-14-10495CL (Ont Sup Ct J (Commercial List))
E.	*Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ct J (Gen Div – Commercial List))
F.	*1529599 Ontario Ltd v Dalcor Inc*, 2012 ONSC 5707 (Commercial List)

G. *Textron Financial Canada Ltd v Chetwynd Motels Ltd*, 2010 BCSC 477

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

S.E. Pepall J.

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

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

Subject: Corporate and Commercial; Insolvency; Property

Headnote

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

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

Table of Authorities

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

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

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

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

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

Statutes considered:

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

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

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

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

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

Relief Requested

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

Backround Facts

2 Rosseau Resort Development Inc. (RRDI) is the registered owner of property on Lake Rosseau in Muskoka. When it was ordered into receivership on May 22, 2009, RRDI had been developing and constructing a first class hotel and condominium complex (the "Hotel"), the construction of which was incomplete. RRDI's property consists of about 40 acres plus the land on which the Hotel is situate. At the time of the receivership, 72 of a total of 221 units had been sold and closed, 65 had been sold but the sale transactions had not closed, and 84 remained to be sold. The terms of the agreements of purchase and sale required that the units be included in a rental pool and then be made available for rent by guests of the Hotel. The court appointed receivership was initiated by the first secured creditor, WestLB AG ("WestLB"). The construction of the Hotel has now been substantially completed.

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

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

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

6 Amongst other things, the HMA provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 The Receiver noted that the RMPAs require the payment of revenue by the rental pool manager to the unit owners but the rental pool manager's ability to do this arises from the payment of operating profit by Marriott Hotels under the HMA. RRMSI does not have an ownership interest in the Hotel or an exclusive right to receive distributions from Marriott Hotels. The Receiver stated that it cannot continue the structure of the RPMAs. The calculation of amounts owing to the unit owners could result in there being an amount owing to the unit owners even when the operations of the Hotel incur an operating loss. The structure appears to have been developed on the premise that RRDI would have the financial resources to backstop the obligations of RRMSI to unit owners and the Receiver was of the view that it was inappropriate to continue in this manner with new unit purchasers. I agree. The Receiver also determined that it was desirable to continue with Marriott Hotels as the Hotel operator. It negotiated a new HMA in which RRDI's obligations would be secured by a court ordered charge in the amount of $5 million subordinate only to the Receiver's charge and borrowing charge and priority construction lien claimants and it also negotiated a charge in favour of unit owners in the amount of $5.3 million.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Positions of Parties

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

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

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

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

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

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

Discussion

37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.* [2], as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])] [3]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.* [4].

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

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

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

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

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

43 In all of the circumstances outlined, it is both just and convenient to appoint a receiver of all right, title and interest of RRMSI in and to the HMA, the RPMAs and the other agreements and arrangements requested by the moving parties. That said, it seems to me just that for the period commencing September 1, 2009 and continuing for 6 months, the receiver be obliged to record all fees, if any, that would have been received by RRMSI as a result of the RPMAs it entered into with unit owners and purchasers. This time period reflects in an approximate way the termination provisions contained in the RPMAs. In submissions, counsel for the Receiver indicated that it would be possible to track those amounts. Once the RRMSI receiver is appointed, it should be in a position to consider the binding nature of any agreement relating to contribution and indemnity with respect to the HMA and whether amounts are owed by RRMSI to RRDI and were improperly appropriated. The record would also enable the Court to consider whether RRMSI has any real entitlements. In all of these circumstances, paragraph 6 of my order also should be sustained without prejudice to claims that may be made by either the Receiver or RRMSI to the subject matter of the aforementioned record. For greater certainty, this would not detract from the ability of the unit owners and unit purchasers to terminate by entering new RPMAs, my intention being to provide them with full protection and at the same time preserving the possibility of a claim by RRMSI to the fees, if any, reflected in the record.

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

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

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

Motion granted.

Footnotes

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

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

3 (07-CL-6913)

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

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

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

TAB B

2008 CarswellOnt 6258
Ontario Superior Court of Justice [Commercial List]

Tool-Plas Systems Inc., Re

2008 CarswellOnt 6258, [2008] O.J. No. 4218, 172 A.C.W.S. (3d) 112, 172 A.C.W.S. (3d) 113, 48 C.B.R. (5th) 91

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Receiver, RSM Richter Inc.
R. van Kessel for EDC, Comerica
C. Staples for BDC
M. Weinczok for Roynat

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

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Debtor manufactured auto parts — Debtor wished to appoint receiver and execute "quick flip", including terms that purchaser would acquire assets of debtor and hire same employees, and assume debt to secured lenders — Receiver brought motion for approval of transaction — Motion granted — Transaction was best available option, and was reasonable — Plan was in best interests of shareholders — Certain parties would benefit, including secured lenders, certain lessors, and certain employees — Certain employees and suppliers would have no possibility of recovery, but were unlikely to recover under any scenario — Price proposed was higher than liquidation value or value of going concern — Secured lenders supported transaction and subordinated secured lenders did not object — Harm could be caused by delay in that relationship with customers could be harmed by disruption.

Table of Authorities

Cases considered by *Morawetz J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

MOTION by receiver for approval of purchase of debtor corporation.

***Morawetz J.*:**

1 This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new

corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

2 The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position — which recommends approval of the sale.

3 The transaction has the support of four Secured Lenders — EDC, Comerica, Roynat and BDC.

4 Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers — namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

5 Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

6 Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

7 The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

8 The only substantial condition to the transaction is the requirement for an approval and vesting order.

9 The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

10 The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

11 The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

12 Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

13 This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

14 Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order — specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

15 A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

16 In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally — the customers of the mould division who stand to benefit from continued supply.

17 On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

18 I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

19 I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

20 In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) have been followed.

21 In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

22 The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

Motion granted.

End of Document

TAB C

2011 ONSC 6292
Ontario Superior Court of Justice [Commercial List]

Graceway Canada Co., Re

2011 CarswellOnt 12770, 2011 ONSC 6292, 209 A.C.W.S. (3d) 555, 85 C.B.R. (5th) 214

In the Matter of the Receivership of Graceway Canada Company (Applicant)

And In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43, as Amended

Morawetz J.

Heard: October 4, 2011
Oral reasons: October 4, 2011
Docket: CV-11-9411CL

Proceedings: additional reasons at *Graceway Canada Co., Re* (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687 (Ont. S.C.J. [Commercial List])

Counsel: F. Myers, L.J. Latham for Applicant
L. Brost, for Bank of America, Administrative Agent for First Lien Lenders
J. Swartz for RSM Richter Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Indirect parent of applicant corporation filed for bankruptcy in Delaware — Corporation was solvent and had ability to pay day-to-day obligations — Bidding procedure would be involved in American bankruptcy proceedings — Corporation brought application for order appointing receiver and stay of proceedings — Application granted — Receiver was appointed — Appointment of receiver was just and convenient — Requirements of s. 101 of Courts of Justice Act were satisfied.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Indirect parent of applicant corporation filed for bankruptcy in Delaware — Corporation was solvent and had ability to pay day-to-day obligations — Bidding procedure would be involved in American bankruptcy proceedings — Corporation brought application for order appointing receiver and stay of proceedings — Application granted — Stay of proceedings was granted — Stay of proceedings was primarily directed towards ensuring status quo in American bankruptcy proceedings — Considering corporation had ability to pay normal obligations, stay was appropriate.

Table of Authorities

Statutes considered:

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

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

s. 101 — considered

APPLICATION by subsidiary corporation for order appointing receiver and stay of proceedings.

***Morawetz J.*:**

1 The indirect parent of the Applicant, Graceway Pharmaceuticals and its affiliates (the "U.S. Debtors") filed under Chapter 11 in Delaware.

2 The Applicant seeks an order appointing RSM Richter Inc. a receiver under s. 101 of the *Courts of Justice Act*. The purpose of the order is to provide a court-supervised process to oversee the sales process for the assets of the Applicant and to coordinate with the Chapter 11 proceedings of the U.S. Debtors. Counsel submits that a receivership order will assist in protecting the interests of the Applicant in respect of the allocation of sale proceeds among the U.S. Debtors' estates and the Applicant, receiving the proceeds of sale for subsequent distribution, and overseeing other issues that may arise during the joint stalking horse process.

3 Although the Applicant appears to be solvent — a stay of proceedings is requested. It is anticipated that normal day-to-day obligations will be honoured and the proposed order does permit the Applicant to make such payments. The stay is primarily directed towards ensuring a *status quo* in the Chapter 11 proceedings and, in particular, at parties having strategic interests in the U.S. Chapter 11 process.

4 In these circumstances, and considering that the Applicant does have the ability to pay day-to-day obligations, I am satisfied that the stay is appropriate.

5 A bidding procedure will be involved in the Chapter 11 proceedings. To the extent that the interests of the Applicant are part of the sale process, it could be that relief may be sought from this Court. If a request for such relief is anticipated, the Applicant and the Receiver will be expected to ensure that the *Soundair* principles are respected. In this respect, the Receiver should be prepared to file a meaningful report. To the extent that the Applicant or the Receiver requires further directions, they can certainly seek directions as provided for in the comeback clause.

6 A DIP Loan is being provided by the Applicant to the U.S. Debtors. The balance sheet and the cash flow information would suggest that creditors of the Applicant will not be prejudiced by the DIP Loan.

7 It appears to be well secured. I have received and considered the comprehensive factum provided by counsel to the Applicant. I have also reviewed the affidavit of Mr. Moccia and the pre-filing report of the Receiver. I am satisfied that, in these circumstances, the appointment of a receiver is both just and convenient. The requirements of s. 101 of the CJA have been satisfied.

8 RSM Richter is appointed Receiver.

9 The form of proposed order includes a Cross-Border Insolvency Protocol. It is my understanding that the issue of approving the protocol is scheduled to come before the U.S. Bankruptcy Court later this month.

10 I am prepared to approve the Protocol at this time, recognizing however, that the Protocol is not effective until such time that it has been approved by the U.S. Court. I also recognize that the Chapter 11 proceedings are expected to be far more significant in scope than these proceedings. In this respect, I would expect that if cross-border communications are desirable in these proceedings, this decision will likely be driven by the U.S. Court in the Chapter 11 proceedings. This Court will accommodate any requests of the U.S. Court for communication, if so required.

11 Receivership Order granted and signed in the form provided.

Application granted.

End of Document

TAB D

Court File No. CV-14-10495-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 8TH
	)	
REGIONAL SENIOR JUSTICE	)	DAY OF AUGUST, 2014
	)	
MORAWETZ	)	

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF REDSTONE INVESTMENT CORPORATION AND REDSTONE CAPITAL CORPORATION

Applicants

ORDER
(Appointing Receiver)

THIS MOTION, made by Redstone Investment Corporation ("**RIC**") and Redstone Capital Corporation ("**RCC**"), for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Grant Thornton Limited as receiver and manager (in such capacities, the "**Receiver**"), without security, of all of the assets, undertakings and properties of RIC and RCC (together, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Eric Hansen sworn July 18, 2014 and the exhibits thereto (the "**Hansen Affidavit**"), the supplemental affidavit of Eric Hansen sworn August 5, 2014 and the exhibits thereto (the "**Supplemental Hansen Affidavit**") the Fourth Report of Grant Thornton Limited, in its capacity as Court-appointed monitor of RIC and RCC (in such capacity, the "**Monitor**") dated July 18, 2014 (the "**Fourth Report**"), the Fifth Report of the Monitor dated July 23, 2014 (the "**Fifth Report**"), the Sixth Report of the Monitor dated August 6, 2014 (the "**Sixth Report**") and on hearing the submissions of counsel for the Debtors, counsel for the

Monitor, counsel for the proposed Receiver, Blake, Cassels & Graydon LLP ("**Blakes**"), as representative counsel ("**Representative Counsel**"), counsel for Edmond Chin-Ho So and 1710814 Ontario Inc. c.o.b. as Redstone Management Services and such other counsel as may be present, and upon reading the affidavit of service of Mary Arzoumanidis sworn July 21, 2014 and the affidavit of service of Jessica Beare sworn August 5, 2014, and on reading the consent of Grant Thornton Limited to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 101 of the CJA, Grant Thornton Limited is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and

the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including, without limitation, those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings, including, without limitation, proceedings commenced by the Debtors against Edmond Chin-Ho So and 1710814 Ontario Inc. c.o.b. as Redstone Management Services bearing Court File No. CV-14-10556-00CL, and to defend all proceedings now pending or hereafter instituted

with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $150,000, provided that the aggregate consideration for all such transactions does not exceed $300,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(q) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;

(r) to carry out the process for the filing of claims against the Debtors' current and former directors and officers (the "**D&O Claims Process**") pursuant to the Directors and Officers Claims Bar Order dated August 8, 2014 granted by Regional Senior Justice Morawetz; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the

Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO PROCEEDINGS AGAINST THE DIRECTORS AND OFFICERS OF THE DEBTORS

10. **THIS COURT ORDERS** that, except as permitted by subsection 11.03(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), no Proceeding against or in respect of any current or future director or officer of the Debtors shall be commenced or continued until an Order is made extinguishing the Directors' Charge, as defined in the Initial Order of Regional Senior Justice Morawetz dated March 28, 2014 (the "**Initial Order**").

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

12. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

13. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

14. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including, without limitation, the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

15. **THIS COURT ORDERS** that the Receiver is directed to establish a separate bank account (the "**Designated Account**") and to deposit and hold in the Designated Account all amounts that are or are required to be deposited and held by the Debtors in a specific bank account pursuant to the terms of the agreement reflected in an e-mail exchange dated June 5, 2014 among counsel for the Debtors, Maplebrook Capital Corporation and Gino Martone and Sulz Family Trust, a copy of which is attached to the affidavit of Eric Hansen sworn July 18, 2014 as Exhibit "Q" (the "**Ring-Fence Agreement**"). The Receiver shall be bound by and have the benefit of all provisions of the Ring Fence Agreement (including all reservations of rights therein) in the same manner and to the same extent as the Debtors, and nothing in this Order shall affect the rights, benefits and obligations of Maplebrook Capital Corporation, Gino Martone and Sulz Family Trust under the Ring Fence Agreement (including all reservations of rights therein).

EMPLOYEES

16. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in subsection 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or

in respect of its obligations under subsections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act.*

PIPEDA

17. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

18. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in

pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

19. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under subsections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

20. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

22. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

23. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $150,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

24. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

25. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

26. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

27. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-

protocol/) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL www.grantthornton.ca/redstone.

28. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

BANKRUPTCY OF THE DEBTORS

29. **THIS COURT ORDERS** that the Receiver is authorized and directed to file assignments into bankruptcy for each of the Debtors, forthwith.

30. **THIS COURT ORDERS** that the Grant Thornton Limited is authorized to act as trustee in bankruptcy (in such capacity, the "**Trustee**") in respect of each of the Debtors.

31. **THIS COURT ORDERS** that the Receiver is authorized and directed to transfer $20,000 to the Trustee for each of the bankruptcies of the Debtors, for a total amount of $40,000, from funds held in the receivership estate in order to fund the bankruptcies of the Debtors.

COURT ORDERED CHARGES

32. **THIS COURT ORDERS** that the Administration Charge and the Directors' Charge established pursuant to the Initial Order in the CCAA Proceedings shall continue to bind the Property of the Debtors, until further Order of the Court.

33. **THIS COURT ORDERS** that the priorities of the Receiver's Charge, the Receiver's Borrowings Charge, the Administration Charge and the Directors' Charge, as among them, shall be as follows:

First – Receiver's Charge;
Second – Receiver's Borrowings Charge;
Third – Administration Charge (to the maximum amount of $750,000); and
Fourth – Directors' Charge (to the maximum amount of $100,000).

DISPENSING WITH NOTICES UNDER THE BIA

34. **THIS COURT ORDERS** that the Receiver be and is hereby relieved from compliance with the provisions of subsections 245(1)(b) and 245(2) of the BIA, provided that the Receiver shall provide notice of its appointment by way of a copy of this Order to the Debtors and to the Superintendent of Bankruptcy, accompanied by the prescribed fee.

35. **THIS COURT ORDERS** that the Trustee shall, in delivering the notice contemplated by subsection 102(1) of the BIA on every known creditor, prepare a list showing the aggregate amounts owed to the Debtors' creditors and the estimated amounts of those claims, but excluding from that list the names and addresses of, and individual amounts owed to, those creditors who the Trustee reasonably believes to be investors (as opposed to trade creditors).

GENERAL

36. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

37. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

38. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

39. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

RSJ

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG - 8 2014

M

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. **THIS IS TO CERTIFY** that Grant Thornton Limited, the receiver and manager (in such capacities, the "**Receiver**") of all of the assets, undertakings and properties of Redstone Investment Corporation ("**RIC**") and Redstone Capital Corporation ("**RCC**" and, together with RIC, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 7th day of August, 2014 (the "**Order**") made in an action having Court file number CV-14-10495-00CL, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2014.

GRANT THORNTON LIMITED, solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

Court File No. CV-14-10495-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF REDSTONE INVESTMENT CORPORATION AND REDSTONE CAPITAL CORPORATION

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

ORDER
(Appointing Receiver)

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TAB E

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

Bank of Nova Scotia v. Freure Village on Clair Creek

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

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

Blair J.

Judgment: May 31, 1996
Docket: none given

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

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Appointment — Application for appointment — General

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

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

Held:

The motions were granted.

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

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable

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

Table of Authorities

Cases considered:

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

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

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

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

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

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

Statutes considered:

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

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

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

***Blair J.*:**

1 There are two companion motions here, namely:

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

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

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

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

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

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

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

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

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

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

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

Receiver/Manager

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

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

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

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

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

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

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which

is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

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

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

Motions granted.

TAB F

2012 ONSC 5707
Ontario Superior Court of Justice [Commercial List]

1529599 Ontario Ltd. v. Dalcor Inc.

2012 CarswellOnt 12474, 2012 ONSC 5707, 222 A.C.W.S. (3d) 660

1529599 Ontario Limited, Applicant and Dalcor Inc., Respondent

D.M. Brown J.

Heard: September 19, 2012
Judgment: October 10, 2012
Docket: CV-12-9706-00CL

Counsel: S. Thom, for Applicant
C. Daley, for Respondent

Subject: Insolvency; Corporate and Commercial; Contracts; Property

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Under February 2012 share purchase agreement, respondent agreed to purchase shares of corporation Z. from applicant — Price payable in two December 2011 and December 2012 installments of $50,000 — Respondent granted applicant security interest in all undertaking, property and assets, including equipment via General Security Agreement — Applicant alleged respondent failed to make December 2011 payment — No payment made in response to applicant's March 2012 demand — Demand included notice of intention to enforce security under s. 244(1) of Bankruptcy and Insolvency Act (Can.) — Applicant was only creditor with registered security interest against respondent — Applicant seized equipment owned by respondent March 2012 — Respondent objected seizure illegal — Respondent alleged having paid at least $75,000 towards purchase by payments in March 2011 and April 2011 plus cash payments — Applicant sought order appointing receiver and manager over respondent's assets and undertaking — Applicant sought judgment for $100,000 for March 2010 promissory note — Respondent counter-applied for return of equipment and losses — Application allowed — Overwhelming evidence respondent failed to make first installment payment — None of alleged $90,000 in payments from respondent to applicant constituted payments under note — Respondent failed to file business records attesting to treatment of payments — Respondent pointed to no document indicating treatment of amounts as partial payments — None of payments constituted payments on their face — Payments apparently for supply and delivery of materials — No support for alleged cash payments totaling $10,000 — Judgment granted for $100,000 due under note — Just and convenient to appoint receiver — Respondent would not co-operate with private appointment of receiver — Respondent's counter-application dismissed.

Business associations --- Powers, rights and liabilities — Corporate borrowing — Rights and obligations of security holders — Remedies on default — Miscellaneous

Under February 2012 share purchase agreement, respondent agreed to purchase shares of corporation Z. from applicant — Price payable in two December 2011 and December 2012 installments of $50,000 — Respondent granted applicant security interest in all undertaking, property and assets, including equipment via General Security Agreement — Applicant alleged respondent failed to make December 2011 payment — No payment made in response to applicant's March 2012 demand — Demand included notice of intention to enforce security under s.

244(1) of Bankruptcy and Insolvency Act (Can.) — Applicant was only creditor with registered security interest against respondent — Applicant seized equipment owned by respondent March 2012 — Respondent objected seizure illegal — Respondent alleged having paid at least $75,000 towards purchase by payments in March 2011 and April 2011 plus cash payments — Applicant sought order appointing receiver and manager over respondent's assets and undertaking — Applicant sought judgment for $100,000 for March 2010 promissory note — Respondent counter-applied for return of equipment and losses — Application allowed — Overwhelming evidence respondent failed to make first installment payment — None of alleged $90,000 in payments from respondent to applicant constituted payments under note — Respondent failed to file business records attesting to treatment of payments — Respondent pointed to no document indicating treatment of amounts as partial payments — None of payments constituted payments on their face — Payments apparently for supply and delivery of materials — No support for alleged cash payments totaling $10,000 — Judgment granted for $100,000 due under note — Just and convenient to appoint receiver — Respondent would not co-operate with private appointment of receiver — Respondent's counter-application dismissed.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — considered

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

Statutes considered:

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

***D.M. Brown J.*:**

I. Overview

1 1529599 Ontario Limited ("152") applied for orders appointing A. Farber & Partners Inc. as receiver and manager over the assets and undertaking of Dalcor Inc. ("Dalcor") and judgment against Dalcor in the amount of $100,000.00 in respect of a promissory note dated March 11, 2010 (the "Note").

2 Dalcor issued a notice of counter-application seeking the return of construction equipment seized by 152 and damages for losses allegedly suffered as a result of that seizure.

3 The cardinal issue in dispute between the parties is whether Dalcor has paid the first installment of $50,000 under the Note.

4 I find that Dalcor has not. I grant the relief sought by 152, and I dismiss part of Dalcor's counter-application, deferring the balance.

II. Procedural history

5 When this application came before me on May 25, 2012, I adjourned the application to permit the calling of *viva voce* evidence. In light of new evidence the applicant wished to file on the return of the application on June 22, I further adjourned the matter and permitted the respondent to file a reply affidavit. The hearing did not proceed as scheduled

on July 25 because respondent's counsel sought to get off the record. On August 17, 2012 the respondent filed a reply affidavit. The applicant objected to the relevance of some portions of the affidavit. By endorsement dated September 5, 2012 I wrote: "Dalcor's right of reply was limited to matters raised in that affidavit (June 22), so to extent Mr. Daley's affidavit of Aug 17/12 (his late-filed reply affidavit) raises any matter which is not proper reply evidence, I will not take such improper evidence into account." The matter finally proceeded, with *viva voce* evidence, on September 19, 2012. Mr. Charles Daley, the principal of Dalcor, represented the company at the hearing.

6 The affidavits filed by both parties were marked as evidence at the hearing and I treated them as the examination-in-chief of the affiants, Brain Constans, the sole officer and director of 152, and Mr. Daley. Both Mr. Constans and Mr. Daley were cross-examined at the hearing.

III. The events

A. The February, 2010 share purchase agreement

7 152 used to own Zuron Construction Inc. ("Zuron"). Daley owns Dalcor. Prior to March, 2010, Daley had worked for Zuron.

8 Under a share purchase agreement dated February 18, 2012, Dalcor purchased all issued and outstanding shares of Zuron from 152 for the price of $100,000.00, payable in two equal $50,000 installments on December 31, 2011 and December 31, 2012. At that time Daley operated both Dalcor and Zuron out of premises located at 10 Ruggles Avenue, Richmond Hill, which they leased from Cobra Power Inc., another company owned by Constans.

9 Amongst the security granted by Dalcor for performance of the obligations set out in the Share Purchase Agreement were the Note dated March 11, 2010 and a General Security Agreement dated March 11, 2010.

10 Under the Note both Dalcor and Zuron agreed to pay 152 the sum of $50,000 on December 31, 2011 and $50,000 on December 31, 2012. The last paragraph of the Note provided:

> This Note shall be open for repayment at any time or times in whole or in part without notice or bonus. This note shall be due and payable in the event of the sale of the assets of Zuron Construction Inc. and/or there is a transfer or change of control in the shareholdings of Zuron Construction Inc. by Dalcor Inc.

11 Under the General Security Agreement Dalcor granted to 152 a security interest in all its undertaking, property and assets, then owned or after-acquired, including equipment. The failure of Dalcor to pay 152 when due any obligation secured by the GSA constituted an event of default. The GSA provided that upon an event of default 152 would enjoy the rights and remedies provided by law, including applying to court for the appointment of a receiver of the collateral and 152 was entitled to take possession of the collateral.

12 Around March 10, 2012, 152 delivered the Zuron shares to the escrow agent specified in the Share Pledge Agreement entered into between Dalcor and 152.

B. The dispute about whether Dalcor paid under the Note

13 Dalcor was evicted from the Ruggles Avenue premises around the end of October, 2011.

14 152 alleged that Dalcor failed to make the first payment due under the Note on December 31, 2011. On March 8, 2012 counsel for 152 sent a demand letter to Dalcor, to the attention of Daley, demanding payment of the $50,000 due on December 31, 2011. The demand letter included a notice of intention to enforce security under section 244(1) of the *Bankruptcy and Insolvency Act*.

15 Dalcor did not make any payments in response to that demand.

16 Constans deposed that 152 is the only creditor with a registered security interest against Dalcor.

17 On March 21, 2012 representatives of 152 attended at 1880 O'Connor Avenue, Toronto and seized three pieces of equipment owned by Dalcor. 152 took possession of the equipment, and it now is stored at 10 Ruggles Avenue. 152 also took possession of a 2006 Caterpillar 906 Loader owned by Dalcor located at the Ruggles Avenue location.

18 On March 26, 2012 Dalcor's counsel responded to the demand letter, describing the seizure of equipment as illegal because:

> [C]ontrary to your client's allegations, our client has made advance payments to your client's company and/or associated companies, in respect of the Promissory Note on March 10, 2011 and April 20, 2011 in the amounts of $25,000.00 and $50,000.00 respectively, for a total payment by our client in the amount of $75,000.00.

In that letter, and in a subsequent letter of March 29, 2012, Dalcor demanded the return of the seized equipment.

IV. The positions of the parties

19 152 took the position that Dalcor had not made any payments under the Note and, therefore, its seizure of the equipment was lawful.

20 Dalcor argued that in 2011 it had made three advance payments under the Note totaling $80,000.00, together with some cash payments. As a result, Dalcor contended that it was not in default under the Note, the seizures were unlawful, and it had suffered losses as a result.

V. Analysis

A. Did Dalcor pay $90,000 against the amounts due under the Note?

21 Daley deposed and testified that several payments Dalcor made in 2011 constituted advance payments of amounts due under the Note:

> (i) a Dalcor cheque dated March 2, 2011 in the amount of $5,000 made payable to Kenco Electrical Supply Inc. in Mississauga;
>
> (ii) a Dalcor cheque dated March 16, 2011 in the amount of $25,000 made payble to Kenco;
>
> (iii) a Dalcor cheque dated April 22, 2011 in the amount of $50,000 made payable to Cobra Power. The "Memo" section of the cheque recorded the word "loan"; and,
>
> (iv) unspecified cash payments totaling $10,000.

Daley testified that each cheque represented a partial re-payment of amounts due under the Note and the cheques were made payable to the stated payees at the direction of Constans. The latter denied having given any such directions and testified that the cheques had nothing to do with the repayment of the amount due under the Note.

22 For the reasons set out below, I do not accept Daley's evidence that these three payments constituted repayments of the amount due under the Note.

23 First, let me start with what Dalcor omitted to place into evidence. I think one can reasonably assume that Dalcor, as an operating company, maintains books and records, including financial statements, which record its debts, as well as any payments made against those debts. Dalcor placed none of its books and records into evidence even though Daley filed a total of four affidavits. The failure of Dalcor to file business records which showed that the three payments were

treated, for its internal accounting purposes, as repayments of the amounts due under the Note weighs heavily against Daley's contention that they were.

24 Second, Dalcor could not point to any document passing between the parties, contemporaneous with any of the three payments, stating that the payments were to be treated as partial payments of the amounts due under the Notes. The parties papered the share purchase transaction in a very formal manner, with a Share Purchase Agreement and several related security documents. This was not a "back of the envelope" deal between two businessmen. Given that context, one reasonably would expect some formal documentation evidencing specific repayments of monies due under the Note.

25 Third, on their face none of the three cheques were noted as constituting repayments of amounts due under the Notes.

26 Fourth, regarding the two cheques Dalcor made payable to Kenco, Constans acknowledged that he was a shareholder in Kenco. At the hearing Daley conceded that Dalcor had bought some supplies from Kenco, perhaps tools. 152 filed a May 2, 2012 letter from Bruce Strain of Kenco stating that the March 18, 2011 cheque for $25,000 was received from Dalcor "on account for the supply and delivery of electrical materials to various project sites".

27 Although this evidence was filed on an "information and belief" basis, it is noteworthy that Mr. Strain included with his letter certain Kenco business records. One was a March 2, 2011 deposit slip for Kenco's account at the Meridian Credit Union which identified, as part of that deposit, the amount of $5,000 from Dalcor "on account". This coincided with the first Dalcor cheque in that amount dated March 2, 2011. The second was a March 16, 2011 deposit slip for Kenco's Meridian account recording a deposit of $25,000 on that date of funds from Dalcor "paid on account". This deposit coincided with Dalcor's second payment to Kenco, the one dated March 16, 2011. At the hearing Daley rejected the suggestion that these slips recorded funds paid by Dalcor for supplies bought from Kenco and stated that the records were either erroneous or falsified. I do not accept Daley's evidence on this point. The most probable conclusion to be drawn from this evidence is that on March 2 and 16, 2011 Dalcor paid Kenco $5,000 and $25,000 on account of supplies it had purchased and, therefore, those payments did not constitute the repayment of amounts due under the Note.

28 Fifth, regarding Dalcor's April 22, 2011 cheque to Cobra in the amount of $50,000, Daley deposed that as a result of Dalcor's advance payments, Cobra provided it with a statement evidencing that only $10,000 was owing to Kenco regarding the Zuron purchase by Dalcor. In support of this statement Daley adduced an August 11, 2001 document on Cobra letterhead. Under the heading "Monies Owing to Cobra Power Inc." appeared the line item: "Owing Kenco regarding Zuron Construction Inc. purchases, $10,000". On its face this line item does not reference the Note or the Share Purchase Agreement.

29 Constans deposed that the $50,000 payment to Cobra was made in partial satisfaction of debts incurred by Dalcor and Zuron in respect of rent and supplies acquired with Cobra's credit. Constans testified that as of April 20, 2011, just prior to the $50,000 cheque, Dalcor and Zuron owed Cobra $124,666.20. In response Daley testified that a November 23, 2011 statement produced by Cobra's accountant, Colavita & Associates, showed that no receivables were owing to Cobra from Zuron or Dalcor at that time. A May 22, 2012 letter the accountant, Joseph Colavita, stated that the document only showed the trade receivables of Cobra and did not show loans payable by Zuron or Dalcor because they were not regarded as trade receivables. Mr. Colavita wrote that as of May 22, 2012 Dalcor and Zuron owed Cobra $184,304. Daley submitted a May 9, 2011 Canada Revenue Agency Notice of Assessment for Dalcor assessing $62,385.11 for unremitted source deductions, including penalty and interest. As I read his May 10, 2012 affidavit, sworn one year after that notice of assessment, as of the latter date Dalcor still had not paid the assessed amount.

30 The weight of this evidence shows that at the material time — April, 2011 — Zuron and Dalcor owned significant sums to Cobra. There is no doubt that the parties worked on some of the same construction projects. Although Daley attempted to demonstrate that in fact Dalcor and Zuron were loaning large amounts of money to Cobra at that time, an examination of some of the payments — e.g. the April 13, 2011 cheque for $58,000 — would indicate that the payments made by Dalcor and Zuron were in the context of ordinary course payments for specific construction projects on which

both parties were involved. Again, the absence of any of the internal accounting records from Dalcor or Zuron makes it difficult to accept Daley's characterization of the payments as advances against the Note.

31 Sixth, Daley could provide no support for the various cash payments he contended reduced the overall debt to $10,000.

32 Finally, the Note bore no interest. Accordingly, while the Note did allow for repayment at any time, the absence of any interest charged on the principal amount meant little financial incentive existed to make any pre-payment.

33 In sum, the overwhelmingly weight of evidence leads to the conclusion that Dalcor has made no repayments of the monies due under the Note. I therefore find that Dalcor failed to pay the first installment due under the Note on December 31, 2011 and, as a result, an event of default occurred under the General Security Agreement.

B. What amount presently is due and owing under the Note?

34 Under the Note Dalcor was required to pay 152 the sum of $100,000.00 in equal, $50,000 payments on December 31, 2011 and December 31, 2012. I have found that Dalcor has not made any payments under the Note. Dalcor therefore breached its obligation to pay $50,000 on December 31, 2011. The Note did not contain a standard acceleration clause. However, as noted, the last paragraph of the Note provided that the Note became "due and payable in the event of the sale of the assets of Zuron Construction Inc."

35 In paragraph 4 of his May 10, 2012 affidavit Daley deposed that Dalcor had taken possession of all the construction equipment and machinery owned or financed by Zuron, and he detailed the pieces of equipment transferred by Zuron to Dalcor. Daley stated that 152 had agreed to those transfers. Daley deposed that in 2011 had purchased from the leasor two pieces of Zuron equipment: a 2006 Caterpillar 420E Backhoe Loader and a 2006 Caterpillar 906 Loader.

36 Constans, in paragraph 42 of his May 13, 2012 affidavit, denied that he had agreed to such transfers. Dalcor produced no documentary evidence supporting its contention that 152 had agreed to such transfers.

37 Then, in paragraphs 3 and 4 of his May 23, 2012 affidavit, Daley deposed:

> At no time was the above noted construction machinery and equipment transferred directly over to Dalcor. Dalcor as owner of the shares and assets of Zuron, by implication, became the owner of all construction machinery and equipment owned or financed by Zuron.
>
> Zuron remains the registered owner of all construction equipment and machinery obtained through the transaction with 152.

38 In contradiction of that evidence 152 adduced documents showing that three of the vehicles owned by Zuron at the time of the share purchase transaction were, as of May 27, 2011, insured in the name of Dalcor. In his August 17, 2012 reply affidavit Daley did not respond to this evidence, although in paragraphs 24 to 25 of his May 10, 2012 affidavit Daley had characterized one of the pieces — a 2006 Triaxle Trailer — as Dalcor's equipment. At trial Daley acknowledged that Dalcor owned the three pieces of equipment for which it was designated as the insured.

39 Daley's assertion in paragraphs 3 and 4 of his May 23, 2012 affidavit that "at no time was the above noted construction machinery and equipment transferred directly over to Dalcor" simply is not borne out by the evidence. On his own testimony Daley admitted that Dalcor had purchased two pieces of equipment leased by Zuron and it owned three other pieces for which Dalcor was registered as the insured. From this evidence I conclude that some equipment owned by Zuron at the time of the share purchase agreement was transferred to or bought by Dalcor. I prefer Constans' evidence that 152 did not consent to such transfers of Zuron equipment over the inconsistent evidence of Daley on the point. I therefore find that after the execution of the Note there was a sale of some of the assets of Zuron and that, in accordance with the terms of the Note, the entire amount under the Note became due and payable. I conclude that

Dalcor owes 152 the sum of $100,000.00 under the Note, and judgment shall issue in favour of 152 against Dalcor for that amount.

C. Request to appoint a receiver over the assets and undertaking of 152

40 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]) the Court described the basic principles governing the judicial appointment of a receiver/receiver-manager:

> 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.

Although Dalcor argued that the appointment of a receiver is an extraordinary remedy to be granted sparingly, as observed by Newbould J. in paragraph 25 of his reasons in *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.), the line of cases expressing that principle do not deal with the situation of a secured creditor, such as 152, exercising its right to enforce its security.

41 In the present case it would be just or convenient to appoint a receiver over the assets and undertaking of Dalcor for the following reasons:

(i) Dalcor owes 152 the sum of $100,000;

(ii) The GSA dated March 11, 2010 grants 152 a security interest in the undertaking, property and assets of Dalcor and enables 152 to appoint a receiver/receiver-manager of the collateral upon an event of default;

(iii) An event of default occurred when Dalcor failed to make the December 31, 2011 payment under the Note;

(iv) The evidence disclosed that Dalcor will not co-operate with the private appointment of a receiver by 152. Indeed, Dalcor's principal, Daley, has disputed any indebtedness, and I have rejected his evidence; and,

(v) There is evidence that Dalcor may owe the CRA a significant sum of money. The appointment by the court of a receiver will ensure that competing claims to the assets and undertaking of Dalcor are dealt with in an equitable fashion.

42 A. Farber & Partners Inc. has consented to act as receiver. I appoint Farber as the receiver and manager of the assets, undertaking and property of Dalcor, and I have signed the draft order submitted by 152 at the hearing.

D. Dalcor's counter-application

43 In light of my findings that Dalcor defaulted on its obligations under the Note and that 152 was granted a security interest in the GSA with the power to appoint a receiver in the event of Dalcor's default, I dismiss that part of its Counter-Application seeking an order for the return of equipment already seized by 152. Since the prudence of the realization of the collateral can be dealt with at an appropriate point in the receivership proceedings, I defer dealing with the relief requested in paragraphs 1(b) through to 1(d) of the Notice of Counter-Application.

VI. Summary and Costs

44 By way of summary, I grant judgment in favour of 152 against Dalcor in the amount of $100,000, I appoint Farber as the receiver-manager of the assets, undertaking and property of Dalcor, and I dismiss the relief sought in paragraph 1(a) of the Notice of Counter-Application.

45 I would encourage the parties to try to settle the costs of this application. If they cannot, 152 may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, October 19, 2012. Dalcor may serve and file with my office responding written cost submissions by Wednesday, October 31, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

End of Document