

TAB G

2010 BCSC 477

British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

2010 CarswellBC 855, 2010 BCSC 477, [2010] B.C.W.L.D. 4567, [2010]
B.C.W.L.D. 4568, [2010] B.C.J. No. 635, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171

Textron Financial Canada Limited (Plaintiff) and Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth (Defendants)

Willcock J.

Heard: February 10, 2010

Judgment: April 9, 2010

Docket: Vancouver S100268

Counsel: W.E.J. Skelly, B. La Borie for Plaintiff

A. Brown for Defendants

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

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff demanded payment from C Ltd. and NHLP, issued notice of intention to enforce security under s. 244 of Bankruptcy and Insolvency Act, and made demand upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for, inter alia, order appointing receiver — Application granted in part — Just and convenient to grant receivership order — As parties stipulated in their contracts that plaintiff would be entitled to appoint receiver or apply for court-appointed receiver in event of default, relief sought not extraordinary — Defendants owed plaintiff significant sum, and had not reduced principal debt — No dispute as to amount of debt, nor that defendants were in default — No imminent prospect of repayment of principal from operations — There had not been full disclosure of defendants' refinancing plans — Interim plan to make partial payments would not indemnify plaintiff against interest accumulating in interim — No assurance interim payments could be made — There was risk to plaintiff's equity and doubt regarding prospect of recovery of principal — Defendants' plans did not provide for indemnity to plaintiff for losses incurred on ongoing basis — There was inadequate provision to minimize irreparable losses lender would incur — No persuasive evidence appointment of receiver would cause defendants undue hardship — Plaintiff should not have to leave its interests in hands of defendants.

Debtors and creditors --- Receivers — Order appointing receiver

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff, commercial lender, lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff made demand upon C Ltd. and NHLP for payment, and issued notice of intention to enforce security under provisions of s. 244 of Bankruptcy and Insolvency Act — Demand was also made upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for order appointing receiver, and that receiver have conduct of sale of hotel, subject

to court approval — Application granted in part — Balancing rights of parties, it was just and convenient to grant receivership order — Order appointing receiver would not authorize receiver to have conduct of sale of hotel — As conduct of sale precluded redemption, order sought was inconsistent with affording defendants redemption period — Special circumstances did not exist such that plaintiff should have order for sale before judgment and consideration of appropriate redemption period — It was not clear that value of security was diminishing — To contrary, there was some evidence that profitability and therefore value of hotel was likely to increase in interim — Some net income was being generated from operations — Receiver would be authorized to engage only in such sales as would occur in ordinary course of business of hotel.

Table of Authorities

Cases considered by *Willcock J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — referred to

Bank of Nova Scotia v. Mrazek (1985), 64 B.C.L.R. 282, 1985 CarswellBC 191 (B.C. C.A.) — considered

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — considered

Canlan Investment Corp. v. Gibbons (1983), [1983] 3 W.W.R. 225, 42 B.C.L.R. 199, 1983 CarswellBC 7 (B.C. S.C.) — considered

Citibank Canada v. Calgary Auto Centre (1989), 58 D.L.R. (4th) 447, 98 A.R. 250, 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343 (Alta. Q.B.) — considered

Devany v. Brackpool (1981), 1981 CarswellBC 266, 31 B.C.L.R. 256, 21 R.P.R. 100, 127 D.L.R. (3d) 498 (B.C. S.C. [In Chambers]) — considered

Eaton Bay Trust Co. v. Motherlode Developments Ltd. (1984), 50 C.B.R. (N.S.) 247, 1984 CarswellBC 548, 50 B.C.L.R. 149 (B.C. S.C.) — considered

First Pacific Credit Union v. Grimwood Sports Inc. (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7, 1984 CarswellBC 605 (B.C. C.A.) — considered

First Western Capital Ltd. v. Wardle (1982), 1982 CarswellBC 2252 (B.C. S.C.) — referred to

Korion Investments Corp. v. Vancouver Trade Mart Inc. (1993), 1993 CarswellBC 2061 (B.C. S.C. [In Chambers]) — considered

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]) — considered

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

Player v. Crompton & Co. (1914), [1914] 1 Ch. 954 (Eng. Ch. Div.) — referred to

Pope v. Roberts (1979), 1979 CarswellBC 6, 10 B.C.L.R. 50 (B.C. C.A.) — referred to

Pratchett v. Drew (1924), [1923] All E.R. Rep. 685, [1924] 1 Ch. 280 (Eng. Ch. Div.) — referred to

Red Burrito Ltd. v. Hussain (2007), 2007 CarswellBC 1936, 2007 BCSC 1277, 33 B.L.R. (4th) 205 (B.C. S.C.) — considered

Ross v. Ross Mining Ltd. (2009), 2009 YKSC 55, 2009 CarswellYukon 123, 57 C.B.R. (5th) 77 (Y.T. S.C.) — referred to

Royal Bank v. Astor Hotel Ltd. (1986), 1986 CarswellBC 487, 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) — considered

Royal Bank v. Cal Glass Ltd. (1978), 29 C.B.R. (N.S.) 302, 94 D.L.R. (3d) 84, 1978 CarswellBC 303, 8 B.C.L.R. 345 (B.C. S.C.) — considered

Royal Bank v. Camex Canada Corp. (1985), 63 B.C.L.R. 125, 1985 CarswellBC 137 (B.C. S.C.) — referred to

Royal Trust Corp. of Canada v. Exeter Properties Ltd. (February 28, 1985), Doc. Vancouver H850260 (B.C. S.C. [In Chambers]) — referred to

South West Marine Estates Ltd. v. Bank of British Columbia (1985), 1985 CarswellBC 249, 65 B.C.L.R. 328, 37 R.P.R. 137 (B.C. C.A.) — referred to

Truman & Co. v. Redgrave (1881), 18 Ch. 547 (Eng. Ch. Div.) — referred to

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — considered

Vista Homes Ltd. v. Taplow Financial Ltd. (1985), 64 B.C.L.R. 291, 1985 CarswellBC 470, 56 C.B.R. (N.S.) 225 (B.C. S.C.) — considered

Statutes considered:

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

Law and Equity Act, R.S.B.C. 1996, c. 253
Generally — referred to

s. 15 — considered

s. 39(1) — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 66 — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 12 — pursuant to

R. 44 — pursuant to

R. 47(1) — referred to

R. 51A [en. B.C. Reg. 367/2000] — pursuant to

R. 57 — pursuant to

APPLICATION by plaintiff for order appointing receiver, and that receiver have conduct of sale of certain property.

Willcock J.:

Introduction

1 Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

Background

2 Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

3 Chetwynd and NHLP built, own and operate the Hotel.

4 Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of \$7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

(c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

5 On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of \$7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

(a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");

- (b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;
- (c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;
- (d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");
- (e) a guarantee and postponement of claims from NHLP to Textron;
- (f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of \$5,000,000, and a postponement of claims in favour of Textron;
- (g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of \$2,500,000, and a postponement of claims in favour of Textron; and
- (h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

6 By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

7 The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

8 For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

9 On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of \$7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

10 The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

11 On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

- (1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

- (2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of \$7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;
- (3) judgment against the Pomeroy guarantors in the amount of \$5,000,000 to November 10, 2009 plus costs and interest thereafter;
- (4) judgment against the Langstroth guarantors in the amount of \$2,500,000 as of November 10, 2009 plus all other applicable costs and interests;
- (5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and
- (6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

12 William Pomeroy describes himself as the president of a group of companies referred to as the "Pomeroy Group". The group operates and manages hotels and restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

13 It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

14 Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

15 Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

16 The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately \$1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of \$202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of \$1.45 million. The budget for 2010 will see the Hotel generating net operating income of \$457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be \$489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of \$1.12 million. That budget calls for revenue of \$1.96 million compared to 2009 revenue of \$1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

17 Chetwynd proposes to make an immediate payment to Textron in the amount of \$20,000, and to pay all interest accruing to Textron on a monthly basis, approximately \$20,000 per month, while the Pomeroy Group is pursuing restructuring.

18 Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

Issues

19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so
2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

20 The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

Applicable Law

Court-Appointed Receivers

21 Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

39(1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

22 Section 66 of *The Personal Property Security Act*, in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act*.

23 The *Rules of Court* provide the appointment may be on terms:

47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

24 In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 (B.C. S.C.), D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

25 The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties

reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

26 This judgment was cited with approval by Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55 (Y.T. S.C.)). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

27 In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

28 The Court was of the view the English line of authorities, of which in *Player v. Crompton & Co.*, [1914] 1 Ch. 954 (Eng. Ch. Div.); *Truman & Co. v. Redgrave* (1881), 18 Ch. 547 (Eng. Ch. Div.); and *Pratchett v. Drew*, [1924] 1 Ch. 280 (Eng. Ch. Div.) were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (B.C. S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]), where receivers were appointed without proof of jeopardy.

29 Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (B.C. S.C. [In Chambers]), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

30 Mr. Justice Burnyeat held, at paras. 15-17:

In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.

The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

31 The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978), pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co.*, [1914] 1 Ch. 954).

32 The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

33 As Taylor J. noted in *Royal Bank v. Cal Glass Ltd.* (1978), 94 D.L.R. (3d) 84 (B.C. S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

34 The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: [*Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95 (Alta. Q.B.); and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.)].

35 As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. [*Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of \$13,600,000. The first mortgage securing a debt of \$3,000,000 was in good standing. *Korion*'s judgment was for \$908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, *Korion* did not adduce evidence to support its submission that the appointment of a receiver-manager

was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

... In *AcmeTrack Ltd. v. Nor East Industries Ltd.*, (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.

Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

37 The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

38 The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

39 The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

40 In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was \$5.7 million. The defendant did not dispute the default. It was prepared to make payments of \$4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

41 The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

42 The parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

43 The defendant owed a significant sum of money;

- 44 There appeared not to be a dispute with the fact of the size of the indebtedness;
- 45 The defendant was in default;
- 46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;
- 47 There were concerns with respect to the financial statements of the defendant; and
- 48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.
- 49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;

- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

51 Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

.....

The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly \$3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

53 The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International*, at para. 17, the Court held:

[T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much

less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

54 In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in *Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

56 Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

15 The court may, before or after judgment in a proceeding

(a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or

(b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,

on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

57 A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (B.C. C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (B.C. S.C. [In Chambers]) and *Canlan Investment Corp. v. Gibbons* (1983), 42 B.C.L.R. 199 (B.C. S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

58 In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

60 The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

61 The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (B.C. C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (B.C. S.C.).

62 In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.

63 That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

64 The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

65 There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.) at para. 21; *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) [*Astor Hotel*], at para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (B.C. C.A.).

66 There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even though the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

67 At p. 234:

While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

68 Further, Bennett notes at p. 245:

In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

69 In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific; Vista Homes Ltd. v. Taplow Financial Ltd.* (1985), 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225 (B.C. S.C.); and *Astor Hotel*.

70 In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

72 In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union* [citation omitted].

73 In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific, Vista Homes, Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (B.C. S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

74 In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property. Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

Discussion

Appointment of a Receiver

75 The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

76 The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

77 There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

78 There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

79 The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

80 If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

81 In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

82 The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

83 The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.*, that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

84 The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

85 Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

86 The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of \$200,000 and aggregate transactions in excess of \$500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

87 The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

88 It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

89 I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

90 The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

91 The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

92 The parties have leave to apply for further directions if necessary.

Application granted in part.

TAB H

2014 NSSC 128
Nova Scotia Supreme Court

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.

2014 CarswellNS 263, 2014 NSSC 128, 1084 A.P.R. 108, 12
C.B.R. (6th) 181, 239 A.C.W.S. (3d) 363, 343 N.S.R. (2d) 108

Enterprise Cape Breton Corporation, a body corporate, incorporated pursuant to the Enterprise Cape Breton Corporation Act, enacted as Part II to the Government Organization Act, Atlantic Canada, 1987, R.S., 1985, c. 41 (4th Supp.) ("ECBC"), Applicant v. Crown Jewel Resort Ranch, Inc., a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel") And I.N.K. Real Estate Inc., a body corporate incorporated Under the laws of Nova Scotia ("I.N.K."), Together the Respondents

Frank Edwards J.

Heard: March 5, 2014
Judgment: April 10, 2014
Docket: SYDJC 423486

Counsel: Robert Risk for Applicant
Nahman Korem for Respondent, Companies

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

Headnote

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

Respondent was indebted to applicant for mortgage and loans — Respondents defaulted on payments — Two principals of respondent were embroiled in divorce proceedings and resort ceased to function — Applicant decided not to enforce security until divorce outcome was known — Respondents were in serious arrears on loans — Applicant sought order appointing MGM as receiver and manager of all assets of respondents — Respondents objected asserting mortgage was not valid, one of companies was capable of making payments and it was not just and convenient to appoint receiver — Application granted; receiver appointed — Respondents' obligations and applicant's rights under mortgage remained in full force and effect — Mortgage was properly executed and duly recorded — Mortgage was given as security for promissory note — Applicant's lawyer was satisfied with promissory note and authorized applicant to disburse funds — There was realistic prospect that respondents would not ever be able to address their debts — Applicant extended respondents every opportunity to turn business around — Business became insolvent and was not in operation for some time — Applicant had no option but to enforce security — Respondents did not make any reasonable progress in obtaining alternate financing with view to paying out applicant's indebtedness — Other than cost of receiver there was no existing or imminent harm beyond potential future risk of receiver obtaining court approval of improvident sale — It was premature to argue irreparable harm.

Table of Authorities

Cases considered by *Frank Edwards J.*:

Bank of Montreal v. Sherco Properties Inc. (2013), 2013 ONSC 7023, 2013 CarswellOnt 16848 (Ont. S.C.J. [Commercial List]) — 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]) — considered

Romspen Investment Corp. v. 1514904 Ontario Ltd. (2010), 67 C.B.R. (5th) 231, 2010 CarswellOnt 2951, 2010 ONSC 1339 (Ont. S.C.J.) — considered

Statutes considered:

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

s. 244 — pursuant to

Judicature Act, R.S.N.S. 1989, c. 240
s. 43(9) — considered

APPLICATION by corporation for order appointing receiver, in bankruptcy of respondent companies.

Frank Edwards J.:

1 The applicant is applying for an order appointing Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. ("MGM") as receiver and manager of all of the undertakings, property and assets of Crown Jewel and I.N.K. pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and/or Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240

2 *Grounds for Order:* The applicant is applying for the order on the following grounds:

1. A General Security Agreement made between Crown Jewel Resort Ranch, Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213736 on February 8, 2005, as amended by Registration No. 21915103 on October 11, 2013.

2. A Mortgage made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated February 4, 2005 registered at the Victoria County Registry of Deeds on February 8, 2005 as Document No. 81337157 (PID Nos. 85017614, 85079127 and 85155281), said Mortgage having been assigned to Enterprise Cape Breton Corporation pursuant to a General Conveyance, Assignment and Assumption of Liabilities Agreement dated March 31, 2008 and registered at the Victoria County Registry of Deeds on May 30, 2008 as Document No. 90774226;

3. A General Security Agreement made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213692 on February 8, 2005, as amended by Registration No. 13924725 on May 23, 2008 (together with the above the "Security")

4. The Respondent Companies (RC's) have defaulted on their payments and failed to honour their obligations pursuant to a Letter of Offer made between Crown Jewel, I.N.K. and ECBC dated on or about October 2, 2003 with respect to Project No. 8600338-1 (the "Letter of Offer").

5. The total amount of indebtedness secured by the Security is \$226,134.00 as at October 8, 2013 together with overdue interest on arrears in the amount of \$1,738.19 and interest thereafter at a per diem rate of \$37.17.
6. The RC's were provided with respective Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act* on October 24, 2013.
7. Greg MacKenzie of MGM has agreed to act as the court-appointed receiver and manager of all of the undertakings, property and assets of both Crown Jewel and I.N.K. and the Applicant consents to his appointment.
8. The Applicant, ECBC relies on Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which reads:

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

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

9. The Applicant, ECBC relies on Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, which reads:

43. (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

3 *Background:* The RC's had obtained financing from the Cape Breton Growth Fund Corporation (CBGF), the Atlantic Canada Opportunity Agency (ACOA), and the Applicant, Enterprise Cape Breton Corporation (ECBC).

4 ECBC succeeded CBGF when the latter wound up in 2008. ECBC delivers and administers all programs offered by ACOA.

5 The RC's' intent was to establish an upscale, four-season, fly-in active vacation resort near Baddeck, Nova Scotia. Operations commenced in 2006 but struggled financially from the outset. The financial problems multiplied when the two principals in the RC's, Nahman Korem (Korem) and Iris Kedmi (Kedmi) became embroiled in protracted divorce proceedings. These continued between 2010 and December, 2012 when the Nova Scotia Court of Appeal dismissed Kedmi's appeal. The resort essentially ceased to function as of the start of the domestic trouble between Korem and Kedmi in 2010.

6 By October 8, 2013, the RC's were in serious arrears on their loans. By that date, the total amount of indebtedness was as follows:

1. *ECBC Secured Letter of Offer*: \$226,134.00 with overdue interest on arrears of \$1,738.19 plus interest of \$37.17 per day.

2. *ECBC Unsecured Letter of Offer*: \$268,254.86 with overdue interest on arrears of \$1,738.19 plus interest of \$44.10 per day.

3. *ACOA Unsecured Loan*: \$256,642.00 plus arrears of \$4,425.80.

7 Throughout the period of 2005-2009 the RC's were able to make their regular scheduled payments on the ACOA Unsecured Loan, having repaid approximately \$234,360.00 of the initial \$500,000.00 loan disbursement. (Lane affidavit para. 22)

8 The RC's have, however, paid only approximately \$6,000.00 toward the outstanding principal on the ACOA Unsecured Loan since 2009. Further, no repayments at all have been made on this loan within the 12 month period from December of 2012 to December of 2013. (Lane Affidavit para. 23)

9 With respect to both the ECBC Secured and Unsecured Letters of Offer, the RC's have to date made only a combined repayment in the approximate amount of \$9,235.00. As noted above, these loans are in significant arrears. Furthermore, overdue interest is due and owing and is accruing daily. (Lane affidavit para. 24)

10 The Applicant gave the RC's Notices of Intention to Enforce Security on October 24, 2013. Korem knew by November 2013 at the latest that ECBC intended to apply to have a receiver/manager appointed by the Court. A General Security Agreement given to CBGF/ECBC by the RC's provided for the appointment of a private receiver upon default.

11 Despite the fact that the loans were already overdue, ECBC took a hands-off approach during the divorce proceedings. Korem and Kedmi were making competing claims regarding the assets of the RC's. ECBC thus decided not to enforce its security until the divorce outcome was known. After dismissal of the Kedmi Appeal in December, 2012, Korem became the effective owner of all the assets and liabilities of the RC's.

12 Korem insists that ECBC is partially responsible for the present situation because it allowed Kedmi to liquidate some of the assets. I reject any such notion. During the 2010 - 2012 period, the resort was clearly in survival mode. The two principals were locked in a particularly acrimonious marital dispute. The resort was generating no revenue. Kedmi was living on the resort property and was assuring ECBC that she was doing her best to maintain it.

13 It was in that context that ECBC allowed Kedmi to liquidate some assets that were not essential to the survival of the resort. ECBC also allowed her to liquidate assets which in fact had actually become liabilities. These included the horses which were very expensive to maintain but had no foreseeable prospect of generating revenue. Korem's grievance with ECBC is misplaced.

14 Korem now rests his hopes of financial recovery on the possibility of operating a timber cutting business. He presented ECBC with an appraisal of the timber resources on the resort property. The appraisal indicated that the value of the standing timber was 1.5 to 2 million dollars less harvesting costs.

15 ECBC gave Korem permission to do some limited wood harvesting but insisted upon the presentation of a business plan by July, 2013. The business plan Korem provided did not address how the RC's intended to service the ECBC and ACOA debts. Nor did it indicate how the RC's would finance the start-up of the timber business.

16 In October, 2013, ECBC again reviewed proposals put forward by Korem. Incidentally, ECBC learned that property taxes for the resort were \$80,000.00 in arrears (Korem says it's now \$75,000.00) and that a tax sale was imminent. ECBC decided it was time to apply to have a Receiver/Manager appointed.

17 *RC's' Objections to Appointment of Receiver/Manager:* Korem acted for the RC's without legal counsel. He put forward three objections to the appointment of a Receiver/Manager:

1. That the Mortgage dated February 4, 2005 is not valid;
2. That I.N.K. Real Estate Inc. is capable of making payments;
3. That it is not "just and convenient" to appoint a receiver.

18 I will deal with the objections in turn:

19 *1. The Mortgage is Valid:* It was properly executed by Korem and was duly recorded. Its repayment terms reflect those agreed to by Korem when he signed as president of I.N.K. Real Estate Inc. on October 2, 2003. Those repayment terms were subsequently modified (in I.N.K.'s favor) on March 23, 2005 and October 30, 2010. On both occasions, Korem signed. (See Lane Affidavit Tabs A & B).

20 The Mortgage was given as security for a Promissory Note dated January 21, 2005. Korem's objection seems to be based upon his view that ECBC's counsel at the time questioned the promissory note. On the contrary, the record shows that the lawyer was satisfied with the promissory note and authorized ECBC to disburse funds.

21 The RC's' obligations and ECBC's rights under the Mortgage remain in full force and effect.

22 *2. The RC's are not Capable of Making Payments:* As an aside, Korem seeks to claim that he cannot speak for Crown Jewel Resort Ranch Inc. (CJRR) because Kedmi still owns that company. At the same time Korem acknowledges that all CJRR's assets and liabilities have been transferred to him. Korem is the effective principal of both companies.

23 To service their debts to ECBC and ACOA, the RC's would have to make monthly payments of just under \$19,000.00 per month. (To say nothing of the arrears). As noted they are also in substantial arrears regarding property taxes (\$75,000.00) and owe contractor D.W. Matheson about \$35,000.00.

24 Korem has provided no details to show how he can finance the start-up of the timber business. By his own estimate, he would need one to two years just to pay off the ECBC Secured debt. He give no indication of how much longer it would take to pay off the Unsecured debts. Korem has been given ample opportunity to seek re-financing with another lender. He admits that commercial lenders will not go near him. There is no realistic prospect that the RC's will ever be able to address their debts.

25 *It is Just and Convenient that a Receiver/Manager be Appointed:* What follows, I adopt, in large measure from the Applicant's Brief.

26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
- (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the apprehended or actual waste of the debtor's assets;

- (e) the preservation and protection of the property pending judicial resolution;
- (f) the balance of convenience to the parties;
- (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
- (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
- (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
- (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (k) the effect of the order on the parties;
- (l) the conduct of the parties;
- (m) the length of time that a receiver may be in place;
- (n) the cost to the parties;
- (o) the likelihood of maximizing return to the parties; and
- (p) the goal of facilitating the duties of the receiver.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (Ont. S.C.J. [Commercial List]) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

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

28 The court in *Bank of Montreal v. Sherco Properties Inc.* offered the following reasons for its decision at paragraph 47 below:

[47] I have reached this conclusion for the following reasons:

- (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
- (b) the terms of the mortgages permit the appointment of a receiver upon default;
- (c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

29 As noted at paragraph 33 of the Affidavit of Steve Lane, the General Security Agreement entered into by Crown Jewel provides ECBC with the specific authority to appoint by instrument a receiver or receiver and manager of the assets of the company upon default. The RC's are in default of the obligations owed to ECBC pursuant to the Secured Letter of Offer as referenced in paragraph 4 of the Affidavit of Steve Lane.

30 Certain other factors to be considered in determining whether it is just and convenient to appoint a receiver are particularly relevant to the case at Bar. These are:

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

31 Mr. Lane states at paragraphs 50 and 51 of his Affidavit that the RC's owe outstanding property taxes to Victoria County, Cape Breton in the approximate amount of \$80,000.00 as of October, 2013 and that, failing payment, Victoria County intends to put the lands up for tax sale in March of 2014. Permitting this situation to continue will undoubtedly place ECBC's security interest at risk.

32 Paragraphs 58 and 59 of the Affidavit of Steve Lane sets out the concerns ECBC has with the alleged lease agreements entered into by Korem. Clearly Korem did not have, on behalf of the RC's, any authority to enter into these lease agreements without the consent of ECBC. Further, the lease agreements appear to have been made by the RC's under a different business name, notwithstanding the fact that this entity has no legal standing. Clearly the RC's can no longer be entrusted with protecting and safeguarding their assets and the actions they have taken with respect to these alleged lease agreements clearly places ECBC's security interest at risk.

(d) the apprehended or actual waste of the debtor's assets;

33 It is apparent that Korem intends to continue with timber harvesting on the lands of the RC's that are subject to the ECBC security interest. Although limited timber harvesting was permitted by ECBC while Korem attempted to resolve the outstanding matrimonial property dispute, ECBC is understandably not confident that Korem will seek such consent in future. Given what appears to be an increasingly desperate financial situation of the RC's, ECBC holds a reasonable apprehension that the assets of the RC's, and in particular the timber resources, may be depleted or wasted.

(e) the preservation and protection of the property pending judicial resolution;

34 Crown Jewel Resort is no longer in operation and has been closed down for quite some time. ECBC remains concerned as to whether the assets of the resort are being adequately preserved and protected. For instance, ECBC has no way of ensuring that Korem will continue to properly maintain the resort property. Further, ECBC is concerned as to whether the assets of the resort will be properly insured on a continuing basis.

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

35 As noted above, ECBC has the right to appoint a receiver by instrument under the General Security Agreement entered into by the Respondent, Crown Jewel. ECBC advised the RC's of its intention to appoint a private receiver with respect to this matter during the November 20, 2013 negotiation referenced at paragraph 53 of Mr. Lane's Affidavit.

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

36 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) granted the motion for appointment by the court of a receiver-manager, holding at paragraph 13:

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 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.

37 Mr. Lane, at paragraph 60 of his Affidavit, notes the concerns ECBC has with the ability of MGM to carry out its duties. It is clear from the email stream of correspondences referenced at paragraph 59 of the Affidavit that Korem intends to set up as many road blocks as he can with respect to both the appointment of the receiver and the subsequent carrying out of its duties. As in *Bank of Nova Scotia v. Freure Village on Clair Creek* above, it appears inevitable that Korem will continue to bring costly, protracted and unproductive litigation against both ECBC and its privately appointed receiver. Further, it appears clear that Korem will not agree on the proper approach to be taken to marketing and selling the assets of the RC's subject to the ECBC security interest. Certainly any such attempts to dispose of the property by the privately appointed receiver would be met with further litigious skirmishing.

(l) the conduct of the parties;

38 It is clear from a reading of Mr. Lane's Affidavit that ECBC has extended the RC's with every opportunity to turn the resort business around. Unfortunately, the business became insolvent and has not been in operation for some time. Ultimately, ECBC had no option other than to enforce its security in an attempt to recover some of the losses it incurred in relation to the loans granted to the RC's. Despite the personal investment Korem has made in the resort, as well as the arduous and extremely adversarial divorce proceedings with Kedmi in regard to the assets of the RC's, Korem has not, despite being given ample opportunity to do so, made any reasonable progress in obtaining alternate financing with a view to paying out the ECBC indebtedness. Further, Korem has yet to provide ECBC with a meaningful business plan outlining the timely repayment of the ECBC debt.

(o) the likelihood of maximizing return to the parties;

39 The most practical and prudent approach to maximizing the return to the parties, including the unsecured debt, would be to proceed with a sale of the resort as soon as possible. In the interim, it remains open to Korem, while the receiver is in place, to obtain alternate financing with a view to paying out the ECBC debt.

40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court. Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the

interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.

41 The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in Houlden, Morawetz and Sarra at p. 1024 below:

The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates 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 whether or not it is more in the interests of all concerned to have the receiver appointed by the court: [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]).

42 Finally, the authors note at p. 1024 of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In *Romspen Investment Corp. v. 1514904 Ontario Ltd.*, 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

[32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.

Conclusion

43 I therefore order the appointment of Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. as the receiver and/or manager of all of the undertakings, property and assets of the RC's, Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Applicant shall also have its costs in the amount of \$1500.00 payable forthwith.

Application granted; receiver appointed.

TAB I

2011 ABQB 759
Alberta Court of Queen's Bench

Romspen Investment Corp. v. Hargate Properties Inc.

2011 CarswellAlta 2133, 2011 ABQB 759, [2012] A.W.L.D. 1141, 209 A.C.W.S. (3d) 843, 86 C.B.R. (5th) 49

Romspen Investment Corporation (Plaintiff) and Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd. (Defendants)

Donald Lee J.

Heard: November 15, 25, 2011

Judgment: December 2, 2011

Docket: Edmonton 1103-17749

Counsel: Schuyler V. Wensel, Q.C. for Plaintiff

Andrew Chamberland for Defendants

Scott Stevens for Receiver, D. Manning & Associates Inc.

Lindsay Miller for Second Mortgagee, Allied Hospitalities Services Inc.

Atul Omkar for Dr. Singh

Subject: Corporate and Commercial; Insolvency; Property

Headnote

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

Plaintiff RIC was Ontario corporation registered extra-provincially in Alberta — Defendant companies were Alberta corporations, individual defendant was officer, director, shareholder, and controlling mind of defendant companies — In accordance with terms of certain loan transactions RIC advanced \$32,000,000, repayable on demand, to defendant companies in November 2010 — Defendant companies provided security for loans in form of registered mortgage in favour of RIC on two distinct parcels of land — One parcel of land had operating hotel on it, other had church — In October RIC made demand for repayment, however defendant companies refused or neglect to pay — Receiver/manager was appointed for mortgaged lands and hotel — Receiver discovered that hotel was operated by separate corporation, CLCPL, and all hotel revenues were being paid to CLCPL — Plaintiff brought motion for order that receiver/manager have control over all property of both defendant companies and CLCPL — Given CLCPL's central role in operating hotel business, that its existence might be in breach of loan agreement, that it appeared to be in significant tax arrears, it was just and convenient that receiver/manager have control of all of property of both defendant companies and CLCPL.

Table of Authorities

Cases considered by Donald Lee J.:

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265, 282 O.A.C. 345 (Ont. Div. Ct.) — followed

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc. (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Land Titles Act, R.S.A. 2000, c. L-4
Generally — referred to

MOTION by plaintiff to include newly discovered corporation in receivership order.

Donald Lee J.:

1 The Plaintiff Romspen Investment Corporation ("RIC") is a corporation incorporated pursuant to the laws of the Province of Ontario, registered extra-provincially in the Province of Alberta. The Defendant companies are bodies corporate incorporated pursuant to the laws of the Province of Alberta. The Defendant Kevyn Ronald Frederick also known as Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick ("Frederick"), is alleged to be the officer, director, shareholder and controlling mind of the Defendants.

2 In accordance with the terms of certain loan transactions alleged, RIC advanced \$32,000,000 to Hargate Properties Inc. ("Hargate") and 1410973 Alberta Ltd. ("1410973") in 2010. The amount due and owing under the Loan Commitment from Hargate and 1410973 to RIC as of November 7, 2011 is submitted to be \$32,743,923.42 with per diem interest thereafter at \$8,746.66.

3 In addition to the Commitment by Hargate and 1410973 to repay the principal and interest, there was also additional security for the loans issued pursuant to the Commitment. Hargate and 1410973 executed and delivered to RIC a *Land Titles Act* mortgage dated May 28, 2010 which was registered with the Land Titles Office for the Alberta Land Registration District on August 10, 2010 whereby Hargate and 1410973 mortgaged in favour of RIC two distinct parcels of land. One title hereafter referred to as the "Hotel Lands" is the downtown location upon which the Chateau Lacombe Crown Plaza Hotel is situated; and the second parcel of land consists of 20.07 acres located on the south end of Edmonton on which a Church is located, hereinafter referred to as the "Church Lands".

4 It is submitted that these two parcels of land secured the payment of the principal sum of \$32,000,000 together with interest on all amounts remaining unpaid, both before and after default at an interest rate of 10% per year. It is alleged that default has been made pursuant to the terms of the mortgage and as described previously as of November 7, 2011 the sum of \$32,743,923.42 plus interest is due and owing. It was an express term of the Commitment, Mortgage as well as a further General Security Agreement ("GSA") dated May 28, 2010 that all indebtedness owing to RIC was repayable on demand.

5 By demand in writing made October 11, 2011 RIC made demand for repayment of the Indebtedness pursuant to the Commitment, the Mortgage and the GSA, however it is alleged that Hargate and 1410973 have refused or neglected to pay. On October 11, 2011 a Notice of Intention to Enforce Security pursuant to Section 244(1) of the *Bankruptcy and Insolvency Act* was delivered to all of the Defendants.

6 It is also alleged that there is a continuing unlimited Guarantee in writing dated March 28, 2011 in effect that was made in consideration of RIC making the loan to Hargate and 1410973 in which Voipus Canada Ltd. ("Voipus"), 1333183 Alberta Ltd. ("1333183"), Bellavera Green Condominium Corp. ("Bellavera") and Frederick all unconditionally guaranteed on a full indemnity basis any money and charges incurred by RIC in recovering the Indebtedness.

7 On November 15, 2011 with respect to the Church Lands consisting of 20 acres, counsel for Dr. Singh appeared submitting that his client should be appointed the Receiver with respect to those lands, separate and apart from any application being made by D. Manning and Associates to be appointed receiver of the Hotel Lands and the hotel operation. Although taxes have not been apparently paid on the Church Lands to the City of Edmonton, the Church on the 20 acres of land pays rent of approximately \$24,000 a year. Foreclosure proceedings have apparently been commenced by Dr. Singh with respect to those lands, and his appointment as Receiver was sought with respect to the Church Land rentals.

8 Remaining counsel present on November 15, 2011 took the position that an independent professional receiver should be appointed with respect to the Church Lands as opposed to Dr. Singh, who may also be engaged in other litigation with respect to the securitisation of the RIC loan in the future. It was proposed that D. Manning and Associates Ltd. be appointed receiver for the Church Lands as well.

9 Counsel for Dr. Singh was concerned about the costs involved in having a professional receiver appointed for such a simple series of transactions with respect to collecting rentals on the Church Lands.

10 An Order was eventually issued appointing D. Manning and Associates Ltd. to be the Receiver/Manager for both lands on the understanding that certain limiting set fees would be charged with respect to the Church Lands. All parties were generally in agreement with respect to the ultimate Receivership Order that was signed on November 15, 2011 containing the standard template provisions with two amendments which read as follows:-

(a) Allowed the Receiver to engage the hotel management services of Allied Hospitality Services Inc.;

(b) Allowed the Receiver to make payments to secured and other creditors including RIC, to ensure the ongoing operations of the debtor.

11 After this application for a Receivership Order was heard and granted on November 15, 2011, an Amended Statement of Claim was filed on November 21, 2011 adding as a Party the Defendant Chateau Lacombe Capital Partners Ltd. ("CLCPL"), and an Order was sought to include CLCPL within the definition of "Debtor" in the initial Receivership Order.

12 It is alleged that following to the Receiver/Manager Order of Hargate granted on November 15, 2011, the Receiver/Manager took possession of all of the Property as defined in that Order on November 15, 2011. The Receiver/Manager then discovered the existence of CLCPL for the first time. It was determined that all of the 120 unionized employees, and all 60 to 70 non-union employees of the Hotel were employed and contracted by CLCPL, allegedly contrary to the terms of the Commitment, Mortgage and GSA.

13 The Receiver Manager also determined that contrary to the terms of those three securitisations, that all of the revenue from the use and operation of the Hargate Property and the Hotel Lands had been diverted to CLCPL and deposited to CLCPL's operating accounts with the HSBC Bank of Canada (the "Operating Accounts").

14 At the time of the granting of the original November 15, 2011 Order, it is alleged that the Operating Accounts had a balance of \$295,000 but that on the morning of the granting of the Order on November 15, 2011, Frederick caused \$145,000 to be transferred from the Operating Accounts to his own personal account with RBC Securities.

15 The Receiver Manager is also alleging from his review of the records of Hargate and CLCPL that the Canada Revenue Agency ("CRA") issued a Requirement to Pay to the CRA account of CLCPL dated September 21, 2011 in the amount of \$513,340.07; and that the balance outstanding for GST Remittances due as of October 31, 2011 is \$407,624.40.

Conclusion

16 The creation and existence of CLCPL as a separate entity for the operation of the hotel business known as Crown Plaza Chateau Lacombe Hotel makes it central to the effective operation of that hotel in combination with the Hotel Lands, the property of Hargate, and the employees. CLCPL apparently receives all of the revenues from the Hotel's business operations, and employs all of the employees.

17 It is proposed that the Receiver/Manager have control over all of the property of both Hargate and CLCPL as Receiver/Manager. Given CLCPL's central role in operating the hotel business, that its existence may be in breach of the Loan Documents, and CLCPL appears to be in significant arrears to the CRA, I conclude that it is just and convenient that the Receiver/Manager have control of all of the property of both Hargate and CLCPL.

18 *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), at paragraph 37 is applicable in the present circumstances:-

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

[Underlining Added]

19 Similarly in *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.), the appointment of an investigative receiver over a company has occurred in circumstances where the company is intrinsically involved with the companies already in receivership, and where it is necessary to review and ascertain the transactions that have taken place within the network of companies.

20 The additional appointment of a Receiver for CLCPL is consistent with the factors a Court may consider in determining whether it is appropriate to appoint a receiver as described by my colleague Romaine J at paragraph 27 in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 CarswellAlta 1531, 2002 ABQB 430 (Alta. Q.B.)

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;

- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

21 I conclude that it would be appropriate to amend the November 15, 2011 Order to include within the definition of "debtor" CLCPL. Accordingly all the terms of the original November 15, 2011 Order shall apply to CLCPL from the date of that Order. Furthermore I will seize myself with all future applications in this matter.

Motion granted.

**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**

EXPORT DEVELOPMENT CANADA
Applicant

- and -

AXIOS MOBILE ASSETS CORP. et al.
Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**BOOK OF AUTHORITIES OF THE APPLICANT
(Appointment of Receiver)**

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