Court File No.: CV-24-00003312-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

TRANS GLOBE LOGISTICS INC., POLESTAR HOLDINGS LTD. and COMPASS ROSE INTERNATIONAL TRANSPORTATION INC.

Respondents

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

BOOK OF AUTHORITIES

July 24, 2024

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: (416) 367-6000
Fax: (416) 367-6749

ROGER JAIPARGAS – LSO No. 43275C
Tel: (416) 367-6266
rjaipargas@blg.com

NICK HOLLARD – LSO No. 83170O
Tel: (416) 367-6545
nhollard@blg.com

Lawyers for the Applicant

Index

Court File No.: CV-24-00003312-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

TRANS GLOBE LOGISTICS INC., POLESTAR HOLDINGS LTD. and COMPASS ROSE INTERNATIONAL TRANSPORTATION INC.

Respondents

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

I N D E X

Tab	Document
1.	*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007
2.	*Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List])
3.	*Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 (Commercial List)
4.	*Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List])
5.	*Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866
6.	*Standard Trust Co. v. Pendygrasse Holdings Ltd.*, 1988 CarswellSask 27 (Sask. Q.B.)
7.	*RBC v. Ten 4 System Ltd. et. al.*, Ont. S.C.J. [Commercial List], CV-23-00705869-00CL, October 18, 2023 (unreported endorsement of Osborne J.)
8.	*Royal Bank of Canada v. Ten 4 System Ltd.*, 2023 ONCA 839

9.	*Citibank Canada v. Calgary Auto Centre*, 58 DLR (4th) 447, 98 AR 250 (Alta. K.B.)
10.	*Ravelston Corporation Limited (Re)*, [2007] OJ No 414 (QL) (Commercial List)
11.	*Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.)

Tab 1

CITATION: Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007
COURT FILE NO.: CV-10-9029-00CL
DATE: 20110215

2011 ONSC 1007 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BANK OF MONTREAL, Applicant

AND:

CARNIVAL NATIONAL LEASING LIMITED and CARNIVAL AUTOMOBILES LIMITED, Respondents

BEFORE: Newbould J.

COUNSEL: John J. Chapman and Arthi Sambasivan, for the Applicants
Fred Tayar and Colby Linthwaite, for the Respondents
Rachelle F. Mancur, for Royal Bank of Canada

HEARD: February 11, 2011

ENDORSEMENT

[1] Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

[2] Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver

of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

[3] The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

[4] The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

[5] BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

[6] The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

2011 ONSC 1007 (CanLII)

[7] Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

[8] Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

[9] On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

2011 ONSC 1007 (CanLII)

[10] It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

[11] Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

[12] Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles

2011 ONSC 1007 (CanLII)

financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

2011 ONSC 1007 (CanLII)

Issues

(a) Right to enforce payment

[13] On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. C.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

[14] Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

[15] I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have

justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

[16] In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

[17] The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

[18] Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

[19] In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million

2011 ONSC 1007 (CanLII)

on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

[20] Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

[21] In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

[22] BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

[23] Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

[24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that

2011 ONSC 1007 (CanLII)

permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[25] It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[26] *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in

2011 ONSC 1007 (CanLII)

Anderson v. Hunking 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd*. 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

[27] In *Bank of Nova Scotia v. Freure Village on Clair Creek,* Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

[28] In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*., (1995), 30 C.B.R. (3d) 49, in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

2011 ONSC 1007 (CanLII)

> 28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

[29] See also *Bank of Nova Scotia v. D.G. Jewelry Inc*., (2002) 38 C.B.R. (4th) 7 in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in Royal Bank v. Zutphen Brothers, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
> …
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

[30] This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997) 32 O.R. (3d0 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create

2011 ONSC 1007 (CanLII)

a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

[31] Carnival relies on a decision in *Royal Bank of Canada v. Boussoulas* [2010] O.J. No. 3611, in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

[32] In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

[33] Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

[34] It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold

2011 ONSC 1007 (CanLII)

out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

[35] In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

[36] In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a

2011 ONSC 1007 (CanLII)

consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

[37] While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

[38] In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

_____

Newbould J.

DATE: February 15, 2011

2011 ONSC 1007 (CanLII)

Tab 2

Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

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

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

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

1996 CanLII 8258 (ON SC)

The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

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

[4] On his cross-examination, Mr. Freure admitted:

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

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was “due and owing” (see cross-examination questions 46-54, 88-96, 233-243).

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

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

1996 CanLII 8258 (ON SC)

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

Receiver/Manager

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

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

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

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

1996 CanLII 8258 (ON SC)

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank’s attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor’s solicitors themselves refer to the prospect of “costly, protracted and unproductive” litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court’s approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

1996 CanLII 8258 (ON SC)

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

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

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

Motions granted.

1996 CanLII 8258 (ON SC)

Tab 3

CITATION: Central 1 Credit Union v. UM Financial, 2011 ONSC 5612
COURT FILE NO.: CV-11-9144-00CL
DATE: 20110926

2011 ONSC 5612 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Central 1 Credit Union, Applicant

AND:

UM Financial Inc. and UM Capital Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: D. Smith and R. Jaipargas, for the Applicant

R. Slattery, for the Respondents

S. Siddiqui, for the proposed intervenor, Multicultural Consultancy Canada Inc.

HEARD: September 23, 2011

REASONS FOR DECISION

I. Motion by Shari'a Board of Scholars to intervene in contested application to appoint a receiver over a debtor's assets and undertakings

[1] A Shari'a advisory board for mortgage-like products, Multicultural Consultancy Canada Inc., moves under Rule 13.01(1) of the *Rules of Civil Procedure* to intervene in this contested application by a creditor, Central 1 Credit Union, to appoint a receiver and manager over all the property, assets and undertaking of the debtors, UM Financial Inc. and UM Capital Inc. (collectively "UM").

[2] For the reasons set out below, I do not grant the motion.

II. The receivership application

A. The credit facility and its performance

[3] Central 1 made available certain credit facilities to UM. The funds loaned by Central 1 to UM were used by the latter to make mortgage loans to their customers which complied with Shari'a law.

[4] UM offers mortgage and financial products to the Muslim community throughout Canada. According to UM's affiant, Mr. Omar Kalair, the company offers:

> Shariah compliant mortgages which adapt traditional security and lending arrangements into recognized Islamic lending instruments. These instruments accommodate, among other things the Islamic prohibition against charging or paying interest, and allow for the lender and the borrower to enter into a partnership instead of a strict debtor creditor relationship.
>
> Although the security and lending arrangements between Central and UM may be, on their face, ordinary loan and security documents, the underlying collateral, being the mortgage agreements entered into between the clients and UM, are not.
>
> As Central is aware, the Shariah complaint mortgages are different lending products with different risks and fees associated with them. Central has been fully involved in the development and application of these documents.
>
> UM is the only corporate entity in Canada who provides this service…
>
> This is an important growth market. With the Canadian Muslim community expected to double to 2.6 million by 2030, it is anticipated that close to 20 percent of new bank accounts opening by 2030 will be from this community.

[5] Mr. Kalair described in some detail the elements of a Shariah-compliant mudarabhah, or partnership, between parties to a commercial enterprise, a key aspect of which is a pre-determined agreement between the partners for the distribution of profits from the enterprise. In his affidavit he reviewed the structure and process of the mushakarah residential real estate mortgage UM entered into with its customers and appended to his affidavit a copy of the standard Mushakarah Mortgage Loan Agreement utilized by UM.

[6] As security for its borrowings UM granted Central 1 general security agreements charging all of their personal property and assigned to Central 1 the real property residential mortgages made by UM to its customers. The commitment letters stated that they were governed by the laws of the Province of Ontario; neither referred to the principles of Shari'a law. Schedules to the commitment letters contained representations and warranties by UM that each mortgage it assigned to Central 1 as security "contains all standard terms and conditions generally contained in residential first mortgages and contains no restrictions on the assignability by [UM]".

[7] Similarly, neither the Business Loan General Security Agreements nor the Master Mortgage Assignment Security Agreement between the parties contained any reference to Shari'a law; both stated that they were governed by the laws of the Province of Ontario. The GSAs contained a right for Central 1 to appoint a private receiver in the event of default.

2011 ONSC 5612 (CanLII)

[8] In his affidavit Mr. Kalair stated that UM created an independent board of scholars who reviewed the on-going compliance of UM's lending with Shari'a principles:

> Its independent overview functions akin to the function performed by Kashruth or Halal food certification organizations.

UM's Board of Scholars consisted of five members, one of whom – Mufti Panchbaya – is Chair of the proposed intervenor, Multicultural Consultancy Canada Inc. ("MCC"). In 2005 the Board issued an opinion that the relationship created by the documents entered into between UM and Central 1's predecessor on the loans was Shariah compliant.

[9] Central 1 alleges that as of March, 2011, UM owed it approximately $31.5 million and was in default. Central 1 delivered to UM notices of default and, on November 23, 2010, it sent UM demands for payment and notices of intention to enforce security under s. 244(1) of the *Bankruptcy and Insolvency Act*. Mr. Dirk Haack, in an affidavit in support of the application, deposed:

> Both before and after the delivery of these notices and demands Central 1 has afforded time to the Companies to repay the amounts owing to Central 1. Central 1 offered to enter into a forbearance arrangement with the Companies to afford them more time to see Central 1 repaid. Despite the efforts of Central 1, the Companies have not repaid Central 1, have not put forward a plan acceptable to Central 1 and have not accepted Central 1's offer to negotiate a short term forbearance agreement.

[10] On March 16, 2011, Central 1 commenced this application seeking the appointment under section 243 of the *BIA* and section 101 of the *Courts of Justice Act* of a receiver and manager over all the property, assets and undertakings of UM.

B. The issues on the application to appoint a receiver

[11] UM has advanced several arguments in opposition to the application of Central 1 to appoint a receiver, including:

(i) At the time Central 1 made its demand all payments owing by UM to Central were paid in full;

(ii) UM was not in default of any monetary obligations under the security lending agreements;

(iii) The termination by Central 1 of the Master Mortgage Assignment Security Agreement was done without notice and without proper resort to that agreement's arbitration provisions; and,

(iv) Central 1 has breached its contract with UM by making its demand and bringing its application.

2011 ONSC 5612 (CanLII)

[12] In his affidavit Mr. Kalair spent some time conveying the views of UM's Board of Scholars about the enforcement proceedings initiated by Central 1:

> The Board is strongly opposed to Central's recent enforcement actions on religious grounds.
>
> In order for the contracts to be recognized as enforceable by the clients of UM, the party enforcing must be a risk sharing partner of those clients. The agreement attached as Exhibit "A" above [the Musharakah Home Financing Agreement] reflects this intention. Any enforcement of these 'mortgages' must be done in accordance with this agreement. It does not appear as though Mr. Haack recognizes this and I do not believe that Central is prepared to abide by this based on a review of the Haack Affidavit.
>
> The Board has released a fatawa (a religious ruling) that if [UM is] put into receivership, it will result in our partnership contracts with the clients being null and void. This is because partnership contracts are only valid if both parties are active partners and share the risks. In the opinion of the Shariah board, the clients are to be advised that if UM is put into receivership the clients are not obliged to meet the obligations under their mortgages with Central.

[13] In light of that evidence I would observe that the Musharakah Home Financing Agreement appended by Mr. Kalair to his affidavit provides that the "purchaser" (i.e. mortgagor) agrees that his obligations under the Declining Balance Real Estate Purchase Financing Agreement are secured by an Encumbrance, executed by the purchaser in favour of UM, and that on default UM may exercise any and all remedies under the Encumbrance. Those remedies include "proceeding under a power of sale or other expedited foreclosure process pursuant to Governing Law", which is defined as Ontario law. In the Master Mortgage Assignment Security Agreement UM warranted that each of the mortgages contains "all standard terms and conditions generally contained in a residential first mortgage" (Article 5.2(f)).

[14] Nevertheless, in paragraphs 100 to 115 of his first affidavit Mr. Kalair explains, at some length, why the appointment of a receiver might have "dire religious consequences" and "likely will lead to the majority of the clients being directed by their religious scholars to immediately sell their homes, regardless of the loss and personal dislocation they will suffer, because they cannot be in a non-Shariah compliant lending arrangement…"

III. The Shari'a Board: Multicultural Consultancy Canada Inc.

A. The purpose of MCC

[15] Recently the UM's Board of Scholars incorporated MCC, and it wishes leave to intervene, pursuant to Rule 13.01, in the receivership application scheduled for October 7, 2011. Mufti Panchbaya swore affidavits in support of MCC's motion. They did not attach MCC's articles of incorporation, so I have no evidence of MCC's corporate purposes. However, Mufti Panchbaya did describe the efforts made to date by the Board to participate in these proceedings

2011 ONSC 5612 (CanLII)

and, as well, he provided some general background information on Islamic financial transactions, in particular the diminishing musharakah, or declining balance co-ownership transaction model used by UM with its customers.

B. Previous attempts by MCC to participate in this proceeding

[16] This past May and June Mufti Panchbaya wrote to Central 1 expressing the Board's concerns about the applicant's enforcement proceedings. In an endorsement dated June 14, 2011 Mesbur J. noted that the Board might be seeking leave to intervene in the proceeding. Mesbur J. set July 25 as the date for a settlement conference between the parties. That day the Board's counsel, Mr. Siddiqui, appeared and sought leave to participate in the settlement conference conducted by Mesbur J. She refused his request. A 9:30 case conference was held before Morawetz J. on September 15. He noted that Mr. Siddiqui again appeared, wishing to participate in the conference on behalf of the Board. Morawetz J. followed the reasoning of Mesbur J. in refusing that request.

C. Why MCC wants to participate in this proceeding

[17] After reading the materials filed by MCC and hearing submissions from its counsel, I confess to a lingering confusion about the purpose and scope of MCC's desired intervention in this proceeding. Nonetheless, let me reproduce those portions of the affidavit of Mufti Panchbaya which touch upon this issue:

> [20] The Shari'a advisory board has communicated some of its concerns about the receivership application to the Credit Union but has not had an occasion to do so in open court.
>
> [21] While Omar Kalair has attempted to communicate our concerns to the court through his affidavit evidence, he is not a Shari'a expert.

Later in his affidavit he continued:

> [26] I did not decide to intervene in the proceedings until I got notice of a potential class action lawsuit by clients of UM Financial against the Credit Union. Attached…is a true copy of an undated, signed letter from Adekusibe Fola. I am advised by my counsel and do verily believe that he received a copy of this letter on September 14, 2011.
>
> [27] Initially, I wanted to participate in the court proceedings in order to ensure that the Shari'a concerns were aired in court by a Shari'a expert. However, now I am concerned that myself and members of the board may be exposed to litgation on the basis that we have certified the Shari'a compliance of products offered by the Credit Union in partnership with UM Financial and the Credit Union…
>
> [28] If Credit Union succeeds in its application for receivership…the board and myself personally face considerable reputational risk and may never be able to sit on another advisory board for an Islamic finance company in Canada in the future.

2011 ONSC 5612 (CanLII)

[18] The recent letter of Ms. Fola to Central 1 stated that should the applicant discontinue the Sharia Compliant Financing Scheme:

> Our clients will be filing a class action to redress the wrongs your action will cause them. In the meantime, they are considering filing a complaint with the Financial Services Commission of Ontario and the Office of The Superintendent of Financial Institutions.

2011 ONSC 5612 (CanLII)

C. The scope of participation rights sought by MCC

[19] During oral argument MCC's counsel confirmed that his client wished to be added as a party intervenor with the right to file evidence, which would be limited to the affidavits of Mufti Panchbaya filed on the motion to intervene. In addition counsel confirmed that MCC:

(i) would not ask to cross-examine on any of the affidavits filed by the parties;

(ii) wished to file a factum for the October 7 hearing;

(iii) wished to make oral submissions of up to one hour at the hearing;

(iv) was not seeking an adjournment of the October 7 hearing;

(v) was not asking for any right to appeal the ruling made on the October 7 hearing;

(vi) wished to participate in subsequent hearings in this proceeding should the court appoint a receiver; and,

(vii) would not seek its costs of participation but, at the same time, did not want to be responsible for the costs of any party.

IV. Analysis

A. The general principles governing requests to intervene

[20] In *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824, I attempted to summarize the key elements of the approach to considering a request for leave to intervene brought under Rule 13.01(1) of the *Rules of Civil Procedure*:

> 7 A person may move for leave to intervene as an added party if the person claims (a) an interest in the subject matter of the proceeding, (b) that the person may be adversely affected by a judgment in the proceeding, or (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding: Rule 13.01(1). A court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the

person as a party to the proceeding "and may make such order as is just": Rule 13.01(2).

8 As has been noted in the jurisprudence, cases in which intervention requests are made fall along a continuum ranging from constitutional and public interest cases at one end, to strictly private litigation at the other: *Authorson (Litigation Guardian of) v. Canada (Attorney General),* [2001] O.J. No. 2768 (C.A.), para. 9. Where the intervention is in a *Charter* case, usually at least one of three criteria must be met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or, it is a well recognized group with a special expertise and a broadly identifiable membership base: *Bedford v. Canada (Attorney General),* 2009 ONCA 669.

9 By contrast, Ontario courts have interpreted Rule 13 more narrowly in conventional, non-constitutional litigation, and the Court of Appeal has cautioned that the "intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of litigation, regardless of an agreement to restrict submissions": *Authorson, supra*., para. 8.

10 The over-arching principle guiding any court considering a request to intervene was stated by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.) as follows, at p. 167:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[21] Counsel were unable to point me to any prior decision of this court where a stranger to the creditor-debtor relationship was granted status as a party intervention on a contested application to appoint a receiver over the assets and undertaking of the debtor.

B. Application of the general principles to the facts of this case

[22] The application in which MCC seeks to intervene as a party involves a request by Central 1 for the appointment of a receiver over the assets and undertaking of UM. Typically the issues for a court to determine on such an application include: (i) the existence of a debt and default; (ii) the quality of the creditor's security; and (iii) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to

2011 ONSC 5612 (CanLII)

preserve the property pending realization.[1] Those issues normally require an adjudication of private rights as between the applicant secured creditor and the debtor respondent with, as well, some consideration of the potential effect of the order sought on other creditors, whether secured or otherwise, and other stakeholders of the debtor corporation who might be affected by a receivership order.[2]

[23] Given those issues, I fail to see from the evidence filed by MCC what interest it might have in the subject matter of this application. It does not put itself forward as a possible creditor of UM, and the material does not disclose that any contractual relationship existed between it and UM.

[24] Mufti Panchbaya deposed that he could provide assistance to the court in explaining Shari'a law. He might well be able to do so, but such an ability does not rise to the level of having an interest in this proceeding for several reasons:

(i) as I noted above, the credit facility and security documents between Central 1 and UM are governed by Ontario law, as are the financing documents between UM and its borrowers. It is not apparent from those documents that any need exists for a court to seek assistance on points of Shari'a law;

(ii) Shari'a law stands as non-domestic law within the Canadian legal system. As such, the principles of Shari'a law must be proved by expert evidence.[3] Although the timing aspects of Rule 53.03 require some modification in the context of applications, its requirements concerning the contents of experts' reports do not. The affidavit filed by Mufti Panchbaya does not comply with Rule 53.03(2.1) and he did not provide the required acknowledgement of his Rule 4.1 duties to the court as an independent expert witness. Indeed, given his stated concern about exposure to personal liability for advice he gave to UM, Mufti Panchbaya could not offer independent expert opinion evidence. Consequently, Mufti Panchbaya's affidavit holds little possible probative value in respect of proving any principle of Shari'a law; and,

(iii) the debtor, UM, has filed responding evidence raising and discussing the issue of Shari'a law, and it was open to UM to file the report of an expert in Shari'a law and Islamic financing if it thought such evidence material to its opposition to the appointment of a

---

[1] Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009), p. 481 and Frank Bennett, *Bennett on Receiverships, Second Edition* (Toronto: Carswell, 1999), pp. 22-23.

[2] Kevin P. McElcheran, *Commercial Insolvency in Canada* (Toronto: LexisNexis, 2011), p. 186.

[3] See, for example, the decision of the High Court of Justice, Chancery Division, in *Investment DAR Company KSCC v. Blom Developments Bank SAL*, [2009] EWHC 3545 (Ch), at para. 7, where one issue on a motion for summary judgment involved whether certain transactions were Shari'a-compliant and within the powers of a Kuwait-incorporated party to the transactions or *ultra vires* by reason of non-compliance with Shari'a law principles.

2011 ONSC 5612 (CanLII)

receiver. UM has not filed such expert evidence, so it is not open to a stranger to the litigation to attempt to gain entry into the proceeding to do so.

[25] In its factum and oral argument MCC submitted that this proceeding possesses a constitutional dimension, bringing into play the freedom of religion and the right to equality without discrimination. I see no merit in such an argument. The parties have not raised any constitutional issues. Neither party is "government" within the meaning of section 32(1) of the *Canadian Charter of Rights and Freedom*, and MCC failed to articulate any common law principle whose development should be informed by the rights and freedoms contained in the *Charter*. Finally, MCC did not give notice under section 109 of the *Courts of Justice Act* to either Attorney General.

[26] Next, the evidence does not disclose that MCC might be adversely affected by a judgment in this proceeding. First, MCC did not file its articles of incorporation, so the record is silent on its corporate purpose and how its corporate objects might be affected by an order. Second, there is no evidence that MCC is a creditor of UM. Third, the concern about some possible reputational impact deposed to by Mufti Panchbaya relates to a possible effect on a personal, not a corporate, interest. Fourth, Mufti Panchbaya's reference to possible litigation-exposure for himself and the other members of the Board of Scholars is speculative. Ms. Fola's recent letter to Central 1 threatened litigation against the creditor/applicant, not against the Board of Scholars. Finally, if a receiver is appointed, it would have to administer UM's assets, including its contracts, in accordance with the terms of those contracts, subject to any approval by the court of contrary conduct. The suggestion that the appointment of a receiver would transform radically the rights and obligations of the parties under the debtor's Musharakah Home Financing Agreements strikes me as highly speculative and based on a misunderstanding of the powers and duties of a court-appointed receiver.

[27] This is not a case where the third branch of the intervention rule – Rule 13.01(1)(c) is engaged.

[28] Finally, I do not accept MCC's submission that its participation as an added party is necessary for the Court to appreciate the potential impact of a receivership order on the Muslim purchasers, or mortgagors, who entered into Musharakah Home Financing Agreements with UM. As I noted above, in his responding affidavit Mr. Kalair dealt with that issue at some length. As I see the matter, MCC's participation on that point would only duplicate evidence already placed into the record by the respondent.

[29] Although no delay in the hearing of the application would result from granting intervention status to MCC, there would be additional costs imposed on both parties (although UM supports MCC's motion). While those costs might not be substantial, they are nonetheless real, and I do not see MCC making any useful contribution to the hearing of the application which would justify the imposition of such costs on the parties.

[30] I should note that in the event the court appoints a receiver (and I make no comment one way or the other whether such an order should issue), it would be open to MCC to communicate

2011 ONSC 5612 (CanLII)

any concerns directly to the receiver who, as I tried to emphasize numerous times during the hearing of this motion, would be acting as an officer of this court with all the attendants duties of such an office.

V. Conclusion

[31] For the reasons set out above, I am not persuaded that MCC has an interest in the subject-matter of this application, would be adversely affected by a judgment, or otherwise would make a useful contribution to the hearing of the application. Accordingly, I dismiss its motion under Rule 13 for leave to intervene as an added party.

[32] I do wish to add one final comment. During the course of its written and oral arguments MCC emphasized the religious dimension of its activities and its desire to participate in this proceeding. Freedom of religion is one of the most precious of our constitutional freedoms. I have written at great length, both as a lawyer and as a judge, about the cardinal position enjoyed by that freedom in our political and legal community - religious belief plays a central role in the lives of a very large number of Canadians. At the same time, arguments about religious freedom can assume a strong emotional dimension. I wish to say, with respect, that counsel who advance freedom of religion arguments must take great care about how they cast their arguments and should avoid the temptation to personalize or emotionalize their submissions. I raise this point somewhat reluctantly, but I think necessarily, given the dramatic closing submission by MCC's counsel who, picking up the copy of the Koran kept by the court registrar, suggested that if leave to intervene was not granted to his client, then the Koran would not have a place in Canadian culture or its court system. Such a style of argumentation is inflammatory, even before a judge alone, and, in my view, improper in a forensic submission to a Canadian court by professional counsel on such an important constitutional right as freedom of religion.

VI. Costs

[33] I would encourage the parties to try to settle the costs of this motion. My inclination would be not to award any costs. However, if any party wishes to seek costs, it may serve and file with my office (c/o Judges' Reception, 361 University Avenue) written cost submissions, together with a Bill of Costs, by Wednesday, October 5, 2011. Any party against whom costs is sought may serve and file with my office responding written cost submissions by Friday, October 14, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

2011 ONSC 5612 (CanLII)

Date: September 26, 2011

2011 ONSC 5612 (CanLII)

Tab 4

1995 CarswellOnt 39
Ontario Court of Justice (General Division — Commercial List)

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

SWISS BANK CORPORATION (CANADA) v. ODYSSEY INDUSTRIES INCORPORATED and WESTON ROAD COLD STORAGE COMPANY

Ground J.

Heard: December 7 and 15, 1994
Judgment: January 31, 1995
Docket: Docs. 94-CU-80416, B 280/94

Counsel: *Frank Newbould, Q.C.* , for plaintiff.
Alan J. Lenczner, Q.C. and *Linda L. Fuerst* , for defendants.

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Debtors and creditors
XIII Loans
XIII.1 General principles
Financial institutions
VI Loans and discounts
VI.11 Miscellaneous

Headnote
Banking and Banks --- Loans and discounts — General
Creditors and Debtors --- General — Loans
Receivers --- Appointment — Application for appointment — Grounds
Secured creditors — Validity of loan — Where loan made by lending institution in contravention of statute or regulation, loan still enforceable.
Receivers — Application for appointment — Creditor under no obligation to prove that irreparable harm would result from failure to appoint receiver.
Two debtor companies were part of a group of companies carrying on a frozen food business. OI Inc. was a holding company and WR Co. was a limited partnership. The bank advanced a loan of $47.5 million to a partnership in which OI Inc. was a partner. In return it received assignments of mortgages and a fixed and floating charge on all of OI Inc.'s assets. The loan was payable on demand.
The bank also made a loan not to exceed $10,179,750 to WR Co. In return it received a collateral mortgage over two warehouses, a general security agreement over the assets and undertaking of WR Co. and guarantees by OI Inc. and JR, who controlled the group of companies.
The group of companies proposed a restructuring plan under which certain conveyances and transfers between the various companies were made. A master agreement provided that the restructuring plan would not be effected or would be reversed unless certain parts of the plan were settled to the satisfaction of the bank.

Both loans were in default. The bank brought a motion for the appointment of a receiver-manager of the property, undertaking and assets of OI Inc. and WR Co. The debtor companies argued that the bank was not entitled to the appointment of a receiver-manager because the loan to OI Inc. was illegal, having been made in breach of regulations under the *Bank Act* . They also argued that the bank was in breach of certain provisions of commitment letters related to both loans and in breach of its fiduciary duty to the companies as borrowers. Finally, they argued that, under s. 101 of the *Courts of Justice Act* (Ont.), a receiver-manager may be appointed by the court where it is just and convenient to do so. In the circumstances, they argued that it would be unjust and inequitable to make the appointment.

Held:

The motion was allowed.

There was no evidence to suggest that various transactions resulted in the security for the loans being in jeopardy or that the ability of the companies to repay the loans was materially affected in such a way as to require the appointment of a receiver-manager. However, defaults under both loans provided ample justification for the appointment of a receiver-manager. The bank was not required to establish that irreparable harm would result from the failure to appoint a receiver-manager. Further, under the master agreement the transfer of assets was reversed or deemed never to have taken place. Therefore, the bank would receive substantial benefit from the appointment of a receiver-manager.

There was no evidence to suggest that the companies would suffer undue or extreme hardship if a receiver-manager were appointed. The fact that a receiver-manager would not have the background and expertise of the companies' principal in running the business was not a reason to refuse the motion for appointment.

The loan to OI Inc. was not illegal because it was made by an institution that was not subject to the regulations under the *Bank Act* . Further, even if a loan is made in contravention of a statute or regulation governing the lending institution, the loan is still enforceable by the lending institution.

There was little evidence to establish a special relationship or exceptional circumstances such as would result in the bank owing the companies a fiduciary duty. The commercial transactions between the parties did not go beyond the normal relationship of lender and borrower. In any event, such allegations would have to be established in an action in damages against the bank. They did not constitute a reason to refuse to appoint a receiver-manager.

Table of Authorities

Cases considered:

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

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (2d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 160, 49 B.C.A.C. 1, 40 W.A.C. 1 — *considered*

Sidmay Ltd. v. Wehttam Investments Ltd., [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (C.A.) , affirmed [1968] S.C.R. 828, 69 D.L.R. (2d) 336 — *followed*

Statutes considered:

Bank Act (being Pt. 1 of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40) [R.S.C. 1985, c. B-1].

Bankruptcy Code, 11 U.S.C.

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

s. 101

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) —

s. 88

***Ground J.*:**

1 This is a motion brought by the plaintiff, Swiss Bank Corporation (Canada) ("Swiss Bank") for the appointment of a receiver and manager of the property, undertaking and assets of the defendants, Odyssey Industries Incorporated ("Odyssey") and Weston Road Cold Storage Company ("Weston").

Factual Background

2 Odyssey and Weston are part of a group of entities controlled by Joseph Robichaud ("Robichaud") which carry on business in Ontario, Quebec and the Maritime Provinces. The business is based upon the storage of frozen foods in large cold-storage warehouse facilities. Other entities controlled by Robichaud either carry on, or carried on, similar business in Western Canada and in the United States.

3 Odyssey, a corporation controlled by Robichaud, was a holding company. It held 100% of the equity of Associated Freezers of Canada Inc. ("AFC"). AFC operated the freezer business under leases from limited partnerships controlled by Robichaud which held the beneficial ownership of the various cold-storage warehouse facilities. As a result of various transactions recently undertaken by one or more of the Robichaud entities, it is in issue as to which corporation or entity manages the business, or has beneficial ownership of the various warehouse properties at this time.

4 Seven cold-storage warehouse plants are registered in the name of 606327 Ontario Limited ("606327"). They are situated in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. Until recently, 606327 held the properties in trust for a limited partnership registered in Ontario as The Polar-Freez Limited Partnership ("Polar-Freez"). Ninety percent of the limited partnership units of Polar-Freez were owned by AFC.

5 Two cold-storage warehouse facilities are owned by the defendant Weston which is a limited partnership registered in Ontario.

6 On December 13, 1988, Swiss Bank advanced approximately $47.5 million (the "Odyssey Loan") to Associated Investors Partnership ("Associated Investors"), one of the partners of which was Odyssey. The loan was repayable on demand. Associated Investors advanced the funds to Odyssey.

7 The security Swiss Bank received for the Odyssey Loan included:

(a) assignments by Odyssey of $30 million and $39 million mortgages (the "Polar-Freez Mortgages") from 606327 to Odyssey, each mortgage being registered over the seven cold-storage warehouse plants beneficially owned by Polar-Freez. The mortgage terms included an obligation to pay all taxes when due; and

(b) a fixed and floating charge debenture (the "Odyssey Debenture") in the amount of $47.5 million given by Odyssey over all of its assets as a general and continuing collateral security. The Odyssey Debenture contained standard provisions dealing with events of default and remedies, including the right to apply to a court for the appointment of a receiver and manager.

8 The Odyssey Loan was payable on demand. By letters dated July 22, 1994, Swiss Bank demanded payment of outstanding arrears and principal to be made no later than September 6, 1994. Payment was not made. Principal outstanding as of November 20, 1994 was $48,959,148.48. As of November 20, 1994, there was $1,178,241.19 of arrears of interest owing.

9 Municipal property taxes on the seven Polar-Freez properties are in arrears of approximately $2.5 million. These arrears have existed over various periods of time within the past two years.

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to exceed $10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

11 The security Swiss Bank received for the Weston Loan included:

(a) a collateral mortgage in the amount of $13 million over the two warehouses owned by Weston. The mortgage provided that Weston was to pay all municipal taxes when due;

(b) a general security agreement over the assets and undertaking of Weston containing standard terms describing the events of the default and remedies available, including the right of Swiss Bank to apply to court for the appointment of a receiver and manager; and

(c) guarantees by Odyssey and Robichaud of the indebtedness of Weston to the amounts of $13 million and $3.5 million respectively.

12 Principal payments on the Weston Loan of $150,000 were due on December 31 each year commencing in 1990. No payments of principal were made and therefore as of December 31, 1993, and thereafter, $600,000 in principal payments were in arrears. The Weston Loan agreement provided for a hedge account to be funded by Weston. The purpose of this account was to provide protection to Swiss Bank as a hedge against any adverse movements in foreign exchange rates in the event that Weston transferred its obligations into Swiss francs. An initial deposit of $1 million was made by Weston to the hedge account at the end of December 1989 as required. Further payments of $350,000 per annum commencing on December 31, 1990 were required; however, the only payment made was a further $15,000 payment on July 31, 1992. The hedge account is in arrears of $1,040,000. Municipal tax arrears against the Weston properties of approximately $1 million have been outstanding for approximately two years.

13 By letter dated July 22, 1994, Swiss Bank demanded payment in full of outstanding principal plus interest by September 6, 1994. Payment was not made. Principal outstanding as of November 29, 1994 was $11,334,907.93. Loan interest payments have been in default since March 31, 1994. The amount of interest outstanding to November 29, 1994 is $203,686.70.

14 In the Spring of 1994, the Robichaud Group presented a restructuring plan that included a reverse take-over of a new Robichaud corporation named Polar Corp. International ("Polar Corp.") by a V.S.E.-traded corporation.

15 The restructuring plan contemplated: (i) Polar Corp acquiring the seven warehouses from Polar-Freez; (ii) a transfer of AFC's ownership interest in Polar-Freez to a corporation named Pacific Eastern Equities Inc. ("Pacific Eastern"), a corporation controlled by Robichaud with no substantial assets; (iii) a winding-up of AFC under s. 88 of the *Income Tax Act* , and conveyance of its assets to Odyssey; (iv) a sale of the leasehold interest of Odyssey (now the tenant) in the seven warehouses to Polar Corp.

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

If:

(a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;

(b) any payment required under Section 2.20 shall not be made when due;

(c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or

(d) by 5 p.m. on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,

this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

17 It appears to be agreed that the conditions set out in s. 2.21 of the Master Agreement were not fulfilled.

Submissions

18 It is the position of counsel for Swiss Bank that the transfers of assets contemplated by the Master Agreement did in fact take place and that the cancellation of the leases to AFC which were assigned to Odyssey on the wind-up of AFC constituted a breach of the covenant of Odyssey contained in the Odyssey Debenture not to dispose of any part of the charged premises except in the ordinary course of business. It is his further submission that, if I should find that the transactions contemplated by the restructuring plan did not in fact take place, there is still ample evidence before the court that the Odyssey Loan and the Weston Loan were in default and that Swiss Bank is entitled to the appointment of a receiver.

19 With respect to the restructuring plan, counsel for Swiss Bank points out that a number of the letters and memoranda and several statements contained in the affidavits of Robichaud, all submitted to the court, refer to the transactions as having taken place and the assets having been transferred in accordance with the restructuring plan. There is no reference anywhere to the transfer documents being held in escrow pending the approval by Swiss Bank to the restructuring plan. He submits that the Master Agreement is of no legal effect in that Swiss Bank gave notice that it was not satisfied as to the tax aspects of the restructuring plan and, accordingly, the situation remains as it was before the Master Agreement was entered into.

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of $1,100,000; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of $2,500,000; that there are principal payments of $600,000 in arrears on the Weston Loan, and that the annual payments of $350,000 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of $203,000; that there are municipal tax arrears on the Weston properties in amounts in excess of $1,000,000; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey Debenture has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the *Bank Act* , S.C. 1980-81-82-83, c. 40 (the "*Bank Act* ") in that the loan could not be made

by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

22 Second, counsel alleges that Swiss Bank is in breach of certain provisions of the commitment letters for both the Odyssey Loan and the Weston Loan by refusing to agree to certain conversions of the loans from Swiss francs to Canadian dollars on several occasions at the request of the borrowers made pursuant to the terms of the commitment letters. In refusing to allow such conversions, counsel submit that Swiss Bank was not only in breach of the terms of the commitment letters, but was also in breach of its fiduciary duty to the borrowers in that Swiss Bank had undertaken to give advice to the borrowers as to the structure of the loans and as to currency conversions.

23 Third, counsel for Odyssey and Weston point out that Swiss Bank is not seeking the appointment of an interim receiver pending trial of this action, but is seeking the appointment of a court appointed receiver and manager to take over the business, undertaking and assets of Odyssey and Weston to enforce the security held by Swiss Bank and effect repayment of the Odyssey Loan and the Weston Loan. Counsel submit that under the provisions of s. 101 of the C.J.A., a receiver and manager may be appointed where it appears to a judge of the court to be just or convenient to do so, and that, in seeking the appointment of a receiver and manager, Swiss Bank is seeking an equitable remedy. It is the position of counsel for Odyssey and Weston that to appoint a receiver in this case would be unjust and inequitable. They submit that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed pending the trial of the oppression action commenced by Swiss Bank. There are certificates of pending litigation registered against the properties and there is an outstanding order restricting the disposition of any assets of Odyssey and Weston. In addition, Robichaud and the Robichaud group are prepared to give an undertaking to the court that there will be no expenditures of cash outside the ordinary course of business pending the trial of the action. It is further submitted that, if it is determined at trial that the assets have been transferred in accordance with the restructuring plan, there is very little in Odyssey for a receiver to administer and that, if it is determined that the assets remain in Odyssey and Polar-Freez, a sale of such assets by the receiver would result in a substantial tax liability and Swiss Bank would not recover an amount which would substantially decrease the principal amount of the Odyssey Loan. In addition, counsel submits that to appoint a receiver would be inequitable in view of Swiss Bank's acquiescence in the asset transfer since the Spring of 1994. Further, it is submitted, the appointment would result in extreme hardship to the borrowers, that Swiss Bank does not come to court with clean hands in view of its refusal to permit conversions of the loans and that any receiver and manager appointed to run the business of Odyssey and Weston would not have the background and experience of Robichaud in the operation of the business.

24 With respect to the diversion of funds to affiliates in the United States, counsel for Odyssey and Weston submit that there is no evidence that the transfer of the deposit receipts was for any improper purpose or was not in the ordinary course of business in view of the history of relationships among the Robichaud group of companies and, in any event, does not constitute evidence that the security for the Swiss Bank loans was in jeopardy or materially affect the ability of the borrowers to repay such loans.

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to have taken place. Section 5.4 of the Master Agreement provides:

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be

fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

26 One could become embroiled in a metaphysical debate as to whether the effect of such section is that the transactions having taken place have been reversed or that the transactions are deemed never to have taken place. Whichever is the case, there has either been a default under the Odyssey Debenture which has been rectified, or no default under the Odyssey Debenture has taken place. Accordingly, it is not, in my view, grounds for the appointment of a receiver and manager by Swiss Bank. I am also not satisfied that the rather confused transactions involving the term deposits in the United States constitute grounds for the appointment of a receiver. It appears that the transfers of the term deposits to the United States were for valid business reasons, i.e. to provide security for the performance of a lease or for the approval of a proposal under c. 11. There is no evidence to support the contention of counsel for Swiss Bank that the failure to reflect one of the transfers of such term deposits on the books of AFC was part of some nefarious plot to divert assets of the Robichaud Group companies. Accordingly, I am not persuaded that these transactions constitute a basis for determining that the security for the loans was in jeopardy, or that the ability of Odyssey and Weston to pay the loans was materially effected by these transactions so as to satisfy the court that it would be just and convenient on this ground to appoint a receiver and manager.

27 It appears, however, that the other defaults under both the Odyssey Loan and the Weston Loan referred to by counsel for Swiss Bank, would of themselves provide ample justification for the appointment of a receiver and manager. One must then consider the submissions made by counsel for Odyssey and Weston that, in this case, it would be unjust and inequitable to order such appointment.

28 The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated (see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (S.C.)).

29 The second submission of counsel for Odyssey and Weston is that there would be no substantial benefit to Swiss Bank resulting from the appointment in that, if it is determined that the assets have been transferred to Polar Corp., there is very little in Odyssey for a receiver to administer. Having found that the effect of the termination of the Master Agreement is that either the transfer of assets has been reversed or is deemed not to have taken place, substantial assets remain in Odyssey and its subsidiaries and a receiver would be in a position to administer such assets and business or to realize upon them to satisfy the indebtedness owing to Swiss Bank. Accordingly, I do not accept the submission that there is no substantial benefit to Swiss Bank from the appointment of a receiver.

30 Counsel for Odyssey and Weston submit that Swiss Bank acquiesced in the transfer of assets since the Spring of 1994, and that accordingly, it would be inequitable to appoint a receiver at this time. My reading of the material before this court is that, although Swiss Bank was aware of the intended restructuring plan and the motivation for such plan, it was concerned throughout about the effect that such plan would have on its security position and the tax ramifications of such plan, and at no time indicated its acquiescence in, or approval of, the plan.

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. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

32 The first submission of counsel for Odyssey and Weston is that the Odyssey Loan was illegal and accordingly the security for such loan is void and unenforceable. The illegality is alleged to have arisen from the fact that Swiss Bank would not have been able to make the original loan to Odyssey itself without being in breach of certain regulations under the *Bank Act* . I am unable to accept this submission for two reasons. The initial loan made in 1985 has been repaid and it is security for the new loan made in 1989 which is now sought to be enforced. There is so far as I am aware no allegations that Swiss Bank was unable to make the new loan in 1989. In any event, Swiss Bank did not make the original 1985 loan; rather, it arranged for the loan to be made by its parent company in Switzerland and an European affiliate of its parent company, neither of whom would have been subject to the regulations under the *Bank Act* . Accordingly, I fail to see how the original loan could be said to be illegal when the loan was not made by an institution subject to the regulations under the *Bank Act* . Moreover, the decision of the Ontario Court of Appeal in *Sidmay Ltd. v. Wehttam Investments*, [1967] 1 O.R. 508 , affirmed [1968] S.C.R. 828 would seem to stand for the proposition that, even if a loan is made in contravention of a statute or regulation governing the lending institution, such loan is still enforceable by the lending institution.

33 Counsel for Odyssey and Weston further submit that Swiss Bank did not come to court with clean hands in view of the fact that it was in breach of the provisions of the commitment letters governing the Odyssey Loan and the Weston Loan by virtue of its failure to allow certain currency conversions, and was also in breach of its fiduciary duty to the borrowers in that it had undertaken to give advice with respect to the structure of the loans and the provision for currency conversion. I can see that the language of the two commitment letters dealing with currency conversions is not abundantly clear and there is little evidence before this court as to whether the requests for currency conversions were properly made on the appropriate dates and with the appropriate notice.

34 There is also very little evidence before this court to establish that this a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in *Hodgkinson v. Simms* , September 30, 1994, (unreported) [now reported at [1994] 9 W.W.R. 609]. At pp. 20-22 [pp. 629-630] of his reasons, LaForestJ. stated:

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith* . I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

> As I noted in *LAC Minerals* , however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...
>
> In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 ; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) , leave to appeal refused, [1982] 1 S.C.R. xi (note) ....

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27 [pp. 632-633]:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest ... No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle.

36 The commercial transactions among the parties to this action do not appear to me to be those rare occasions where the fiduciary principle would be invoked.

37 In any event, in my view, such allegations of breach of contract and breach of fiduciary duty would have to be established by the borrowers in an action in damages against Swiss Bank and such damages may well be offset against the amounts owing under the Odyssey Loan and the Weston Loan. The fact that such allegations are being made at this time does not, however, constitute a reason for refusing to grant the appointment of a receiver at this time or convince me that it would be unjust or inequitable to do so. It has not been suggested that the damages which might be awarded to Odyssey and Weston, should they be successful in any such action, would be sufficient to pay off the Odyssey Loan and the Weston Loan. In fact, the limited evidence before the court as to the damages to which Odyssey and Weston would be entitled would seem to indicate that such damages would fall far short of the amount necessary to pay off the two loans.

38 In summary, although I am not satisfied that at this time there exists any default resulting from a transfer of assets pursuant to the restructuring plan or that the transfer of the deposit receipts to affiliates in the United States constitutes grounds for the appointment of a receiver, the existence of the other defaults with respect to interest payments, principal payments, arrears of taxes and failure to pay principal on demand, in my view, justifies the appointment of a receiver and none of the submissions put forward by counsel for Odyssey and Weston convinces me that it would be unjust or inequitable to grant such appointment.

39 Accordingly, an order will issue, substantially in the form of the order annexed as Sched. "A" to the notice of motion, appointing Coopers & Lybrand Limited as receiver and manager of the property, undertakings and assets of Odyssey and Weston. If counsel are unable to settle the terms of such order, they may attend upon me. Counsel may also make oral or written submissions to me as to the costs of this motion.

Motion allowed.

Tab 5

CITATION: Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131127

2013 ONSC 6866 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.COM) AND 7500106 CANADA INC., Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD & ENDORSED: **NOVEMBER 4, 2013**

REASONS: **NOVEMBER 27, 2013**

ENDORSEMENT

[1] At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

[2] Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"),

without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

[3] The application was not opposed.

[4] The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of £17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[5] Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

[6] Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately £3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

[7] Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

[8] Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

2013 ONSC 6866 (CanLII)

[9] It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

[10] Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

[11] itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

[12] The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

[13] Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

[14] The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

[15] Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

[16] Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the

2013 ONSC 6866 (CanLII)

"Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

[17] Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

[18] Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

[19] Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

[20] If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

[21] The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

[22] The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

[23] This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

[24] Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

[25] Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

2013 ONSC 6866 (CanLII)

[26] In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. 5088 at para. 10 (Gen. Div.)

[27] Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*., 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

[28] Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

[29] Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

[30] It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

2013 ONSC 6866 (CanLII)

(a) the potential costs of the receivership will be borne by Elleway;

(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;

(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;

(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and

(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

[31] It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[32] Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

[33] Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

[34] Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

Morawetz J.

Date: November 27, 2013

2013 ONSC 6866 (CanLII)

Tab 6

1988 CarswellSask 27
Saskatchewan Court of Queen's Bench

Standard Trust Co. v. Pendygrasse Holdings Ltd.

1988 CarswellSask 27, [1988] C.L.D. 1921, 11 A.C.W.S. (3d) 447, 71 C.B.R. (N.S.) 65

STANDARD TRUST COMPANY v. PENDYGRASSE HOLDINGS LTD.

Grotsky J.

Judgment: September 19, 1988
Docket: Saskatoon No. 2445

Counsel: *G. Scharfstein*, for applicant.
B. Wirth, for respondent.

***Grotsky J.*:**

Background

1 In the fall of 1987 a motion was launched on behalf of the applicant pursuant to the provisions of:

a. Sections 234(2) or 95 of the Business Corporations Act, R.S.S. 1978, c. B-10; or alternatively

b. Section 45(8) of the Queen's Bench Act, R.S.S. 1978, c. Q-1; or alternatively

c. Section 56(2) of the Personal Property Security Act, S.S. 1979-80, c. P-6.1

for an order appointing Annaheim Properties Ltd., with an office at the city of Saskatoon, in the province of Saskatchewan, as receiver-manager of all present and future undertakings, property and assets of the respondent which are presently located on premises legally described as Condominium Units Nos. 1 to 144, both inclusive, each of which said condominium units are included in Condominium Plan No. 82-S-23659 and therein more particularly described.

2 This application was, thereafter, on a number of occasions, adjourned from time to time. Ultimately it was heard concurrently with a number of other applications, in several other actions, brought at the suit of either Standard or Pendygrasse. Particularly, an application at the suit of Standard in Q.B. Action No. 1465 of 1988 wherein, amongst other things, Standard sought as against Pendygrasse, et al., an interlocutory mandatory injunction to compel those respondents to call, convene and conduct an annual general meeting in compliance with the statutory requirements of the Condominium Property Act, R.S.S. 1978, c. C-26, and applicable bylaws in that regard.

3 On 3rd June 1988 I delivered my reasons for decision (not yet reported) on the application for injunctive relief in Action No. 1465/88. I directed the respondents to call an annual general meeting. I further directed that notice of the meeting be given in accordance with the requirements of the Act and bylaws in sufficient time to permit the meeting to be properly convened, held and conducted by or before 30th June 1988.

4 In view of my disposition of the application in Action No. 1465/88, and my perceived expectations therefrom, in reasons delivered by me on 9th June 1988 in respect of the application for appointment of a receiver-manager in Action No. 2445/87 (not yet reported), I directed that this application be adjourned sine die with leave to either counsel, if so advised, on not less than five days' notice to the other, to return this application to the chamber's list.

5 On 8th September 1988 counsel for Standard gave notice to Pendygrasse through counsel of its intention to return its application for appointment of a receiver-manager to the chamber's list. In due course this matter came before me on 15th September 1988.

Conclusion

6 For the reasons which follow, this application is dismissed without any order as to costs.

The facts

7 The facts pertinent to this application, as they existed prior to June of 1988, are contained in my reasons for decision delivered on 9th June 1988. There is no need to repeat them. Suffice it to add to them that as directed by me, on 29th June 1988, pursuant to notices properly given (or properly waived) an annual general meeting of the owners: Condominium Plan No. 82-S-23659 ("the condominium association") was convened, held and properly conducted at the city of Winnipeg, in the province of Manitoba in accordance with the applicable bylaws and statutory requirements.

8 At this meeting, amongst other things, it was proposed, discussed, and ultimately unanimously agreed (passed) that "Bylaw Number 26 in Condominium Plan Number 82-S-23659", which had previously been passed on 18th August 1982, be repealed and replaced with a new Bylaw No. 26 to read:

> The Board shall consist of not less than one and not more than seven persons who are owners or registered mortgagees and shall be elected at each general meeting.

9 Following passage of new Bylaw No. 26, a discussion followed re specting the composition and election of a board of directors. Eventually, four names were put into nomination. Three of the nominees were identified as being from Standard Trust Company. The other was identified as being from Pendygrasse. In time it was agreed that a board of three would be sufficient at this time. In due course three persons were elected as the board. Two of those elected were proposed by Standard. The other elected member was proposed by Pendygrasse. These three persons are now the board.

The law

10 Generally, there are a number of principles which guide the court in determining whether it should exercise its discretion in favour of an application to appoint a receiver-manager. In appropriate circumstances one or more of a number of factors will be required to be shown. These include: (1) the fact that under its security instrument the applicant has not the power to appoint a receiver-manager; (2) the security may at the time of the application be, or have become, insufficient to secure the indebtedness; (3) the debtor may have broken or otherwise failed to carry out its obligations; (4) an appointment is necessary to protect the security from existing or realistically perceived jeopardy or danger; (5) the debtor's failure to account; (6) the applicant will suffer irreparable harm or injury if that which is sought is not granted; (7) there is a demonstrated urgency for that which is sought; (8) the costs (to the parties) of making the appointment sought, in the context that such an appointment might, if granted, lead to dissipation instead of preservation of the secured assets; (9) the balance of convenience is a factor to be given proper weight; (10) whether the proposed appointee is capable of carrying out the purpose for which the appointment is sought.

11 The foregoing is not an exhaustive list of factors to be considered but are some which come to mind on this application which, as required, is made in the context of an existing action.

12 Whatever may have been the situation prior to the annual meeting of 29th June 1988, that situation has now undergone a significant change. While, under its mortgage security, the applicant does not possess the power to appoint a receiver-manager, since 29th June 1988 it, through its members on the condominium association board of directors, now has significant control of the security. It, through its dominated board, has access to the records of the association; the board will now be in a position to determine how the complex ought to be managed; any previously complained of non-compliance by the mortgagor can be effectively addressed and dealt with. If the security is, or has been, in any danger or jeopardy, that concern too can now be addressed and dealt with.

13 In short, with the election and present composition of the condominium association new board of directors, all of Standard's previous alleged concerns can now, without this court's intervention, be adequately dealt with.

14 The renewal of this application is not founded upon any of the previously expressed concerns as delineated in my reasons delivered on 9th June 1988. Rather, this application is founded upon a letter recently received by Standard's solicitors from Pendygrasse's solicitors. It reads as follows:

> Enclosed is a copy of the Management Agreement between Duraps Corporation and the investors (hereinafter referred to as the "Management Agreement"). This Agreement was assigned by Duraps Corporation to Pine Hill Management Ltd. and must be read in conjunction with the Agreement between the Owners: Condominium Plan No. 82-S-23659 and Pine Hill Management Ltd. (hereinafter referred to as the "Condominium Corporation Agreement").
>
> For the record, the position of Pendygrasse Holdings Ltd. and Pine Hill Management Ltd. with respect to these agreements is as follows:
>
> 1. There is no basis upon which the newly-elected Board of Directors of the Condominium Corporation can legally or justifiably terminate the Condominium Corporation Agreement;
>
> 2. Even if the Board of Directors could terminate the Condominium Corporation Agreement, any new management agreement entered into would have to exclude those management functions provided for in the Management Agreement, since those functions are the subject of an agreement between Pine Hill Management Ltd. and the investors, and the Board of Directors has no legal right to interfere with that agreement;
>
> 3. If as a result of the actions of Standard Trust Company, either through the newly-elected Board of Directors or otherwise, Pine Hill Management Ltd. is prevented from carrying out its contractual duties under the Management Agreement with the result that it becomes disentitled to the remuneration provided for under that agreement, Pine Hill Management Ltd. will be forced to sue Standard Trust Company for the loss of all such remuneration and all other damages it suffers. As you will appreciate, the amount involved would be substantial.

15 I am satisfied that the renewal of this application has its real root in the above letter because in the supporting affidavit deposed to by Standard's mortgage manager on 7th September 1988 he deposes to the following:

> 6. By letter of June 30, 1988 the solicitors for Pendygrasse Holdings Ltd. wrote our solicitors advising of the legal repercussions and recourse of Pine Hill Management Ltd. and Pendygrasse Holdings Ltd. should the new Board of Directors of the Condominium Corporation terminate the Agreements exhibited hereto as Exhibits "C" and "D". Attached hereto as Exhibit "E" is a true copy of the said letter.
>
> 7. The appointment of a Receiver/Manager *appears necessary to preclude legal action* against Standard Trust Company and/or the Condominium Corporation *and that would be the only way the current management could be replaced until December 31, 1989 whereupon the Management Agreement will be terminated pursuant to paragraph 13 of Exhibit "C"*. [emphasis added]

Disposition

16 Clearly, Standard seeks to avoid possible future legal liability for anticipated future action by it, under the protection of a judicial umbrella.

17 Standard and Pendygrasse each have their own legal counsel. It is for their counsel to read, consider, interpret and thereafter to advise them of their legal duties, obligations and responsibilities arising under their various agreements with each other or others party to and/or affected thereby. If, under the existing contractual, or other relationship between them, the right exists to terminate Pine Hill Management Ltd. as the complex manager, then, whether or not that right can now, or should in the circumstances, be exercised by Standard, is a matter for its decision based upon the advice it receives from its own solicitors.

If the advice it receives and acts upon is called into question by Pine Hill Management Ltd., and/or Pendygrasse on its behalf, if indeed Pendygrasse is able so to do, or others entitled so to do on its behalf, and legal action follows, then, and only then, in the context of the nature of the proceedings brought for determination, will this court, if required so to do, be required to determine the issues then raised thereby.

18 In the circumstances, this application will be, as it is, dismissed.

Costs

19 When this application was first brought forward, and, indeed, until the meeting held on 29th June 1988, there appears to have been some basis for that which was being sought. However, since the 29th June meeting, any basis for the appointment sought has disappeared. In these circumstances, the renewal of the application appears not to have been necessary. As there has, therefore, to some extent been divided success on this application, and, as well, as neither counsel pressed the issue of costs, there will not be any order as to costs of or incidental to the application, either in its original form or as brought forward.

Application dismissed.

Tab 7

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00705869-00CL **DATE:** October 18, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC V.TEN 4 SYSTEM LTD et. al

BEFORE JUSTICE: Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Doug Smith	RBC	dsmith@blg.com
Roger Jaipargas	RBC	rjaipargas@blg.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Manjit Singh	TEN 4 SYSTEM LTD	MSingh@MSinghLaw.ca

ENDORSEMENT OF JUSTICE OSBORNE:

Chronology

1. The Applicant, RBC, seeks an order appointing msi Spergel Inc. as receiver over the assets and properties of the Respondents/Debtors Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. pursuant to section 243(1) of the *BIA* and section 101 of the *CJA*.

2. The full Application Record was originally served September 13, 2023. At the first return date of September 20, 2023, I scheduled the hearing of the Application on the merits for October 11, 2023 at the request of the Respondents, Debtors, to give them their requested additional opportunity to fully respond and to file responding materials. I imposed a timetable that required the delivery of responding materials by October 2.

3. The Application was heard on the merits as scheduled on October 11, 2023.

4. While the matter was under reserve, counsel for the Respondents wrote to the Court unilaterally to advise that a funding commitment had been obtained. The Applicant objected to the unilateral communication, but requested a short case conference before the Court to address the matter. That case conference proceeded today.

5. Just prior to the case conference, the Respondents filed supplementary materials including, as discussed below, the late-breaking commitment referred to above.

6. The Applicant maintains its position that the appointment of a receiver is appropriate. The Respondent urges the Court to consider alternatives as further described below.

The Test for the Appointment of a Receiver

7. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

8. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

9. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

10. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment 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 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 a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties 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; and

p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

11. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

12. The issue is whether a receiver should be appointed in the circumstances of this case.

The Facts and Application of the Relevant Factors

13. Many, and indeed almost all, of the material facts are not in dispute. The Applicant relies on the Affidavit of Tro DerBedrossian sworn September 12, 2023 together with Exhibits thereto, and the Reply affidavit sworn October 4, 2023 together with Exhibits thereto.

14. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

15. Ten 4 is an Alberta Corporation extra provincially registered in Ontario, primarily engaged in the business of shipping, transportation and logistics. The director of Ten 4 is Nasir Mahmood. The other two numbered company Respondents are essentially holding companies that hold title to real estate properties.

16. RBC made available to the Debtors credit facilities. Those included an RBC visa business card agreement. The obligations of Ten 4 to RBC were guaranteed by each of the two numbered company Respondents and by Mr. Mahmood. His guarantee is for a maximum amount of $2.5 million plus interest.

17. As security for the advances thereunder, the parties entered into three general security agreements; one from each of the Debtors. Each GSA gives RBC the contractual right to appoint a receiver. The guarantees were entered into also. Mortgages registered on title to real property and assignments of rents and insurance were also given.

18. The Debtors are in default of their obligations. RBC has delivered demands and section 244 Notices of Intention. The defaults are material and have not been waived. As of August 31, 2023, Ten 4 was indebted to RBC in amounts as set out in the Application materials of approximately CDN $5,200,000 and USD $453,000. The numbered company Respondents are indebted in the approximate amounts of CDN $4.2 million and CDN $5.3 million respectively.

19. The concern of RBC has been exacerbated by the fact, of which it has just recently learned, that a writ of execution has been filed against Ten 4 on August 10, 2023 in respect of a judgment in favour of BVD Capital Corporation in the amount of $1,099,763.44, the enforcement of which would erode the RBC security.

20. In addition, the Respondents have committed covenant defaults in that, for example, Ten 4 is required to report to the bank on a monthly and quarterly basis with respect to aged accounts receivable and quarterly financial statements, neither of which were received on either of May 15, 2023 or August 14, 2023, as required. In addition, monthly reporting of borrowing base certificate, aged accounts receivables, payables in priority payables was not provided on September 30 as required.

21. RBC has therefore demanded payment of the obligations which are clearly (and admitted to be) repayable on demand according to their contractual terms. As stated above, demands and section 244 Notices were delivered, all in August, 2023. No repayment has been made by any of the Debtors or the guarantors.

22. RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

23. The Respondents rely on the Affidavit of Mr. Mahmood affirmed October 2, 2023, together with Exhibits thereto, the Supplementary Affidavit sworn October 10, 2023 together with Exhibits thereto, the Further Supplementary Affidavit of October 17, 2023 and the Affidavit of Abdul Ishaq sworn October 17, 2023 together with the one Exhibit thereto. I pause to observe that the last two affidavits were filed yesterday, without leave, in advance of the case conference today.

24. The Respondents advance the position that the triggering event for RBC was the fact that one of the primary customers of Ten 4, Northwest Carrier Ltd., paid certain outstanding accounts in the amount of CDN $1.1 million by cheque, and certain of those cheques were returned as NSF. All of this resulted in a trickle-down effect on the liquidity of the Respondents and their inability to pay RBC. The Respondents emphasized that this event was out of their control.

25. In addition, the Respondents say that Northwest subsequently paid approximately two thirds of the amount owing (CAD $720,840.57) but the balance remains outstanding. RBC submits and the banking records show that the relationship and transactions with Northwest are more complicated than indicated. Numerous different cheques from two different entities were sent. The returned cheques were effectively replaced on August 9 and 10, 2023, with the deposit to accounts of Ten 4 of a further series of 69 checks, totaling over $3,500,000 in the aggregate from two other entities that RBC believes to be connected to the Respondents or their principal. All of those 69 cheques were also all subsequently returned NSF between August 11 and August 14, 2023. This resulted in the overdraft position referred to above.

26. With respect to property taxes, the Respondents asserted, and subsequently filed supplementary materials confirm, that real property taxes had in fact been paid.

27. The Respondents stated that the accountant for Ten 4 was out of the country between July and September for vacation with the result that the company could not provide its August and September reports to RBC. In my view, it is not an answer to a contractual commitment to provide formal reports on the agreed-upon terms and by the agreed-upon deadlines, to say that an accountant was on vacation for some three months.

28. Concerningly to RBC, however, the Respondents disclosed for the first time in their responding materials filed just prior to the hearing of the Application that they are currently in the process of removing a charge registered by a non-party (Pride Truck Sales Ltd.) but encumbering the property of the Respondents in the amount of $6 million.

29. The Respondents maintain, however, that the $6 million charge against title to the property was registered in error, and that in fact it was supposed to be registered in a maximum amount of $3 million and moreover, the debt outstanding that is secured by the charge totals significantly less than that, and in any event, counsel for the Respondents advises that the Respondents are "in the process of settling that dispute". There is, however, no evidence in the Record beyond the admitted fact of the $6 million charge.

30. Finally, the Respondents submitted an appraisal report of the Property dated October 10, 2023 reflecting a current value with the result, the Respondents submit, that the bank is not at risk since there is ample equity in the property to pay out all indebtedness to RBC, even if that became necessary.

31. At the hearing of this Application on October 11, 2023, counsel for the Respondents advised that while the Respondents had no firm commitment for refinancing or a buyout, they were in active negotiations with third parties. No commitment was in the record.

32. As noted above, following the hearing, counsel to the Respondents wrote to the Court unilaterally to advise that commitment had in fact been obtained, resulting in the case conference today at the request of the Applicant. Also as noted above, further affidavit evidence was filed without leave yesterday, but I have considered it nonetheless.

33. As part of that evidence is what was represented by the Respondents to be a commitment letter which would fully satisfy the obligations to RBC. That commitment letter, dated October 12, 2023, is attached as Exhibit "A" to the affidavit of Abdul Ishaq.

34. However, and as submitted by counsel for the Applicant, the commitment letter is problematic in a number of ways:

    a. it contemplates first mortgage financing for the numbered company Respondents over the Property;

    b. the commitment, from Toronto Wire Solutions Corp., contemplates the numbered company Respondents as borrowers and a number of other parties, including Nasir Mahmood, to be joint and several guarantors;

    c. it contemplates a loan amount of $23,600,000 "in favour of [existing properties]", interest at 9% per annum payable monthly on account of interest-only in the amount of $177,000 per month or a one year term;

    d. it contemplates an advance date of January 16, 2024; and

    e. it includes various express conditions precedent to which the obligation to advance funds are expressly subject, including appraisals, inspections, surveys, "up-to-date Environmental Reports, satisfactory to the lender in its sole discretion" and other conditions.

35. In short, and having considered the commitment letter notwithstanding the manner and timing of its filing, it does not get the Respondents where they need to be. The commitment is highly conditional, and even if the conditions were met, it does not provide for funding until January next year. It simply does not answer the problem, let alone do so in any timely way.

36. I am satisfied that, considering all of the relevant factors in the circumstances of this case, that the appointment of a receiver is appropriate. Not only have the parties contractually agreed the appointment of a receiver in an event of default, which has clearly occurred here, but I am satisfied that it would otherwise be appropriate in any event.

37. The indebtedness is outstanding and payments are not being made. A receivership will provide for stability, transparency and orderly conduct under the supervision of a court-appointed officer that is necessary here. It may well be that the receiver negotiates a firm, unconditional and more expedient source of alternative funds, either with the proposed lender referred to in the commitment letter discussed above, or any other investor or lender. I would expect the receiver to investigate and explore all available options.

38. If those options bear fruit in the sense that there is a binding and unconditional commitment that will generate funds sufficient to pay out RBC inclusive of all indebtedness, fees, interest and costs, I would expect that the receivership could be terminated relatively quickly. But unless and until that occurs, a receivership is appropriate here.

39. There is considerable uncertainty about the status and amount of possibly competing claims. There is uncertainty about whether the value of the Property, even if accurate as reflected in the appraisal report, would be sufficient to pay out all claims. The fact that the mortgage is currently registered in the amount of $6 million (in addition to the security of RBC) suggests that there may not be a material surplus, if indeed there is any at all.

40. A receivership will allow for the orderly exploration, investigation and analysis of those claims, and the available assets, all in circumstances where potential chaos of competing claims, and the ensuing expensive litigation, can be avoided or minimized. It will also allow for the avoidance of further chaos and an analysis of the receivables and payables of the Debtors.

41. Counsel for the Respondents urges that the Court considered creative or more flexible relief, such as a standstill agreement and an order imposing terms that no further encumbrances could be placed on the Property of the Debtors without consent or order of the Court, and that the indebtedness to Pride secured by the mortgage is in question referred to above in the aggregate sum of $6 million, be limited to an amount of $2 million in the aggregate.

42. Even if I had the jurisdiction to impose such terms, which I am far from certain I do, I would decline to do so in the circumstances of this case. Such would amount to rewriting of the agreements between the Debtors and counterparties which are not represented here and in which in my view would not be appropriate in any event.

43. For all of these reasons, I am satisfied that the appointment of a receiver is not only just or convenient, as is the test, but indeed that it is just *and* convenient in the circumstances.

44. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Addendum: This Endorsement was amended on the consent of all parties on October 26, 2023 to remove a dollar figure in para. 30 per endorsement of that date. No other changes made.

Tab 8

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Ten 4 System Ltd., 2023 ONCA 839
DATE: 20231215
DOCKET: COA-23-OM-0304

2023 ONCA 839 (CanLII)

Brown J.A. (Motions Judge)

BETWEEN

Royal Bank of Canada

Applicant
(Responding Party/Respondent)

and

Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc.

Respondents
(Moving Parties/Appellants)

Manjit Singh, for the moving parties/appellants

Roger Jaipargas and Douglas O. Smith, for the responding party/respondent

Heard: in writing

On appeal from the order of Justice Peter Osborne of the Superior Court of Justice, dated October 18, 2023.

ENDORSEMENT

I. OVERVIEW

[1] Ten 4 System Ltd., 1000043321 Ontario Inc., and 1000122550 Ontario Inc. (the "Debtors") move, pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, for an order granting them leave to appeal the order of

Osborne J. dated October 18, 2023 (the "Appointment Order"), which appointed msi Spergel inc. as receiver of the Debtors' assets, undertakings, and properties. The Appointment Order was made pursuant to *BIA* s. 243(1) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

[2] Several key facts were not in dispute before the application judge:

- the Debtors owed their creditor, the respondent Royal Bank of Canada, approximately CAD$14.7 million and USD$453,000;
- They were in default of their obligations to RBC; and
- RBC holds valid security, including three general security agreements that give RBC the contractual right to appoint a receiver.

[3] Very late in the life of the appointment application process, the Debtors filed a commitment letter they submitted would solve their financial problems with RBC. The application judge explained, in considerable detail, why he was not satisfied that the highly conditional commitment letter would answer the problems in a timely way. After taking into account a variety of relevant factors and circumstances, the application judge concluded it was just and convenient to appoint a receiver, as requested by RBC.

II. ANALYSIS

[4] The exercise of granting leave to appeal under *BIA* s. 193(e) is discretionary and must be exercised in a flexible and contextual way. The prevailing

2023 ONCA 839 (CanLII)

considerations for a court to take into account are summarized in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. I shall consider each.

2023 ONCA 839 (CanLII)

A. Merits of the proposed appeal

[5] I start by considering the merits of the Debtors' proposed appeal. In their notice of motion for leave to appeal, the Debtors identify four grounds on which they intend to appeal.

First ground of appeal

[6] As their first ground of appeal, the Debtors contend the application judge denied them a fair hearing. Their notice of motion states:

> The learned Applications Judge erred in law by incorrectly relying upon [RBC's] characterization of evidence it had compiled in a so-called "confidential brief" that was neither served upon or made available to the Defendants or their counsel, nor filed with the Superior Court of Justice or put before the learned Applications Judge.

[7] Assessing the merits of this ground of appeal requires some understanding of the background facts, including what the Debtors refer to as the "confidential brief".

[8] RBC's application for a receiver was supported by the affidavit of Tro DerBedrossian, Director of RBC's Special Loans and Advisory Services ("SLAS"). In para. 24 of his affidavit, Mr. DerBedrossian deposed that the Debtors'

accounts were transferred to SLAS on August 17, 2023 “due to unusual account activity resulting in the full utilization of the operating line and an account excess of CA$2,489,450.90 and US$452,915.45.”

[9] In para. 8 of his reply affidavit, Mr. DerBedrossian repeated that there had been unusual activity involving the Debtors’ accounts and went on to provide considerable details of that unusual activity in paras. 9 through 14 of his reply affidavit. At paras. 24 and 25 of his endorsement, the application judge reproduced some of the details about the unusual activity described in Mr. DerBedrossian’s reply affidavit.

[10] After providing details of the unusual account activity, in para. 14 of his reply affidavit Mr. DerBedrossian went on to depose:

> A confidential brief (“Confidential Brief”) evidencing the unusual account activity of the Debtors has been prepared and will be made available to the Court, if the Court requests same at the hearing of this application. In the event that the Court requests that the Applicant produce the Confidential Brief, I understand that counsel for the Bank will request that the Court grant a sealing Order in respect of same, until further Order of the Court.

[11] There is no dispute that the application judge did not request disclosure of the confidential brief referred to by Mr. DerBedrossian nor did he review it. His reasons make no mention of a confidential brief. However, paras. 24 and 25 of his reasons do refer to the unusual activity described by Mr. DerBedrossian in his

2023 ONCA 839 (CanLII)

affidavits. As well, para. 22 summarizes the position advanced by RBC on the appointment motion as follows:

> RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

2023 ONCA 839 (CanLII)

[12] The Debtors contend three errors arise from that factual background:

- First, RBC's failure to disclose the confidential brief "irretrievably tainted the hearing from the outset". I have difficulty seeing how. RBC disclosed the existence of the brief and indicated it would be disclosed if subject to a sealing order. However, there is no suggestion in the record that the Debtors ever asked the application judge to obtain disclosure of the brief;
- Second, the Debtors contend their right to a fair hearing "was further exacerbated by [RBC's] self-serving characterization of the documents in the so-called secret confidential brief as suggestive of 'unusual activity' in the [Debtors'] bank accounts". If a party views language in a document filed in court as "scandalous, frivolous or vexatious", it can request the court to strike out the offending language: *Rules of Civil Procedure*, r. 25.11(b). The record does not disclose any such request from the Debtors; and

- Third, the Debtors argue the application judge erred by repeating in his reasons some of the language used in the DerBedrossian affidavits and adding to the deponent's word "unusual" his own word "suspicious" in describing the account activity. A judge is entitled to summarize a party's submissions using the language employed by the party, which the application judge did at para. 22 of his reasons. I read his use of the word "suspicious" as simply a synonym for "unusual".

[13] In any event, the unusual activity RBC observed in the Debtors' accounts was not one of the facts upon which the application judge rested his decision to appoint a receiver: Reasons, at paras. 35 to 40. Consequently, the Debtors' first ground of appeal is not *prima facie* meritorious.

Second ground of appeal

[14] Second, the Debtors assert the application judge erred in law by incorrectly applying *CJA* s. 101 notwithstanding the fact that the relief sought in the application was for a final and not an interlocutory order.

[15] I confess I have difficulty following the Debtors' argument: an initial order appointing a receiver, such as the form of order used in this case, does not finally determine any rights. Instead, it appoints a receiver to preserve a debtor's assets for distribution to its creditors following a review of their respective rights and determination of a proper allocation. In any event, RBC applied under *BIA* s. 243(1)

2023 ONCA 839 (CanLII)

as well as *CJA* s. 101; the final/interlocutory distinction does not play the same role under the *BIA* as it does for civil litigation under the *CJA*. The application judge clearly had the authority to make the order that he did.

[16] The Debtors' second ground of appeal is not *prima facie* meritorious.

Third and fourth grounds of appeal

[17] The Debtors' third and fourth grounds of appeal are related. The Debtors contend the application judge made a palpable and overriding error of mixed fact and law by concluding that it was just and convenient to appoint a receiver notwithstanding the fact that reasonable alternatives were available in the circumstances and that the Debtors' assets exceeded the value of their liabilities.

[18] Although the Debtors obviously disagree with the weight the application judge assigned to different factors in his analysis, his reasons do not disclose that he applied incorrect or inapplicable legal principles. And while the evidence may have shown that the Debtors' assets exceeded their liabilities, there was no dispute about the amount of their indebtedness to RBC or their default under the loans.

[19] These are very weak grounds of appeal on which to seek to set aside a discretionary order. In my view, they stand a very low possibility of success.

2023 ONCA 839 (CanLII)

B. Issue of general importance to insolvency practice or the administration of justice

[20] Since the record does not disclose any merit in the first two grounds of appeal, they cannot raise issues of general importance. The third and fourth grounds of appeal are rooted in the application of established principles to the specific facts of the case before the application judge; they do not give rise to issues of general importance.

C. Effect of granting leave on the specific insolvency proceeding

[21] I accept RBC's submission that granting leave to appeal would unduly hinder the progress of the administration of the receivership. The consequent automatic stay under *BIA* s. 195 would halt the receivership. Given the level of indebtedness of the Debtors to RBC, their default, and the absence of firm replacement financing, the interests of justice would not be served by granting leave.

D. Conclusion

[22] Considering the criteria as a whole, I would not grant leave to appeal. The grounds of appeal either lack any merit or are very weak; they do not raise any issue of general importance; and permitting the Debtors to appeal, thereby staying the receivership, in the absence of firm replacement financing would pose a serious risk to the rights of creditors in the circumstances.

2023 ONCA 839 (CanLII)

III. DISPOSITION

[23] The Debtors' motion for leave to appeal is dismissed.

[24] As the successful party, RBC is entitled to its costs of this motion. Under the terms of the security, the Debtors are liable for "all costs, charges and expenses reasonably incurred by RBC … in preparing or enforcing …" the security. RBC seeks its costs of this motion on a full recovery basis. RBC filed a bill of costs stating that is actual legal costs for the motion amounted to $35,225.00. I am not satisfied that the full amount of those costs constitutes "reasonably incurred" costs. This was a simple motion, yet RBC's bill of costs records time spent by two partners, an articling student, and a law clerk. In my view, costs "reasonably incurred" should be set at $25,000, inclusive of disbursements and applicable taxes, and I order the appellants to pay RBC such costs within 30 days of the date of this order.

"David Brown J.A."

2023 ONCA 839 (CanLII)

Tab 9

Alberta Court of Queen's Bench
Citibank Canada v. Calgary Auto Centre
Date: 1989-04-26

L.R. Duncan, for the plaintiff;

B.R. Crump, for the defendants.

(Calgary No. 8801-12922; 8801-12923)

April 26, 1989.

[1] D.C. McDONALD J.: — This is an appeal from a decision of Master Alberstat who granted a receivership order in favour of a mortgagee, in regard to rents to be received by the mortgagors on several commercial premises.

[2] There are two actions. In each the plaintiff is Citibank ("the bank"). The defendant in one action is Calgary Auto Centre Ltd. ("Auto Centre"). It borrowed money from the bank to finance the purchase of certain land in Calgary. The land consisted of about a dozen commercial building sites. On one of these, Auto Centre built a commercial building. As security it granted the bank a debenture (which may be described as a mortgage) as well as general and specific assignments of rents. It leases that building to a Mercedes-Benz car dealership. That land is referred to as the "Mercedes land". Auto Centre also granted the bank a second mortgage on the other commercial sites in the proximity of the Mercedes land. All these sites were subject to a fixed mortgage in favour of Burnco which had sold the lands to Auto Service.

[3] The defendant in the other action is Western Securities Limited ("Western"). It gave Citibank a second mortgage and assignment of rents on a commercial property in Calgary. It gave an assignment of rents on a commercial property in Banff. The buildings in both properties are leased to commercial tenants. Western also gave the bank a general mortgage and assignment of rents on a 100-unit townhouse development in Calgary. These mortgages were given as security for the loan by the bank to Auto Centre.

[4] The bank advanced $6,067,749.29 in principal to Auto Centre. Auto Centre also owed the bank $75,000.00 for Letter of Credit commission. In May 1988 Auto Centre received a letter from the bank asserting that the Auto Centre was in default under the

1989 CanLII 3440 (AB KB)

debenture. It relied on a provision of the Loan Agreement between the bank and Auto Centre that stated that any default pursuant to another specified Loan Agreement would constitute an event of default for the purposes of the Loan Agreement between the bank and Auto Centre. That other Loan Agreement was between the bank and The Renaissance Shopping Centre Ltd. ("Renaissance") in respect of other lands that Renaissance had proposed to develop. The bank had agreed to provide certain financing for that development. There was thus a linkage between securities granted by the Auto Centre and Western to the bank and the lender-borrower relationship between the bank and Renaissance. This linkage is referred to by counsel as "cross-collateralization".

[5] In May, 1988 the bank wrote to Renaissance alleging default in Renaissance ' s obligation to repay to the bank all the money (some $21,000,000.00) which had been advanced by the bank to Renaissance. The bank then sued Renaissance for judgment for the full amount of principal and interest. Renaissance defended and counterclaimed. It alleged that the relationship that developed between the bank and Renaissance in 1986 to April 1988 went beyond that of lender and borrower, and that the bank and Renaissance were in reality joint venturers. The bank applied to a Master for summary judgment. That application was dismissed. The bank appealed. On March 31, 1989, after hearing oral argument, I held that the application for summary judgment should fail and accordingly I dismissed the appeal. I gave a detailed order designed to expedite the progress of the case to trial.

[6] In reaching my conclusion that there should not be summary judgment I held that, on the basis of the evidence placed before me, there was a triable issue. In view of that holding, in the present appeal, Mr. Crump solicitor for Auto Centre and for Western (as well as for Renaissance in the earlier appeal), argued that there has not been default. I need not decide whether the circumstances of disputed default of the Renaissance obligation entail that there has not been default in the obligations of Auto Centre and Western. For, since May 1988, Auto Centre has defaulted in its obligation, pursuant to the security documentation, to pay moneys as they came due under the Burnco mortgage, to pay interest on the bank's mortgage, and not to permit builders' liens to be filed against the Mercedes land.

1989 CanLII 3440 (AB KB)

[7] Since the commencement of the bank's actions against Auto Centre and Western, three of the building sites have been sold by Auto Service to strangers (for use as automobile dealerships). This has resulted in the payment of approximately $6,704,000.00 to the bank in reduction of the bank' s claim. Because of the accrual of interest, the indebtedness claimed by the bank as at March 22, 1989, was still $3,519,720.43, with per diem interest of $1,390.01 since then.

[8] Burnco obtained an order nisi of foreclosure in the fall of 1988. There was a six-month period of redemption. That period having since expired, Burnco has the right to proceed to advertise the lands over which it still retains its first mortgage security -that is, the lands (other than the Mercedes land) which remain unsold. The balance owing to Burnco is $3,253,-039.62 as of March 1, 1989 (after allowing for payments made to Burnco out of the proceeds of the three sites that were sold).

[9] Mr. Crump says that the bank unreasonably refused to permit the sale of a site to Terra Venture Developments Ltd. but I am not persuaded that Auto Centre's proposed distribution of sale proceeds, which would have resulted in no money being paid to the bank, constituted a reasonable proposal on Auto Centre's part.

[10] Rents received by Auto Centre have been used to pay obligations of Auto Centre to other parties in regard to construction of improvements concerning building sites sold to purchasers. These expenditures were not expenditures included among the purposes of the bank's loan to Auto Centre.

[11] Mr. Crump argues that there was an agreement between the bank and Western, that as building sites were sold and the liability to Burnco was decreased so that the bank' s equity in the remaining sites increased, the Western securities held by the bank were to be decreased proportionately. This is denied by Mr. Duncan, solicitor for the bank. That is an issue to be resolved at trial. Meantime, for the purposes of this application, I think it proper to treat the obligations of Western as remaining unabated.

[12] The monthly rents received by Auto Centre from Mercedes pursuant to a net-net lease amount to $32,122.10. The three Western properties produce monthly gross rents

1989 CanLII 3440 (AB KB)

totalling $77,777.00. After deducting payments due to first mortgages and other prior encumbrances and for reasonable operating expenses and taxes, the balance available, that may be applied to the indebtedness to Citibank, is about $20,000.00. Thus what is in issue in this application, from the point of view of what the bank might ultimately receive, is about $52,000.00 a month.

[13] The Master did not deliver written reasons for granting the receivership order. Mr. Crump says that his oral reasons placed emphasis upon the fact that in their agreements with the bank, Auto Centre and Western had agreed that in the event of default the bank could commence an action for the appointment by the court of a receiver to collect rents. While I do not doubt that that is a factor to be taken into account in deciding what is just or convenient, I do not regard it as the controlling factor.

[14] I confirm the order made by the Master, subject to certain variations, for the following reasons.

[15] The application is made under the provisions of s. 13(2) of the **Judicature Act** and s. 45 of the **Law of Property Act**. Section 13(2) of the **Judicature Act** reads as follows:

> "13(2) An order in the nature of a mandamus or injunction may be granted or a receiver 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, and the order may be made either unconditionally or on any terms and conditions the Court thinks just."

[16] Section 45 of the **Law of Property Act** (including subparagraph 1.1, which was added by amendment in 1984) reads as follows:

> "45(1) Notwithstanding section 41, after the commencement of an action on
>
> (a) a mortgage of land other than farm land, or
>
> (b) an agreement for sale of land other than farm land,
>
> to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:
>
> (c) appoint, with or without security, a receiver to collect rents or profits arising from the land;

1989 CanLII 3440 (AB KB)

(d) empower the receiver to exercise the powers of a receiver and manager.

"(1.1) If

(a) a mortgage of land or an agreement for sale referred to in subsection (1) is in de fault, and

(b) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,

the Court shall, on application by the mortgagee or vendor, appoint a receiver where the court considers it just and equitable to do so."

[17] I shall deal first with s. 45 of the **Law of Property Act**. Subsection (1) is permissive; at the same time, it does not state any criteria upon which the court is to decide whether to appoint a receiver to collect rents.

The new subs. (1.1) is mandatory, but only "where the court considers it just and equitable" to appoint a receiver of rents. Mr. Duncan contends that subs. (1.1) was intended to remove any doubts that might previously have been entertained by the courts of Alberta as to the appointment of a receiver of rents where, for example, there is a substantial equity in favour of the mortgagee or the mortgagor debenture gives the lender the power to appoint a receiver privately. He adopted the view expressed in Price and Trussler, **Mortgage Actions in Alberta**, (1985), at pages 308-309, as follows (footnotes omitted):

"The use of the word 'may' in both s. 13(2) of the **Judicature Act**, and in s. 45 of the **Law of Property Act** as it existed before May 1984, resulted in the Court exercising its discretion and refusing to appoint a receiver if it felt that the appointment was inappropriate. Use of the word 'may' in a statute, however, does not absolve the Court from its duty to make the appropriate order if a case is made out for it. This interpretation was reinforced in May 1984, when the word 'may' in s. 45 was amended to 'shall'. However, addition of the words 'where the court considers it just and equitable to do so,' has confused the exact intention of the Legislature.

"Prior to the amendments, it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured. Where the property was in need of maintenance, or where the application was unopposed or consented to, the Court was more likely to appoint a receiver, notwithstanding the defendant's equity, but if the application were opposed, the Court preferred to exercise its discretion against such appointment and did not feel constrained to grant the mortgagee's application as of right.

"With the new s. 45(1.1), it would appear that the Legislature's intention is to increase the number of occasions in which a receiver will be appointed. The only

1989 CanLII 3440 (AB KB)

> preconditions stated by the section are (1) that the mortgage or agreement for sale be in default and (2) that the property be producing rent. Since these have always been obvious preconditions, there must have been some reason to recite them in s. 45(1.1). It is suggested that these two conditions are the primary factors to be considered by the Court, and unless there are some extraordinary or unusual circumstances, the Court should consider it 'just and equitable' to appoint a receiver if these two conditions are satisfied."

[18] With respect to the authors, I would not regard the two facts referred to as being the "primary" factors governing the appointment of a receiver of rents pursuant to s. 45(1). If that had been the intention of the legislature, there would have been no need to add the requirement that the court appoint a receiver if the court "considers it just and equitable to do so". In my view, that additional requirement dictates that the court must consider all circumstances that are relevant to doing justice and equity between the parties.

[19] The result is that, in my opinion, the position under s. 45(1) of the **Law of Property Act** is assimilated with that under s. 13(2) of the **Judicature Act**. I can see no real difference between searching for what is "just and equitable" and for what is "just or convenient". There may be circumstances (e.g., of emergency) in which it is "convenient" to appoint a receiver in an interlocutory order when it is not clear that to do so is just or equitable, but it is hard to think of any such circumstances when what is convenient would not also be what is just, especially if the intent is only to preserve the rents for ultimate allocation between the parties once their dispute is adjudicated upon.

[20] Conversely, it is difficult to imagine circumstances in which it would be just to order the appointment of a receiver unless it were also convenient to do so. A similar observation may be made as to the phrase "just and equitable". In each case it is appropriate to adapt the felicitous approach of Laskin, C.J.C., to the phrase "cruel and unusual" as found in s. 2(b) of the Canadian **Bill of Rights**: see **R. v. Miller and Cockriell** (1977), 11 N.R. 386; 31 C.C.C.(2d) 177 (S.C.C.), at 184. Adapting what he said there to the two combinations of nouns in s. 13(2) of the **Judicature Act** and s. 45(1.1) of **the Law of Property Act**, those combinations of words are not to be treated "as conjunctive in the sense of requiring a rigidly separate assessment of each word", but "rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm."

1989 CanLII 3440 (AB KB)

[21] I am further of the view that the following passage at page 309 of Price and Trussler's work is a correct approach to the matter:

> "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 contract, 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."

[22] Mr. Crump has cited **N.A. Properties Ltd. v. Ronald J. Young Professional Corporation and Gower** (1982), 20 Alta. L.R.(2d) 399, in which Master Quinn stated at page 400:

> "In my opinion, a receiver should not be appointed under s. 45 of the Law of Property Act unless it is shown that the equity of the debtor is such that there may be inadequate security afforded to the creditor."

With respect, I do not accept that as an accurate statement, if it was it was intended as a general statement of the law. I do not doubt that the existence of a substantial equity may, in some circumstances, assume a dominant position among the factors to be taken into account in deciding what is "just and equitable". The same would apply to a decision under s. 13(2) of the **Judicature Act**. But one cannot go further than that.

[23] Master Quinn further said that even if, as in that case, the defendant was in arrears and there were three mortgages against the title all of which required the defendant to make payments, those facts alone did not constitute "sufficient reason to grant an order for receivership in the absence of evidence that the vendor is in a tenuous position from a security point of view". If Master Quinn meant that a receiver should be appointed only when the vendor "is in a tenuous position from a security point of view", then, with respect, I disagree. That was a case of the appointment of a receiver being

1989 CanLII 3440 (AB KB)

sought by an unpaid vendor under an agreement for sale. The view apparently expressed by Master Quinn (if it is to be read as a general proposition) is, in my opinion, not correct either in the case of an unpaid vendor or that of a mortgagee.

[24] It is also true that Alberta courts have expressed reluctance to appoint a receiver when the lending instrument gives the lender a power of private appointment. For example, in **C.I.B.C. v. El Dorado Holdings Ltd.** unreported October 14, 1983, Alta. C.A. No. 15672 (cited in Price and Trussler's book at page 308n), Laycraft, C.J.A., in a Memorandum of Judgment delivered from the Bench, said:

> "We have on the other hand a debenture holder with a power of private appointment who has come to the Court to receive a Court appointment instead of proceeding on its own. That is something the Court is usually loath to do unless there are exceptional circumstances."

Despite the apparent generality of that statement, it will be noted that it is no more than a generalization. The facts of that case themselves were such as to persuade the Court of Appeal to appoint a receiver of rents, the rents to "be applied against the municipal taxes and levies, against the proper insurance of the property, and otherwise to prevent waste" and the "balance of the rents if any" to be held by the receiver. Among the other factors which the court balanced were those militating against the appointment (an allegation that a lease of the property to companies affiliated with the borrower authorized the lessees to cancel the lease if a receiver were appointed, and the fact that appointment of a receiver might damage the commercial credit of the borrower), and those militating in favour of the appointment (an allegation by the borrower that the debenture had been amended by a third party - not the borrower, lack of precision in another defence as pleaded, the failure of the borrower to make any of the payments due to the lender, and the facts that the land charged by the debenture was the sole asset of the borrower and that there had been no evidence as to where the rents had gone, why the taxes were not paid with the rent, or whether the rents were being paid at all).

[25] Another instance of reluctance to appoint a receiver is **Macotta Co. of Canada Ltd. v. Condor Metal Fabricators Ltd.** (1980), 40 A.R. 408; 35 C.B.R. (N.S.) 144 (Q.B.). Cavanagh, J., held that a receiver should not be appointed where there was no evidence

1989 CanLII 3440 (AB KB)

that the proposed receiver (already in possession of the property pursuant to a private appointment under debentures) could, if appointed by the court do something that he could not do or had not already done. The receiver had sought "no help from the court in carrying out its task". Therefore, Cavanagh, J., held that it had not been shown that it would be just or convenient to make the appointment. In those circumstances, it was not surprising that Cavanagh, J., observed:

> "One can speculate that the real purpose of such an application [to appoint the same receiver already appointed privately] is to clothe the appointed receiver with the authority of the court, which may tend to dissuade other creditors and dispossessed debtors from looking too deeply into the actions of debenture holders. If that is the aim of the applicants in such a situation, I think it ought to be discouraged."

[26] In the present case no mention has been made of the lending documents giving the lender a power to appoint a receiver privately, and in any event that has not been done.

[27] In the first of the two passages I have quoted earlier from Price and Trussler's book, two Alberta cases are cited in support of the proposition that before the 1984 amendment to the **Law of Property Act** "it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured". For that proposition the authors cited two cases. One was **N.A. Properties Ltd. v. Ronald J. Young Professional Corp.**, a decision of Master Quinn which I have already discussed. The other was **Madison Development Corporation Ltd. v. Mehra** (1981), 40 C.B.R.(N.S.) 180, a decision of Master Funduk. Both were really cases in which the evidence fell far short of establishing facts which might support a conclusion that it would be just or convenient to appoint a receiver. In the **Madison** case, for example, there was no evidence of the value of the land and hence no support for the submission apparently made that the borrower had no equity in the land. That does not make the case authority for the proposition that a receiver will not be appointed where the mortgagee is well secured. Nor is the ratio decidendi of the **N.A. Properties** case authority for that proposition, although it is true that Master Quinn's judgment appears to support it. What I say, as I have said earlier, is that there is no such general rule.

1989 CanLII 3440 (AB KB)

[28] As I have said, Mr. Crump submits that a receiver should not be appointed because there is a fundamental dispute between the bank and Renaissance as to whether the event of default by Auto Centre occurred, being the nonpayment by Renaissance to the bank. He relies upon the following passage in **Kerr on Receivers** (7th Ed.), p. 7:

> "The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver the court will not prejudice the action, or say what view it will take at the trial. Indeed the court will not appoint a Receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim."

(The sentence underlined is emphasized by Mr. Crump.)

[29] In my view the sentence emphasized is not authority for the wide proposition advanced by Mr. Crump. As authority for the proposition stated in that sentence Kerr cites **Greville v. Fleming** (1845), 2 J. and L. 335, and **Marshall v. Charteris,** [1920] 1 Ch. 520. The facts of those cases must be examined in order to understand the precise meaning of Kerr's sentence. **Greville v. Fleming** was a decision of Sugden, L.C., of the High Court of Chancery of Ireland. He decided to appoint a receiver of tithe rent-charges upon the application of the son of one G., by then deceased. G. had asserted that he was the lay impropriator of a certain parish and therefore entitled to all tithes or rent-charges in lieu of tithes in respect of lands in the parish, that were payable to whoever was the lay impropriator of the parish for the time being. However, in his lifetime G.'s title to the rights of the lay impropriator was contested, and after his death those opposing the application for the appointment of a receiver continued to contest it. The court refused to appoint a receiver because the appointment of a receiver in a summary proceeding, not subject to appeal, would conclude the question of title for all practical purposes. In that case, therefore, the making of the order sought would have been to conclude the issue for all time. That is not so if the order I am asked to make is made, particularly if the funds collected are not placed at the disposal of the bank until the issues in the litigation are resolved by judgment or settlement.

1989 CanLII 3440 (AB KB)

[30] The other case cited by Kerr is **Marshall v. Charteris** a judgment by Eve, J. In an ejectment action in which the title to a house was in dispute, the defendant was in possession. In an interlocutory application the plaintiff sought an order appointing a receiver of the rents and profits of the house and ordering the defendant to give up possession to the receiver. In refusing to make the order, Eve, J., gave several reasons, one of which was that to deprive the defendant of possession would prejudice her right to plead her possession as a statutory defence and would thus in substance give the plaintiff judgment in the action. Moreover, there was no real concern about rents because the defendant, being in possession, was not receiving any. That case is distinguishable from the present case, for the making of the order I propose to make, in the form I intend (i.e. not placing the rents collected at the disposal of the bank), would in no way decide the issues in the litgation.

[31] I turn now to whether in the present case it is "just or convenient" or "just and equitable" to appoint a receiver of the rents. In my view both those tests are interchangeable, and are met in the circumstances. A useful summary of the circumstances that ought to be considered is found in **Bennett on Receiverships** at p. 91, as follows:

> "In determining whether it is 'just or convenient' that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others. In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court appointed receivership if the debtor is in default."

In the present case I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.

[32] In assessing the risk to the security holder I have regard to the extent to which Auto Centre and Western have equity in the mortgaged lands vis-a-vis the amount

1989 CanLII 3440 (AB KB)

claimed by the bank; if Burnco completes its foreclosure the equity of Auto Centre in its undeveloped lands (now $3.06 million) will be lost, leaving a maximum equity of $2.1 million in the Mercedes land and $2.7 million in western's properties, for a total of $4.8 million. This is not greatly in excess of the present claim of the bank. The risk to the security holder would moreover be increased if the order were not made because there can be no assurance that the defendants will use the rents to pay taxes or Burnco, or that they will not use the money for purposes unrelated to the obligation they incurred at least prima facie by executing the security instruments upon which the bank relies.

[33] There is here no question of waste.

[34] What I have said already addresses in part the issue of the preservation and protection of the property; in addition, the receiver will be able to use the rents, as provided in the Master's Order, to insure the property, pay taxes, pay utilities and necessary operating expenses and reasonable management fees to Auto Centre.

[35] The balance of convenience, in my view, is in favour of making the order.

[36] Finally, by making the order the court is ensuring that if the bank is successful in the litigation, the rent moneys (after making the deductions already mentioned) will be available as a means of enforcing the bank's rights under the security investments when those moneys might otherwise be used for other purposes and be exposed to the claims of other creditors of the borrower. The balance of the rent moneys so held in trust will be held on behalf of the parties to the action alone according to their rights: see **Halsbury's Laws of England** (4th Ed.), p. 408.

[37] The Master's Order is therefore confirmed except for the following:.

> 1 The bank by its solicitor will give an undertaking as to damages which will appear in the usual form in the preamble to the order.
>
> 2 Paragraph 2(c) of the Master's Order, which provides for payments of the balance to the bank, will be deleted. Instead the Order will provide that the balance be held by the receiver in trust for the parties to the actions according to their rights, to be paid out to whichever of the parties is held to be entitled to them at the conclusion of the actions by judgment.

1989 CanLII 3440 (AB KB)

[38] I have questioned counsel as to the Master's appointment of Auto Centre and Western as the receivers. This flies in the face of the principle that a receiver appointed by the court should be a disinterested party. Despite my concern, Mr. Crump has assured me that he is content that Auto Centre and Western should be the receivers of their respective properties, and I am prepared in that circumstance not to disturb the Master's Order in that respect.

[39] Costs may be spoken to.

Appeal dismissed.

1989 CanLII 3440 (AB KB)

Tab 10

COURT FILE NO.: 05-CL-5863
DATE: 20070207

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

2007 CanLII 2663 (ON SC)

B E T W E E N:	)
	)
IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended	) ***Alex MacFarlane*** and ***Max Mendelson,*** for the Moving Party Receiver
	)
AND IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc.	) ***Peter F. C. Howard*** and ***Danielle K. Royal***, for Conrad Black Capital Corporation
	)
AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended	) ***Earl A. Cherniak, Q.C., Edward L. Greenspan, Q.C., George S. Glezos*** and ***Lisa Munro,*** for Conrad Black
	)
	) ***Robyn Ryan Bell*** and ***Derek J. Bell,*** for Sun-Times Media Group (formerly Hollinger International Inc.)
	)
	) ***M. P. Gottlieb*** and ***W. Brock***, for Hollinger Inc.
	)
	) ***David R. Wingfield*** and ***Paul D. Guy***, for Peter G. White and Peter G. White Management Limited
	)
	) ***David Moore***, for Catalyst Fund General Partner I Inc.
	)
	) ***Clifton Prophet,*** for Argus Corporation Limited
	)
	) **HEARD:** January 15, 18, 25, 26 and 30, 2007

REASONS FOR DECISION

2007 CanLII 2663 (ON SC)

CUMMING J.

The Plea Agreement Motion

[1] The Receiver of The Ravelston Corporation Limited ("RCL"), RSM Richter Inc. ("Richter"), brings a motion for an order approving its Eighteenth Report dated January 5, 2007, approving the activities of the Receiver, and in particular, for an order directing the Receiver to:

> (1) enter into a Plea Agreement (as attached to the Eighteenth Report) with the United States Attorney's Office (Northern District of Illinois) ("USAO"), and
>
> (2) subject to the acceptance by the U.S. District Court of the guilty plea by RCL, as represented by the Receiver, voluntarily enter a plea of guilty to Count Two of the Third Superceding Indictment dated August 17, 2006 on behalf of RCL.

[2] The Receiver asserts that the Plea Agreement is fair and reasonable and entry into the Plea Agreement accomplishes the primary objective of the Receiver, being "to extricate RCL on a timely basis from the morass of litigation to which it is a defendant." The motion raises several novel issues. (This motion is referred to as the "Plea Agreement Motion" or simply as the "Motion".)

[3] Conrad Black Capital Corporation ("CBCC"), the majority shareholder of RCL, Conrad M. Black, Peter G. White, and Peter G. White Management Corporation ("PWMC") (a shareholder of RCL), oppose the Motion. (The opposing parties are collectively referred to as the "Black group".)

[4] CBCC brought what in effect was a cross-motion for directions on January 15, 2007, challenging the process followed by the Receiver in making its Eighteenth Report and the adequacy of such Report. (This cross-motion is referred to as the "CBCC Cross-Motion for Directions".)

Background to the Receivership

[5] RCL is a privately held corporation, with 98.5% of its equity owned by officers and directors of Hollinger Inc. ("Hollinger") and Hollinger International Inc. ("International") at the relevant times and 1.5% owned by the estate of a former Hollinger director. Approximately 65.1% of RCL is owned by CBCC, which in turn is controlled by Conrad M. Black, who became a member of the House of Lords of the United Kingdom in 2000, becoming Lord Black of Crossharbour. Lord Black was the Chief Executive Officer and Chairman of the Board of

Directors of RCL, Hollinger and International at the material times. Lord Black resigned as an officer of RCL on April 19, 2005.

[6] Mr. F. David Radler was the President of RCL until the Receiver was appointed April 20, 2005. Between 1998 and 2003 Mr. Radler was the President and Chief Operating Officer of Hollinger and International. Mr. Radler holds a 14.2% ownership interest in RCL through his holding company, F.C. Radler Ltd.

[7] Mr. Peter G. White, then a director and Executive Vice-President of RCL, swore an affidavit dated April 19, 2005 in support of the application of RCL and its subsidiary, Ravelston Management Inc. ("RMI") for an order staying all proceedings in respect of RCL pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and appointing Richter as Receiver pursuant to s. 101 of the *Courts of Justice Act* R.S.O. 1990, c C.43 ("*CJA*") and s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), for the purpose of maintaining and maximizing value for all stakeholders. (These ongoing proceedings can be referred to as the "Canadian Insolvency Proceedings.")

[8] Pursuant to an Order of Farley J. of this Court, dated April 20, 2005, Richter was appointed as receiver and manager and interim manager with respect to the property, assets and undertaking of RCL, and RMI. RCL and RMI were granted protection under the *CCAA*. See *Ravelston Corporation Ltd. (Re),* [2005] O.J. No. 1643 (Super. Ct.).

[9] The primary business purpose of RCL is an investment holding company, with its principal asset being its direct or indirect interest in Hollinger, a Canadian corporation and reporting issuer with retractable common shares and exchangeable non-voting preference shares Series II listed on the Toronto Stock Exchange. As of March 5, 2005 RCL and RMI owned directly or indirectly some 78.3% of the common shares of Hollinger.

[10] The most significant asset of Hollinger is its interest in International, a Delaware and public corporation traded on the New York Stock Exchange, which through its operating subsidiaries has owned and published newspapers around the world, including the Chicago Sun-Times in the United States, The Daily Telegraph in the United Kingdom and the National Post in Canada. (International has since been re-named "Sun-Times Media Group, Inc." in 2006 and is referred to herein as either "International" or "Sun-Times.")

[11] As of April 1, 2005 Hollinger owned directly or indirectly some 17.4% of the equity and 66.8% of the voting interest in International. As of May 18, 2004, there were cease trade orders made in respect of both Hollinger and International. As such, RCL, deemed an insider, cannot trade its shares in Hollinger.

[12] RCL and its subsidiary RMI provided management and advisory services for compensation to each of Hollinger and International and other related entities pursuant to agreements until about late 2003. The termination of these agreements is the subject of litigation.

2007 CanLII 2663 (ON SC)

[13] There is extensive litigation involving all the entities referred to and the principal individuals behind the entities, as set forth in Mr. White's affidavit of April 19, 2005.

[14] Mr. White states in his April 19, 2005 affidavit that given the underlying value of Hollinger and International he believed the value of RCL exceeded the liabilities of the corporation. However, given the lawsuits faced by RCL, the absence of distributions from Hollinger, the non-payment of management fees and the inability of RCL to dispose of any shares of Hollinger, RCL and RMI were unable to pay amounts then owing to creditors as they became due. Hence, RCL and RMI were "facing severe financial difficulty" with its financial condition "eroding quickly." There was a need for the Receiver to be appointed to provide stability and to preserve the assets.

[15] The receivership ultimately embraced RCL, RMI, and other subsidiary entities, those being Argus Corporation Limited ("Argus") and 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., and 509647 N.B. Inc. (collectively, the "N.B.Subs"). (All collectively being the "Companies").

[16] As stated above, RCL, directly or indirectly through the Companies, owns about 78.3% of Hollinger, or some 27.4 million common shares. Hollinger has about 17.4% of the equity of International.

[17] The United States Securities and Exchange Commission ("S.E.C.") commenced proceedings against Lord Black, Mr. Radler and Hollinger on November 15, 2004. Lord Black commenced a proceeding in Ontario (Court file 06-CL-6259) for contribution and indemnity in respect of certain ongoing proceedings (not including the S.E.C. action).

[18] An Agreement was later made on November 13, 2006 to toll the limitation period in respect of Lord Black's claim for contribution and indemnity from RCL, RMI and Argus in respect of the S.E.C. action until the completion of the S.E.C. action.

Background to the Criminal Proceedings in the United States

[19] On August 18, 2005 an indictment was returned in Chicago against RCL, Mr. Radler and Mark S. Kipnis (an officer of International) with each defendant charged with five counts of mail fraud and two counts of wire fraud.

[20] Mr. Radler entered into a Plea Agreement on September 20, 2005 whereby he would plead guilty to Count One.

[21] Mr. Radler has stated in his plea agreement that:

> (i) He personally and on behalf of RCL participated in a scheme to divert non-compete payments from International to Hollinger, RCL and other individual defendants;

2007 CanLII 2663 (ON SC)

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors; and

(iii) It was not in International's interest to have monies diverted to Hollinger or RCL from International in respect of non-compete payments.

[22] The defendants allegedly benefited from having non-compete payments diverted to Hollinger from International because RCL had a greater direct interest in Hollinger than in International.

[23] The Receiver engaged U.S. counsel to represent and defend RCL. The Ninth Report of the Receiver dated September 15, 2005, reviews and reports upon these events.

[24] The Receiver in its Tenth Report dated September 15, 2005, stated that the Receiver would make a thorough analysis after its U.S. criminal counsel obtained discovery of the evidence accumulated by the USAO. The Receiver expressed the view RCL should voluntarily accept service of the indictment and "that it is appropriate for RCL to enter a plea of not guilty…." An Order by Farley J. of this Court dated October 4, 2005, directed the Receiver to accept service of the Indictment and enter a plea of "not guilty". See *Ravelston Corp. (Re)* [2005] O.J. No. 4266 (Super. Ct.). On November 10, 2005, the Order of Justice Farley directing the Receiver to attorn was upheld by the Court of Appeal: *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.). The plea of not guilty was entered on November 22, 2005.

[25] On November 17, 2005, a First Superceding Indictment added Lord Black, John A. Boultbee and Peter Y. Atkinson as defendants. A Second Superceding Indictment was returned December 15, 2005. Messrs. Black, Boultbee, Atkinson and Kipnis have entered pleas of not guilty to the charges.

[26] An 80 page Third Superceding Indictment was returned by the Grand Jury on August 17, 2006, pursuant to which RCL was added as a named defendant to Counts 8 and 9 in respect of the alleged diversion from International of non-compete payments paid by CanWest Global Communications Corp. ("CanWest") as part of the purchase of a 50% interest in the *National Post* and certain other newspaper related assets. (There are now seventeen Counts in the Third Superceding Indictment.)

[27] The Receiver and its counsel entered into discussions with the USAO in April, 2006, in an attempt to negotiate a settlement of the criminal charges against RCL. On January 4, 2007, the USAO delivered a final version of a Plea Agreement relating to certain criminal charges to the Receiver's counsel.

[28] The Plea Agreement is based upon a guilty plea by RCL to Count Two of the Third Superceding Indictment, dealing with a non-compete payment in the Forum Communications Inc. ("Forum") transaction.

2007 CanLII 2663 (ON SC)

[29] On January 5, 2007, the Receiver served its notice of this Motion for an order approving RCL entering into the Plea Agreement and to change its plea from not guilty to guilty. The Receiver's Eighteenth Report sets forth the Receiver's position in support of the Motion.

[30] On January 3, 2007, CBCC and Peter White Management Limited ("PWML") had served a notice of motion seeking directions with respect to the Receiver's obligation to prepare for the trial, given its not guilty plea. The Receiver had advance notice of this motion as of December 22, 2006. CBCC and PWML assert that the Receiver was obliged to not finalize the content of the Plea Agreement in the face of their outstanding motion.

[31] On August 7, 2006, RCL had given notice to its co-defendants it would be withdrawing from the joint defence agreement (which the defendants had orally agreed to) for 60 days. RCL did not participate in the joint defence agreement thereafter.

[32] Given this course of events, it would be apparent to the co-defendants that there was a real possibility that RCL might enter into a Plea Agreement. In my view, this is why CBCC and PWML gave notice to the U.S. District Court and to RCL on December 22, 2006 of the intent to bring a motion for directions in this Court. This motion became moot given the Receiver's Plea Agreement Motion, served January 5, 2007.

[33] The trial of the defendants is scheduled to commence March 14, 2007, before Judge Amy J. St. Eve in the United States District Court, Northern District of Illinois, Eastern Division.

The CBCC Cross-Motion for Directions, heard January 15, 2007

[34] On January 9, 2007, in response to the Plea Agreement Motion at hand, CBCC provided the Receiver with an initial set of questions with respect to the Eighteenth Report. The Receiver provided written responses ("Receiver's Answers") on January 10, 2007. On January 11, 2007, CBCC provided the Receiver with an additional set of questions. The Receiver provided answers ("Additional Answers") the same day. CBCC asserted that the Receiver had not properly considered the interests of all stakeholders in the Ravelston estate.

[35] As mentioned above, on January 15, 2007 CBCC brought what was in effect a cross-motion for directions in respect of the Receiver's pending Motion. This Cross-Motion for Directions was dismissed orally at the conclusion of the hearing. I undertook to give written reasons for my decision in respect of the Cross-Motion for Directions. My reasons follow.

Issues arising from the CBCC Cross-Motion for Directions

[36] There were three issues arising from the CBCC Cross-Motion for Directions.

(1) Was CBCC entitled to examine the Receiver on the information contained in the Eighteenth Report relating to the proposed Plea Agreement?

2007 CanLII 2663 (ON SC)

(2) Had the Receiver waived its right to claim solicitor-client privilege over communications regarding the Plea Agreement and issues related thereto by allegedly disclosing portions of such communications in the Eighteenth Report? and

(3) Should the Receiver be required to disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documentation?

Issue #1 Is an examination of the Receiver appropriate in the circumstances?

[37] The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Re Bakemates International Inc* (alternate.: *Re Confectionately Yours, Inc.*) (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilites v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)

[38] In *Bell Canada International Inc.*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:

> [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.,* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* [*Re Confectionately Yours*] clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the

2007 CanLII 2663 (ON SC)

> officer of the court is in that respect open to cross examination. [emphasis added.]

[39] CBCC submits that the Receiver is not acting in an objective and neutral manner in dealing with CBCC's questions or the interests of its stakeholders.

[40] In my view, the evidentiary record did not support the allegation that the Receiver was not acting in an objective and neutral manner. There was no good reason to depart from the norm that a court-appointed receiver is not subject to cross-examination on its reports.

Issue #2: Has there been a waiver of solicitor-client privilege on the part of the Receiver?

[41] CBCC cites the reference by the Receiver in s. 4.1 of the Eighteenth Report that the Receiver worked closely with its counsel during May and June, 2006 "to formulate a position" relating to a proposed *nolo contendere* plea, taking into account certain factors. The USAO rejected RCL's offer to plead *nolo contendere*. Negotiations in respect of the Plea Agreement under present consideration were ultimately concluded January 5, 2007.

[42] The Receiver has refused to provide access to CBCC to legal opinions underlying the Receiver's determining that the Plea Agreement should be executed. The Receiver claims that such information is subject to solicitor-client privilege.

[43] Anyone considering a plea agreement in respect of a criminal charge is entitled to the confidential advice of the person's counsel, and solicitor-client privilege attaches to the communications between counsel and client. The principle that communications between a solicitor and his/her client are privileged is recognized as fundamental to the administration of justice. *Canada v. Solosky*, [1980] 1 S.C.R. 821.

[44] There can be a waiver of privilege where it is shown the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive such privilege. There is no evidence in the situation at hand that the Receiver voluntarily intended to waive privilege.

[45] There can also be a waiver of privilege even in the absence of an intention to waive, "where fairness and consistency so require". *S. & K. Processors Ltd. et al. v. Campbell Ave. Herring Producers Ltd. et al.*, [1983] 4 W.W.R. 762 at paras. 6-10 (B.C. S.C.).

[46] CBCC asserts in its factum that the legal advice received by the Receiver "is critical" to this Court's assessment of the Plea Agreement

> and understanding of whether the Receiver independently and fairly assessed the risks associated with attempting to defend the U.S. Criminal Proceeding, the likelihood of conviction, the enforceability of a monetary penalty and its ranking in the estate, the impact of any restitution orders on distribution, the costs of

2007 CanLII 2663 (ON SC)

> maintaining a defence and the impact of the Plea Agreement on all of Ravelston's stakeholders.

[47] Legal advice received in respect of a proposed plea agreement is by reason of its subject matter "critical" advice. The evidentiary record does not establish any arguable unfairness such that it can be asserted that privilege should fall away. In my view, there is not any aspect of "fairness" in the situation at hand that comes into play such that the normative sanctity to solicitor-client privilege is to be overridden.

Issue #3 Must the Receiver disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documents?

[48] CBCC requested an order that the Receiver provide copies of all documents, analyses and reports, including legal opinions and advice, with respect to the negotiation with the USAO in respect of the Plea Agreement.

[49] To discharge its duties in the administration of an estate, a receiver necessarily enters into confidential discussions to resolve issues or disputes with specific stakeholders. A receiver must have the ability to conduct meaningful and candid negotiations in confidence with a view to achieving a resolution in the best interests of the estate. RCL itself could conduct such negotiations in confidence prior to the appointment of the Receiver. The Receiver steps into the shoes of RCL for administrative purposes of the RCL estate.

[50] To require a receiver to disclose all the details of its discussions with a stakeholder, regardless of whether those details are relevant to the outcome of the discussions, would severely impede a receiver's ability to embark upon any negotiations. The USAO provided the Receiver and its counsel with witness statements. The confidentiality in respect of these statements is protected pursuant to a Protective Order granted by Judge St. Eve in the U.S. District Court. The record establishes the USAO entered into discussions April 10, 2006 with the Receiver on a confidential basis.

[51] The USAO and Receiver understood the Receiver would be obliged, if the negotiations were successful, to provide to this Court the information necessary to enable the Court to reach an informed conclusion as to whether to approve the Plea Agreement. The implicit agreement as to confidentiality of the negotiations limits the disclosure needed to meet that standard.

[52] In my view, the negotiation of the Plea Agreement was properly a matter dealt with in confidence between the Receiver and the USAO. Notice to the Receiver on December 22, 2006, of the intended CBCC/PWMC motion (served January 3, 2007), referred to above, was irrelevant to these negotiations.

The Motion for a "Payments Report"

[53] The Receiver brought a motion (which can be referred to as the "Payments Report Motion") on January 12, 2007 seeking approval of its Nineteenth Report dated January 9, 2007

2007 CanLII 2663 (ON SC)

and, in particular, an order authorizing the Receiver to complete a report and analysis to be filed with this Court setting out the payments made by RCL and its subsidiaries between January, 1998 and January, 2004 to Messrs. Black, Radler, Boultbee and Atkinson.

[54] At the return of the motion, the Receiver advised it has been engaged in this analysis as a necessary requirement in the ordinary administration of the estate. The Receiver advised it expected the analysis to be completed in some three or four weeks.

[55] The Black group appeared at the return of the motion and gave notice that they were opposed to public dissemination of the analysis and report.

[56] The so-called "Payments Report Motion" has been adjourned to February 12, 2007.

The Plea Agreement Motion

[57] In formulating its position relating to a proposed *nolo contendere* plea, the Receiver states in its Eighteenth Report it took into account the following factors:

(a) The Receiver had no first-hand knowledge of RCL's activities which predated its appointment in April 2005;

(b) The Receiver's knowledge about the events underlying the criminal and civil claims was limited to what it was able to learn by reviewing the documents it had received to date;

(c) RCL's liabilities likely greatly exceeded the realizable value of its assets. The Receiver sought to extricate RCL from the U.S. Criminal Proceedings on a cost-effective basis provided that in doing so, the interests of RCL's estate were well served;

(d) As an indicted corporation, the Receiver understood that RCL's guilt at trial would be based, in large part, on the actions of its officers and other agents;

(e) The directors and officers of Hollinger, Sun-Times and RCL were overlapping, and the relationship amongst these entities was complicated (i.e. the same individuals alleged in the Second Superseding Indictment as "RCL's Agents" were also agents of Sun-Times and of Hollinger);

(f) The Receiver determined that notwithstanding that RCL had not yet been charged in respect of the CanWest non-compete payments, it would likely be charged with those counts if it did not pursue a plea arrangement. Furthermore, the Receiver was concerned that proceeding to trial would increase the quantum

2007 CanLII 2663 (ON SC)

of the fine sought by the USAO if RCL was ultimately unsuccessful at trial;

(g) The Receiver was mindful that the manner in which it resolved the U.S. Criminal Proceedings should not adversely impact on its ability to defend the civil proceedings to which RCL was named as a defendant; and

(h) The uncertain status of any U.S. fine or restitution order in the Canadian Insolvency Proceedings (as defined below). It was important the Receiver establish that any fine or restitution order have no greater status (if any) in the Canadian Insolvency Proceedings than that of ordinary unsecured claims.

2007 CanLII 2663 (ON SC)

[58] The Receiver in its Eighteenth Report then lists factors taken into account in deciding to propose entering a guilty plea to Count Two of the Third Superceding Indictment, being:

(a) In accordance with general corporate law, a corporation acts only through its officers, directors, employees or agents;

(b) A corporation is generally responsible for the acts or omissions of its officers, directors, employees or agents;

(c) Radler, the former president of and significant shareholder of RCL, president of Sun-Times and a director of Hollinger, has stated in his plea agreement and is likely to testify at trial that:

(i) He personally and on behalf of RCL, participated in a scheme to divert non-compete payments from Sun-Times to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors;

(iii) It was not in Sun-Times' interest to have monies diverted to Hollinger or RCL from Sun-Times in respect of non-compete payments; and

(iv) The defendants benefited from having non-compete payments diverted to Hollinger from Sun-Times because RCL had a greater direct interest in Hollinger than in Sun-Times, and Radler's company, F.D. Radler Ltd., held a 14.2% ownership interest in RCL;

(d) Radler's testimony, as the former president of RCL, is likely to bind RCL at trial;

(e) Hollinger, in its Cooperation Agreement (the "Hollinger Cooperation Agreement") with the USAO has acknowledged (i) the U.S. Government has developed evidence during its investigation that Hollinger is criminally liable because one or more of Hollinger's former officers, directors or employees violated U.S. Federal criminal law with the intent, in part, to benefit Hollinger with the fraudulent diversion from Sun-Times to Hollinger of approximately US$16.55 million; (ii) that one or more of Hollinger's former officers, directors or employees acted illegally with respect to Hollinger's receipt of the said US$16.55 million in non-compete payments; and (iii) that it was inappropriate for Hollinger to receive those monies. The individuals whose acts are impugned were also officers or directors of RCL; and

(f) The USAO has a very high success rate in securing convictions.

[59] The Receiver then states in its Eighteenth Report that it concludes there is "a strong rationale" to enter into the Plea Agreement, for the following reasons:

(a) The guilty plea of RCL's president, Radler, in conjunction with the factors set forth above;

(b) Prior to it's appointment in April, 2005, the Receiver had no first-hand knowledge of RCL's prior activities. Many of the events underlying the criminal and civil claims against RCL occurred as much as ten years ago. The Receiver is only able to discern what it knows about the events underlying the criminal and civil claims by reviewing documentation and witness statements made available to it.

(c) The RCL estate lacks liquidity – it is likely that the value of the valid claims against the RCL estate will significantly exceed the net realizable value of its assets. The Receiver is of the view that it should attempt to extricate RCL from any litigation on an economic basis provided that by doing so, RCL's interests are well served;

(d) The criminal litigation is complex; it will be costly to litigate. The Receiver estimates that the cost of preparing for and

2007 CanLII 2663 (ON SC)

attending at trial could exceed US$3 million. As noted above, RCL's estate has limited financial resources;

(e) The implications to RCL of a guilty plea are strictly monetary. A guilty plea will only result in a fine and restitution order in favour of the U.S. government being levied against RCL. Pursuant to the Plea Agreement, the status of any such fine or restitution order in the Canadian Insolvency Proceedings will be determined in those proceedings and will have no higher priority (if any) than a general unsecured claim. The Plea Agreement eliminates the risk that the U.S. government may attempt to assert a property or similar claim ranking in priority to all other claims asserted against RCL;

(f) In practice, a receiver does not attest to matters that pre-date its appointment. The Receiver therefore considered the factors/evidence available to it that may put RCL at risk at trial. In this regard, the Receiver understood that RCL's guilt at trial would be based, in part, on the actions of its officers and other agents with the ability to bind RCL. Radler, RCL's president, pled guilty to one count of the Indictment. Hollinger also acknowledged the wrongdoings of certain of its former officers and directors (some of whom were also officers and directors of RCL) in the Hollinger Cooperation Agreement;

(g) Should RCL be found guilty of one or more counts as charged under the Third Superseding Indictment, there is a significant likelihood that a higher fine would be levied. The Fine is significantly less than stipulated by the *Guidelines* if RCL were to be found guilty. (Furthermore, the Receiver is of the view that the amount that is likely to be distributed by RCL in respect of the Fine (if a provable claim) will be considerably less than the agreed amount of the Fine);

(h) The Plea Agreement preserves the Receiver's right to challenge the validity of the Fine and/or any restitution order in the Canadian Insolvency Proceedings;

(i) Even if the restitution order results in a valid claim against the RCL estate, any monies paid to Sun-Times from the RCL estate in respect of the litigation detailed in Section 5.1(e)(v) of the Plea Agreement will be offset dollar-for-dollar against the amounts payable under the restitution order;

2007 CanLII 2663 (ON SC)

(j) The Plea Agreement preserves the Receiver's right to advance arguments at sentencing as to RCL's responsibility for any damages, including the argument that in determining the amount attributable to RCL, the damage caused by other parties and individuals must be considered, as well as the amount paid by those parties and individuals (i.e. at the present time it appears that the total amount paid in respect of criminal restitution cannot exceed US$83,950,000, of which US$32.8 million has already been paid);

(k) The Receiver is of the view that the civil proceedings in both the U.S. and Canada are the preferred forum in which to resolve the competing claims made against RCL, its affiliates and subsidiary companies, rather than the U.S. Criminal Proceedings. The Receiver determined that participating in the U.S. Criminal Proceedings would not be helpful, but might be detrimental, to the position of RCL in its civil proceedings. An unfavourable outcome in the U.S. Criminal Proceedings would adversely affect RCL's ability to defend itself in the civil proceedings; a favourable outcome would still require RCL to litigate the civil proceedings;

(l) By pleading guilty to the Forum transaction, which involved the least of the non-compete payments received by Hollinger, the Receiver structured the Plea Agreement in such a manner as to minimize any adverse ramifications that a guilty plea may have to the interests of RCL, including its interests as a defendant to the civil proceedings; and

(m) In the Receiver's view, the Plea Agreement incorporates many of the provisions and concepts of the *nolo* [*contendere*] plea (including the requirement to have the status of any fine and restitution order determined in the Canadian Insolvency Proceedings).

The role of the court-appointed Receiver

[60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, [1913] A.C. 160 at 167 (J.C.P.C.).

[61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect,

2007 CanLII 2663 (ON SC)

the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.

[62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].

[63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

[64] It is appropriate for a receiver to consider negative economic factors such as cost, time and risk. See generally *National Trust Company v. Massey Combines Corporation* (1988), 69 C.B.R. (2d) 171 at 179 dealing with the test to be employed in considering whether to approve a sale of assets.

[65] There apparently has only been one previous analogous situation in Canada to the one at hand, where a receiver sought court approval to plead guilty to a criminal charge in the U.S.

[66] In *Re the Matter of YBM Magnex International, Inc.*, (14 April, 1999), Calgary No. 9801-16691 (Alta. Q.B.) [*YBM*], Paperny J. of the Alberta Court of Queen's bench (as she then was) dealt with an unopposed motion by a receiver seeking court approval of a guilty plea agreement with the U.S. Attorney in respect of a one-count information for criminal conduct related to money-laundering and falsification of public financial statements. She stated at p.17:

> This court must determine whether the plea agreement being entered into is fair and reasonable, considering the interests of all the stakeholders to the estate.
>
> I am satisfied that the receiver independently and fairly assessed the risks associated with attempting to defend these charges, the likelihood of conviction, the likelihood of pre-trial forfeiture, the size of the fine, the ranking in the estate, the impact of competing restitution orders on distribution and the costs of maintaining a defence, successful or not. I accept his risk assessment.
>
> In my view, this agreement is prudent and commercial reasonable in the circumstances, as well as being abundantly fair to all stakeholders. [emphasis added]

[67] A court-appointed receiver under the *BIA* or *CJA*, as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act

2007 CanLII 2663 (ON SC)

even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. *Re YBM Magnex International Inc.*, [2004] A.J. No. 1118 (Q.B.) at paras. 34, 87; and *Re Confederation Treasury Services Ltd.*, [1995] O.J. No. 3993 at para. 8 (Gen. Div.), (citing Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3rd ed. 1995) at 1-61/2).

[68] In *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 at para. 40 (C.A.) Doherty, J.A. stated:

> Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision in within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

[69] In *Royal Bank of Canada v. Soundair Corp.* (1991), O.R. (3d) 1 at 5-6 (C.A.) Galligan J.A. made general observations as to how a receiver is to make business decisions in the administration and management of an estate. He emphasized that the court should be reluctant to second-guess the considered business decisions made by a receiver. As well, the conduct of the receiver is to be reviewed in the light of the specific mandate given to the receiver by the court. The duties of a receiver are to consider the interests of all parties or stakeholders. The court is to consider whether there was unfairness in the process leading to the receiver's recommendation to the court and whether the receiver acted reasonably and prudently in all the circumstances.

The risks in a guilty plea vs. the risks in pleading not guilty and proceeding to trial

[70] There are two options for the Receiver in respect of the criminal charges facing RCL: plead guilty or continue a plea of not guilty and defend at trial.

2007 CanLII 2663 (ON SC)

[71] The Receiver is faced with an imminent criminal trial. The Receiver must decide what is in the best interests of the estate of RCL in these unfortunate circumstances. This decision must be made, and be seen to be made, within the bounds of reasonableness. The Receiver must balance the interests of all the stakeholders in exercising its business judgment and in making its recommendation.

[72] In his Endorsement dated October 4, 2005 (reported as *Ravelston Corp. (Re)* [2005] O.J. No. 4266 (Super. Ct.)) dealing with the Receiver's request for approval to voluntarily appear and enter a plea of not guilty on behalf of RCL to the Indictment returned August 18, 2005, Farley J. stated at para. 5:

> However, the Receiver also has to be mindful that a fundamental reason for its appointment was to extricate Ravelston from the morass of litigation in which it was involved (including litigation with International and [Hollinger] on the other side). The US Criminal Proceedings are not something as to which the Receiver was instrumental; as I understand it, the complaints involved there predate the Receiver's involvement. Acting responsibly, the Receiver must zealously safeguard the interests of legitimate stakeholders (including the DOJ and those for whom the DOJ is responsible for protecting); the Receiver thus has an umbrella responsibility and it would be helpful for the DOJ to recognize that responsibility of the Receiver. If the Receiver concludes that it would be wasteful for Ravelston's estate to engage in protracted, costly litigation, then it would be undesirable to adopt a "scorched earth" policy or anything approaching same. That approach would as well be unlikely to be fruitful in seeing if a resolution of the US Criminal Proceedings (including any further potential exposure) vis-à-vis Ravelston could be advantageously discussed with the DOJ.

[73] Counsel for CBCC submits that the question that must be answered by the Receiver is - What are the comparative prejudices to the competing stakeholders in RCL by a changed plea and what is the appropriate balance in weighing such comparative prejudices? The Black group asserts that the Receiver has made erroneous assumptions in calculating possible prejudice, has followed an imperfect process lacking in due diligence, and that the Receiver ultimately brings its Motion to change the plea upon a false rationale.

[74] The Receiver emphasizes that it seeks as much avoidance of risk and uncertainty as possible. The Receiver says that there is an issue of significant cost in RCL defending at trial. The Receiver argues that the liabilities of RCL exceed the realizable value of its assets. There are also three possible adverse consequences to RCL being convicted in the criminal proceedings: a fine, a restitution order, and collateral estoppel in respect of the civil proceedings. (I leave aside the possibility of forfeiture of assets as forfeiture does not seem to be sought by the USAO

2007 CanLII 2663 (ON SC)

against RCL. RCL apparently has only some jewelry worth about US $100,000 situated in the United States and the USAO has reportedly advised the Receiver it is not interested in asserting any claim against the jewelry. There are Forfeiture Allegations against the individual defendants included within the Indictment.)

[75] The three possible adverse consequences must be weighed in the plea consideration. These consequences are relevant to the determination by the Receiver of the balancing of interests as between the stakeholders in RCL and in the Receiver adopting a position in respect of the plea of RCL.

[76] The Receiver's position is that after consultation with its counsel and after careful review of all the available evidence against RCL that there is sufficient evidence to justify a plea of guilty on behalf of RCL. The Receiver says that given such evidence, in conjunction with the economics and terms of the Plea Agreement, coupled with the precarious financial position of RCL, the Plea Agreement is in the best interests of RCL's stakeholders.

[77] All defendants other than Mr. Radler have entered pleas of not guilty. None of the allegations have yet been proven in court.

[78] With respect to a former director or officer innocent of any criminal wrongdoing, the stigma or association with the criminal proceedings exists at present and in all events. The stigma may be worsened by a corporate plea of guilty by RCL but, if so, it is only incremental and not such as to displace the greater interest of the estate. In any event, the failure of this Court to approve the plea would, of course, not mean the U. S. criminal proceedings would disappear.

[79] Assuming the U.S. District Court is prepared to accept a guilty plea from RCL, based upon evidence that establishes the constituent elements of the offence, and certain former directors and officers are also criminal defendants, the plea of the co-accused has no juridical impact upon the position of another defendant. Any one defendant has no say (*qua* a defendant) on whether a co-defendant can plead guilty. There is no prejudice of legal interest in the criminal proceedings potentially affected.

[80] Lord Black and Mr. White as shareholders of RCL, and as unsecured creditor claimants of RCL, have an economic interest in the estate of RCL. It is their economic interests as stakeholders in RCL that must be considered by the Receiver in determining whether to enter into the Plea Agreement.

[81] As stated above, Mr. Radler entered into a Plea Agreement with the USAO on September 20, 2005, wherein he agreed to enter a voluntary plea of guilty to Count One of the Indictment. Mr. Radler indirectly has an equity interest in both Hollinger and International through a 14.2% ownership in RCL through a holding company, FDR Ltd. Mr. Radler was President of RCL and President and Chief Operating Officer of Hollinger and International at the material times.

2007 CanLII 2663 (ON SC)

[82] It is alleged in the Indictment that RCL and its agents fraudulently inserted themselves and Hollinger as recipients of non-compete fees from the sale of newspaper businesses by International that should have been paid exclusively to International.

[83] The issue of guilt of RCL at trial is dependent in large part upon the actions of its officers and other agents. There is an overlapping of the directors and officers of RCL, Hollinger and International. The individuals alleged to be wrongdoers in the Indictment were agents of all three entities (other than Mr. Kipnis who was an officer of International and not of RCL).

[84] A corporation can have criminal liability even though it is an artificial, juristic person. RCL is responsible for an act committed by an agent of RCL within the scope of his employment. Even if a jury finds that an act of an agent was not committed within the scope of his employment, RCL may be responsible because RCL later approved of the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

[85] Ravelston is a named defendant in Counts One through Nine. The Plea Agreement provides that RCL would plead guilty to Count Two, dealing with a single transaction, being the Forum transaction.

[86] RCL acknowledges in the Plea Agreement that to its knowledge Forum had not requested that Hollinger be included as a non-compete covenanter in the sale to Forum of community newspaper assets by International for some U.S.$14 million. Hollinger received US $100,000 as the result of the insertion of it as a non-compete covenanter entitled to 25% of the total amount payable (US $400,000) for the non-compete covenants. The Plea Agreement states that RCL breached its fiduciary duty to International to refrain from acting to benefit itself or anyone else at International's expense and that it participated in a scheme to defraud International of money to which International was entitled under the Forum transaction. The Receiver is of the opinion, having examined the witness statements and documentation that Mr. Radler's testimony at trial, as the former President of RCL, is likely to bind RCL at trial.

[87] The Black group claims the Receiver has not done due diligence before entering into the Plea Agreement. The Receiver says in fact that it has had significant pre-criminal trial disclosure, being that to which all defendants are entitled. The Receiver says it and its counsel have reviewed the sworn witness statement of Mr. Radler dated August 18, 2005 as provided to the Grand Jury. The Receiver says it has reviewed statements Mr. Radler has made to the Federal Bureau of Investigation and other US law enforcement agencies, and has reviewed the witness statements of each of the co-defendants, or agents of RCL, provided to the Special Committee of International and to the USAO.

[88] Indeed, as a corporate defendant the Receiver says it has been entitled to even greater disclosure than that afforded to the individual defendants, by reason of s. 16 (a) (i) (C) of the

2007 CanLII 2663 (ON SC)

U.S. Federal Rules of Criminal Procedure which has resulted in disclosure of the witness statements of the directors, officers, employees or agents of RCL. This disclosure was made under a Protective Order made by Judge St. Eve on January 6, 2006.

[89] The Receiver says that it did not approach the other defendants because the Receiver was of the view that it had a duty to make certain public disclosures such that the individual defendants would have declined any attempt to be interviewed. However, as the Black group points out, a Receiver may be able to exert a protective "common interest privilege" in certain situations in respect of disclosures. *CC &L Dedicated Enterprises Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 637 (Super. Ct.).

[90] In my view, although common interest privilege may perhaps have been available to meet the Receiver's concerns in talking to the defendants in the context of the Receiver's intent to possibly change RCL's plea, this is not fatal to the Receiver's Motion. The Receiver says it had ample disclosure as to the USAO's case against RCL such that the Receiver formed the view that there was a significant risk of conviction of RCL.

[91] The Receiver has determined, with the advice of its U.S. criminal counsel, based upon the facts known to them, that there is a "substantial risk" that RCL would be found guilty at trial of one or more of the counts charged under the Third Superceding Indictment, based in part upon the guilty plea of Mr. Radler, the President of RCL over the relevant time period.

[92] It is noted that in *Hollinger International Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004) at 11-12, 15-16, and 46-47, Vice Chancellor Strine of the Court of Chancery of Delaware considered a November, 2003 written agreement, signed by Lord Black, which constituted a "Restructuring Proposal" for International. The agreement included a statement that the non-compete payments "were not properly authorized on behalf" of International. Vice Chancellor Strine examined the findings of International's Special Committee in respect of the non-compete payments received by Messrs. Black, Radler, Atkinson and Boultbee. He concluded that the evidence did not support Lord Black's claim in the case before him that the non-compete payments were properly approved by International's independent directors. The Vice Chancellor found that the best evidence in the record suggested that the Restructuring Proposal was accurate in saying that there was not proper authorization for the non-compete payments.

The factor of a fine

[93] RCL agrees to a fine of US $7 million through paragraph 12 of the Plea Agreement. The contemplated fine takes into account the United States *Sentencing Guidelines ("Guidelines"*) which considers the relevant conduct of a defendant in respect of all related offences or possible charges beyond the count to which the defendant has been convicted. As such, the amount of pecuniary gain which RCL is alleged to have derived looks to all the non-compete payments (admitted to be US$83,950.000) in which RCL allegedly participated and not simply the relatively small non-compete payment received in respect of the Forum transaction.

2007 CanLII 2663 (ON SC)

[94] The USAO gives the Receiver a two level reduction in the offence level because of the cooperation of the Receiver (Paragraph 6(d) of the Plea Agreement). Applying the sentencing minimum and maximum multipliers, the fine range would be US $67,160,000 to US $134,320,000 if RCL was convicted at trial, given that US $83,950,000 is the total pecuniary amount involved in all transactions underlying the offences.

[95] The Receiver says that the US $7 million fine is some 90% less than the low end of the range for fines seen under the *Guidelines* for a total pecuniary loss of US $83,950,000. While advisory rather than directory, the *Guidelines* are to be consulted and considered together with the relevant statutory sentencing factors set forth in 18 U.S.C. s. 3553(a), when sentencing in Illinois. *U.S. v. Stitman*, 2007 WL 60421 (7th Cir. 2007); *United States v. Alburay*, 415 F.3d 1041 (7th Cir. 2005). The *Guidelines* fine range is expressly referred to in paragraph 6(f) of the Plea Agreement.

[96] In my view, the Receiver is reasonable in contemplating the possibility of a fine, in the event of conviction, that is significantly higher than the US $7 million agreed upon in the Plea Agreement.

[97] The *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c. 37 ("*MLACMA*") provides in s. 9(1) that when the Minister of Justice approves the enforcement of the payment of a fine imposed in respect of an offence by a court of criminal jurisdiction in the United States, the fine can be enforced in Canada.

[98] The fine and any restitution order must ultimately be dealt with in the Canadian insolvency proceedings. The USAO may amend the claim already filed with the Receiver to reflect the fine and any restitution order. This Court would ultimately have to determine whether a claim for either or both the fine and restitution order constitute valid claims in the Canadian insolvency proceedings. The Receiver retains the right to argue that they do not give rise to a valid claim.

The assets and liabilities of RCL

[99] The Receiver in its Eighteenth Report makes the somewhat cryptic statement that in 2006 "RCL's liabilities likely greatly exceeded the realizable value of its assets." The Receiver seeks to extricate RCL from the U.S. criminal proceeding on a cost-effective basis. At the conclusion of the hearing on the Cross-Motion for Directions on January 15, 2007, this Court suggested that a more detailed financial analysis of RCL would be appropriate for the return of the Plea Agreement Motion.

[100] This resulted in a Supplement to the Eighteenth Report. In the Supplement's Appendix "A", the "Analysis of Estimated Funds Available for Distribution", the estimated range is from a negative of $27 million to a positive of $10 million after priority payments for ongoing restructuring proceedings costs (some $6-10 million), payments to the Argus preference shareholders (some $23-$24 million), payment of priority claims of the tax authorities (some $4.256 million) and payment of secured claims of Hollinger/Domgroup and payment of the

2007 CanLII 2663 (ON SC)

Pension Administrator Claim (some $29 million-$66 million), before addressing the estimated unsecured and filed contingent claims of some $1.037 billion.

[101] This Analysis suggests it is extremely unlikely that there will be any surplus available for shareholders in any and all events. However, the Black group submits that the Receiver's estimate of the present value of RCL lacks meaningful analysis.

[102] The major asset of RCL is the value of its shares in Hollinger (and indirectly the value of Hollinger's shares in International). Taking the January 16, 2006 market value of Hollinger's thinly traded shares, the Receiver gives an estimated value to Hollinger's holding in International as being only $31 million. CBCC submits that with an acquittal of the defendants in the criminal proceedings the value of the shares would rise significantly. CBCC refers to the 2005 purchase by Catalyst Fund General Partner I ("Catalyst") of a sizeable bloc of some 883,000 common shares for over $7.00 per share (well above the listed value of $1.15 per share on January 16, 2007).

[103] In Appendix "A" to its Third Supplemental Record the Receiver calculates the required realization per Hollinger share to fund claims *prior* to a consideration of contingent claims to be $7.12 per share. After a discounted estimate for the contingent claims, the Receiver estimates a realization of $8.95 to $12.60 per share in Hollinger would be required to settle all claims before any surplus would be available for shareholders.

[104] Thus, the Receiver's view is that there cannot realistically be a recovery of share value such as to result in equity for RCL's shareholders. However, the Black group says that if the Receiver changes its plea to a guilty plea to Count Two, that the shareholders of RCL will lose any chance at all for a recovery of their equity notwithstanding an acquittal in the criminal proceedings.

[105] If there is a conviction of all defendants in the criminal proceedings then it seems certain that with fines and restitution orders, coupled with possible civil action awards, that the individual defendants would lose their equity in RCL and RCL would lose its equity in Hollinger.

[106] However, if there is an acquittal then the Black group says there is a realistic chance of regaining equity on their part through a rise in value of the shares and restructuring under their leadership. They say that a change in plea by the Receiver dooms this possibility while in reality gaining nothing or relatively little for the Receiver. Hence, they argue, in balancing the economic interests of the various stakeholders, the balance should favour the Black group in not approving the change in plea.

The factor of costs in going to trial

[107] The Receiver submits that there would be an estimated outlay of $3 million in legal fees to defend the criminal proceeding. As well, the Receiver points out that the legal fees would be a

2007 CanLII 2663 (ON SC)

priority charge against the assets of the estate. The liquid and near-liquid assets of the estate are less than $7 million.

[108] The estimate of legal fees for RCL to retain counsel and mount a proper defence in the criminal proceedings seems modest at $3 million, given the anticipated length (reportedly at least three months) and complexity of the trial.

[109] The Black group says that RCL could have a relatively cost-free defence through an inactive, “coat-tail” defence following that of the other defendants. The Black group says that there are not truly diverging interests as between the defendants. The Black group says that there is an identical interest to the defence of all defendants in their central position that Mr. Radler is being untruthful in his expected evidence and that, accordingly, all defendants are to be acquitted.

[110] The Receiver says that there is some divergency in the defendants’ defences evidenced by Atkinson, Boultbee and Kipnis having filed severance motions. However, these motions were dismissed by Judge St. Eve on January 22, 2007 on the basis that the defendants had failed to demonstrate that their claimed mutually antagonistic defences would prejudice them in a joint trial.

[111] In my view, the Receiver is reasonable in being of the opinion that a so-called coat-tail defence would be inappropriate and inadequate and hence, inadvisable. RCL’s interests and fate are not necessarily tied to that of any one or more of the other defendants and their positions. RCL should properly have separate counsel prepared and present in all events to independently advise the Receiver and to ensure that RCL’s interests are protected at all times at trial. This is particularly necessary as a divergency of interests as between defendants is seen to be a distinct possibility by the Receiver and RCL’s counsel.

The factor of restitution

[112] RCL agrees by paragraph 6(f) of the Plea Agreement that the total pecuniary loss involved in the transactions underlying all the offences set forth in the Third Superceding Indictment pertaining to the alleged diverted non-compete payments is US$83,950,000. Paragraph 9 states that RCL understands that the offence to which it pleads guilty carries “any restitution order ordered by the Court.” U.S. Code s. 3663A requires that restitution for the loss is required in respect of an offence against property. Paragraph 20 of the Plea Agreement sets forth the agreement as to the determination of restitution.

[113] Paragraph 20 (a) of the Plea Agreement provides that the restitution order is to provide for restitution for the pecuniary loss attributable to the offense of conviction *and* the transactions underlying the offences charged in the Third Superceding Indictment. Thus, RCL is potentially liable for restitution of pecuniary loss up to about US $51,150,000 (ie. US$83,950,000 less US $32.8 million already repaid relating to non-compete payments). However, an apportionment of liability would be done to fairly determine RCL’s actual contribution to the loss. If more than one convicted defendant contributed to the pecuniary loss, apportionment of liability is required

2007 CanLII 2663 (ON SC)

pursuant to U.S. Code s. 3664(h). RCL reserves the right to make representations as to allocation. RCL's "economic circumstances" can also be taken into account in determining restitution.

[114] Article XVII.2 of the *MLACMA* states that the two Governments shall assist each other, *inter alia*, in proceedings related to restitution to the victims of crime and the collection of fines.

[115] United States Code s. 3572(b) provides that the imposition of a fine in sentencing is not to impair the ability to make restitution to a victim such as International. Section 8C.3 (a) of the *Guidelines* is to the same effect, saying that the court shall reduce the fine to the extent the imposition of the fine would impair the ability to make restitution. Sections 5E1.1 and 5E1.2 say that if a defendant is ordered to make restitution and to pay a fine, any money paid is first to be applied to satisfy the order of restitution. Thus, the Black group argues, if there is a conviction of the defendants, the quantum of the restitution order, even with an allocation, would overwhelm the possibility of a large fine being payable by RCL.

[116] As stated above, in the event of the conviction of the individual defendants, the apportionment of liability and allocation of restitution would be made by the court as between the defendants. Indeed, with a conviction of all defendants, assuming enforceability in Canada of the restitution order, the defendants' indirectly held shares in RCL would be subject to seizure to satisfy the restitution requirement.

[117] However, in the event of an acquittal of all defendants other than Mr. Radler, there is uncertainty as to how much of the US$ 83,950,000 RCL might be required to pay in restitution.

[118] The Black group argues that the present Plea Agreement leaves the possibility that a large amount would be ordered payable by RCL as restitution upon the guilty plea, and potentially most of the restitution would be payable by RCL if the other defendants are acquitted.

[119] The impact of paragraph 20(a) of the Plea Agreement upon RCL's liability to pay restitution is uncertain in the event of an acquittal of the individual defendants (other than Mr. Radler). The Receiver was apparently unable to obtain greater clarity, and hence greater certainty, in further discussions with the USAO during the course of the hearing of the Motion at hand. However, paragraph 20(a) states that restitution is for the pecuniary loss attributable to "the transactions underlying the offences charged in the Third Superceding Indictment *which* are *attributable to the defendant* [ie. RCL]" [emphasis added]. Thus, it would be arguable that in respect of non-compete payments made directly to an acquitted defendant, such loss could not be attributed to RCL.

[120] There has already been restitution made by Hollinger and individual defendants (a total of US$32.8 million) in respect of non-compete payments relating to the sale of the U.S. community newspapers. Thus, RCL's potential exposure to a restitution requirement appears to be limited to the US$26.4 million allegedly paid directly to RCL by Can West as a non-compete payment (some US$26.4 million was also allegedly paid directly to the individual defendants) in

2007 CanLII 2663 (ON SC)

connection with the purchase of a 50% interest in the *National Post* and several hundred Canadian newspapers for about US $2.1 billion.

[121] However, any such restitution order following upon a guilty plea would probably have only limited impact upon RCL from a practical standpoint.

[122] First, the Receiver reserves the right (by paragraph 20(c)(vi) of the Plea Agreement) to argue that any restitution order does not give rise to a valid claim by the U.S. Government in the Canadian insolvency proceedings.

[123] Second, whether or not there are acquittals of the individual defendants in the criminal proceedings, there remains a significant risk of civil liability on the part of RCL in respect of the Illinois civil claims advanced by International for recovery of this $26.4 million received by RCL.

[124] Paragraphs 20(e)(iii) and (iv) of the Plea Agreement provides that any amount to which International may become entitled to through its Illinois civil action is subject to an agreement of May 13, 2005 between the Receiver and International whereby such amount is to be accepted as a claim for distribution purposes in the Canadian Claims Procedure in the *CCAA* proceeding. If the US Government's claim based upon any restitution order is recognized by the Ontario Court as a valid claim in the Canadian insolvency proceedings, such restitution to International will then be off-set and reduced dollar-for-dollar by the amount of the claims finally proven through a resolution of the civil actions by International. This removes the possibility of double recovery by International.

[125] Third, it is agreed (by paragraph 20(e)(vi) of the Plea Agreement) that any U.S. Government claim based upon a restitution order, if accepted as a valid claim in the Canadian insolvency proceedings, is simply an unsecured claim without any priority. The unfortunate reality is that there is a probable significant excess of liabilities to assets in the winding-up of RCL. If so, the *pro rata* claim of the U.S. Government would impact adversely upon other unsecured creditors in respect of any monies available for the unsecured creditors, but have no practical impact upon RCL itself.

The risks of collateral or issue estoppel in the civil proceedings

[126] In the United States, the doctrine of collateral estoppel or issue preclusion may be applied in civil proceedings in respect of issues which have been previously determined on a criminal conviction through a guilty plea. *Appley v. West* 832 F.2d 1021 at 1025-6 (7th Cir.) [*Appley*]. A criminal conviction based upon a guilty plea within Illinois and the ambit of the 7th Circuit seems to conclusively establish for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he or she was convicted. *Nathan v. Tenna Corp.*, 500 F.3d 761 at 763 (7th Cir. 1977).

2007 CanLII 2663 (ON SC)

[127] In Canada, criminal convictions are admissible in subsequent civil proceedings. A criminal conviction ordinarily constitutes *prima facie* proof, "but in some cases, the person convicted may be precluded by the doctrine of abuse of process from contesting the underlying facts." *K.F. v. White* (2001), 53 O.R. (3d) 391 at para. 19 (C.A.) per Sharpe J.A.

[128] The Plea Agreement proposes that RCL plead guilty to Count Two, which involved an alleged non-compete payment of $400,000 in the Forum transaction. It is alleged that $100,000 was wrongly diverted to Hollinger. The Receiver submits that collateral estoppel at most would apply only to the $100,000 in the Forum transaction.

[129] The Receiver is faced with RCL being a defendant in the criminal proceedings. The Receiver is also faced with RCL being one defendant in a number of civil actions both in the U.S. and Canada, including: a class action, *Trudy Betthel et al v. Lord Conrad N. Black et al* in the Court of Queen's Bench Judicial Centre of Saskatoon, No. 1492 of 2004; a class action in Ontario, being *Steve Drover et al. v. Argus Corporation et al.* file no. 04-CV-028649; an Ontario action, *Hollinger Inc. v. The Ravelston Corporation et al.,* file no. 06-CL-6261; an action in the U.S. District Court for the Northern District of Illinois, Eastern Division, *Hollinger International Inc. Hollinger Inc. et al,* No. 04C-0834; and a class action in the U.S. District Court for the Northern District of Illinois, *Teachers' Retirement System of Louisiana v. Conrad N. Black et al.*, No. 0C-0834 (collectively, referred to as the "civil proceedings"). These civil proceedings raise several alleged causes of action beyond allegations simply related to the non-compete payments. However, they include in part alleged wrongdoing because of the non-compete payments, including those referred to in Counts One and Two.

[130] The Black group says that the Receiver failed to properly evaluate the risk that a guilty plea to Count Two of the Third Superceding Indictment will prejudice RCL's position in subsequent civil proceedings. The Black group submits that there is a real risk that plaintiffs in the civil proceedings would seek to use a guilty plea to prevent RCL from relitigating the facts and issues underlying Count Two, pursuant to the U.S. doctrine of collateral estoppel and the Canadian doctrine of abuse of process.

[131] The Black group also asserts that Hollinger and International support the Receiver's Plea Agreement Motion at hand because collateral estoppel would likely result in their civil actions being successful.

[132] The Black group submits that a plea of guilty to Count Two, given its wording, is an admission as to facts beyond simply those relating to the Forum transaction. In Count Two the Grand Jury charges RCL as follows:

> The Grand Jury realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

[133] Count Two then charges RCL with mail fraud "for the purpose of executing and attempting to execute the above–described scheme". The proof of the "scheme" is a pre-

2007 CanLII 2663 (ON SC)

condition to a finding of guilt in respect of mail fraud. The "scheme" is that described in paras. 1 to 33 of Count One, set forth in the first 22 pages of the Third Superceding Indictment.

[134] I turn then to a consideration of paras. 1-33 in Count One of the Third Superceding Indictment. Paragraph 1 sets forth as background the interests and inter-relationships of the defendants in respect of RCL, Hollinger and International. The accusation is made in paragraph 2 that from about January, 1999 to about May, 2001 at Chicago the defendants "intended to devise, and participated in a scheme to defraud International and International's public shareholders…" The alleged general "scheme" as to the diversion of non-compete payments is then described at length and in detail in paras. 3 to 33, dealing with a number of sales of community newspapers and other publications by International, totaling about US $678 million in sale proceeds to International.

[135] The Black group argues that by pleading guilty to Count Two, RCL would admit to the facts constituting alleged fraud in respect of all the transactions set forth in Count One. The particular non-compete payments referred to in Count One allegedly diverted to the defendants include US$2 million (American Trucker), US$12 million (CNHI 1), US$1.2 million (Horizon), and US $100,000 (Forum).

[136] The U.S. doctrine of collateral estoppel is similar to issue estoppel in Canada. It may preclude the relitigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical. Unlike issue estoppel in Canada, collateral estoppel does not require mutuality (see *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77 at 99 (*C.U.P.E.*)). Collateral estoppel may be applied in civil trials to issues decided in a prior criminal conviction: *Appley*, *supra* at 1025-6.

[137] The Canadian doctrine of abuse of process provides courts with the discretion to prevent relitigation of issues decided in a previous proceeding. A previous criminal conviction is *prima facie* admissible in a civil proceeding under s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23. When determining whether or not the criminal conviction has preclusive effect in the civil proceeding, the Supreme Court in *C.U.P.E.* advises the courts to, "turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process". In that same case, the Supreme Court identified a non-exhaustive list of situations where relitigation enhances, rather than impeaches, the integrity of the judicial system: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; and (3) when fairness dictates that the original result should not be binding in the new context (e.g. where there was an inadequate incentive to defend a criminal prosecution): *C.U.P.E.*, *supra* at 106, 110.

[138] As I have already outlined above, the Black group points out that Count Two incorporates by reference paras. 1-33 of Count One, which describe in detail the alleged scheme to defraud International of non-compete payments received from the sale of its U.S. community

2007 CanLII 2663 (ON SC)

newspapers to various entities, including Forum. The Black group referred the Court to the decision in *U.S. v. Belk*, 435 F.3d 817 at 819 (7th Cir. 2006) [*Belk*]. They submit that the *Belk* decision indicates that the crime to which the Receiver proposes to plead guilty is not limited to mail fraud in relation to the Forum transaction, but also includes the entire "scheme" to defraud International as set out in paras. 1-33 of Count One. In other words, by pleading guilty to Count Two, RCL would be admitting that it participated in a scheme to defraud International of non-compete payments for every transaction involving the sale of International's U.S. community newspapers. As mentioned above, according to the Black group, there is a real risk that plaintiffs would rely on the doctrines of collateral estoppel and abuse of process to prevent RCL from attempting to rebut these admissions in the pending civil proceedings in both the U.S. and Canada.

[139] The Receiver asserts that the Plea Agreement reduces RCL's exposure to civil liability because the guilty plea to Count Two is restricted to mail fraud only in relation to the Forum Transaction.

[140] By paragraph 5 of the Plea Agreement, RCL agrees to plead guilty "to the charge contained in Count Two". As stated above, Count Two necessarily incorporates by reference an admission to the facts of the alleged "scheme" set forth in Count One. However, paragraph 5 of the Plea Agreement goes on to say that "[I]n pleading guilty [RCL], by its Receiver, admits the following facts…." Paragraph 5 then goes on to provide some background but refers only to a "scheme" to defraud International of money to which its was entitled under the Forum transaction. Paragraph 5 goes on to describe how RCL used interstate mail to execute that scheme. The Plea Agreement does not mention any other sale of U.S. community newspapers to any other entity. Paragraph 5 concludes with the statement that "[t]he factual summary contained in this paragraph is provided for the sole purpose of establishing a factual basis for [RCL's] plea of guilty."

[141] In addition, both the Receiver and Hollinger submit that even if the Black Group is correct in its analysis of the consequences of a guilty plea to Count Two, the risk of actual prejudice to RCL in the civil proceedings is minimal, for two reasons. First, RCL faces a number of civil suits regarding the U.S. $2.1 billion CanWest transaction (the alleged scheme to defraud International of non-compete payments from this transaction is described in Counts Eight and Nine of the Third Superceding Indictment). According to paragraph 25 of the Plea Agreement, all other Counts against RCL (ie. other than Count Two) will be dismissed, which preserves RCL's ability to defend the CanWest aspect of the civil proceedings without raising concerns of collateral estoppel and abuse of process.

[142] Second, restitution has already been paid for the approximate U.S. $32.8 million in non-compete payments allegedly improperly taken from International in relation to the sale of the U.S. community newspapers (*Hollinger International Inc. v. Black* 844 A.2d 1022 (Del. Ch. 2004). C.A. No. 183-N (Del. Ch. May 19, 2004) (Transcript), aff'd 872 A.2d 55 (Del. Supr. 2005). (Reportedly, Hollinger has made restitution of US$16.5 million, Lord Black US$7.1 million. Mr. Radler, U.S.$7.1 million and Mr. Atkinson, US$2.2 million.) Thus, the only

2007 CanLII 2663 (ON SC)

outstanding issues in this aspect of the civil proceedings relating to these non-compete payments are compensatory and punitive damages.

[143] I note that neither party put forward evidence from a U.S. attorney regarding the likely impact of the proposed Plea Agreement on RCL's position in the U.S. civil proceedings. There is no way for this Court, as a Canadian court of law, to objectively evaluate the risk that the U.S. doctrine of collateral estoppel will prejudice RCL in the U.S. civil proceedings if it pleads guilty to Count Two. In addition, it is not obvious whether it would be an abuse of process for RCL to rebut the facts set out in Count Two in a Canadian civil proceeding, given the significant discretion afforded the trial judge to assess whether relitigation would be detrimental to the adjudicative process. Suffice it to say that collateral estoppel and abuse of process are live issues.

[144] Nevertheless, I am satisfied that the Receiver acted reasonably. The Receiver has retained experienced civil counsel in both Canada and the U.S. In consultation with its counsel over a number of months, the Receiver has concluded that the risk of prejudicing its position in the civil proceedings by pleading guilty to Count Two is lower than the risk of prejudice RCL faces in the civil proceedings if it is convicted on all Counts it faces.

[145] In my view, it was reasonable for the Receiver to evaluate and compare the risks associated with the "worst case scenarios" – i.e. the risk of prejudice to RCL's position in the civil proceedings by (i) entering the Plea Agreement or (ii) being convicted on all of Counts One to Nine.

[146] If there were to be an acquittal then, of course, there is no risk of prejudice through a continuing plea of not guilty. However, the prospect of acquittal is not relevant to evaluating the risk to RCL's position in the civil proceedings. This is because the Receiver has reasonably concluded that there is a significant risk of RCL being convicted of all Counts against RCL in the Third Superceding Indictment.

[147] Given the conclusion RCL faces a significant risk of conviction, the Receiver is left with an evaluation of the risks resulting from a guilty plea to Count Two under the Plea Agreement as compared with the risks arising from a continuing not guilty plea with an eventual conviction on all nine Counts it faces.

[148] Were RCL convicted on all Counts, it would face the risk that collateral estoppel and abuse of process would preclude relitigation of the issues surrounding the sale of all the U.S. community newspapers *and the CanWest Transaction*. But if RCL enters into the Plea Agreement, there would be greater certainty for the estate because it would only face the much lesser risk that collateral estoppel and abuse of process would preclude, at most, relitigation of the issues surrounding the sale of the U.S. community newspapers.

Disposition

2007 CanLII 2663 (ON SC)

[149] The major underlying premise to the Receiver's Motion to change its plea from not guilty and plead guilty to Count Two of the Third Superceding Indictment, is that the Receiver considers there is a significant risk of the conviction of RCL on all nine Counts it faces if it proceeds to a trial.

[150] Having made that assessment, the Receiver entered into negotiations with the USAO with a view to determining whether the alternative of a change of plea was feasible and desirable. In doing so, the Receiver has acted with the realization that the RCL estate has limited assets and that the significant cost of defending at trial will have a very adverse impact upon the limited resources remaining available in the estate.

[151] The Receiver submits that the Plea Agreement brings some greater certainty, inasmuch as the fine is fixed at US$7 million, the concern as to collateral estoppel arguably relates only to Count Two and a possible civil claim of US$100,000, and that an order of restitution would likely be less than that seen upon a conviction on all nine Counts.

[152] The Plea Agreement achieved has reduced significantly the probable fine that would be otherwise imposed upon a conviction at trial. While there is certainly a risk of a significant restitution order upon sentencing through the Plea Agreement, the impact is lessened by other protective provisions. There is a risk as to a greater quantum of restitution being ordered if there is a conviction following upon a trial.

[153] There is a concern of collateral or issue estoppel that may arise upon a plea of guilty to Count Two. However, this risk is modest in all the circumstances, and in any event, this risk would be significantly greater in the event of a conviction at trial upon all nine Counts faced by RCL.

[154] In my view, the Receiver has made a reasonable and sufficient effort to determine the best course of action in all the circumstances, has considered the interests of all parties and has followed a fair and proper process in arriving at the Plea Agreement. The Receiver has assessed the risks of (1) the likelihood of conviction; (2) the size of the potential fine and ranking in the estate; (3) the impact of a competing restitution order on a receivership distribution and (4) the cost to the estate of maintaining a defence. I accept the Receiver's risk assessment. The Receiver has concluded that there is a greater probability of each of the risks coming to pass in the event the Receiver did not enter a guilty plea pursuant to the Plea Agreement. The Receiver's decision to enter into the Plea Agreement is well within the bounds of reasonableness. In my view, the Plea Agreement is prudent and commercially reasonable taking into account all the circumstances, as well as being fair to all stakeholders.

[155] The Receiver has taken such reasonable steps as are possible in the circumstances to minimize any impact of a guilty plea by RCL upon former directors and officers. It has not named any former director or officer other than Mr. Radler and the fact of his Plea Agreement.

2007 CanLII 2663 (ON SC)

Each of the individual defendants maintains all the defences and rights that he may have at present.

[156] The Receiver has followed a fair and proper process in arriving at the Plea Agreement, determining upon a change of plea and in bringing forward the Motion at hand for approval. The interests of all stakeholders have been given due consideration. The Receiver has weighed carefully and fairly the pros and cons of entering into the Plea Agreement and in trying to balance responsibly the divergent interests of the various stakeholders. The Receiver, facing an extremely serious criminal trial, has fairly, objectively and responsibly negotiated the Plea Agreement and brought forward same for approval by this Court, all with a view to acting in the best interests of the estate.

[157] For the reasons given, the Motion is granted. An Order will issue in accordance with these Reasons for Decision.

_____

CUMMING J.

DATE: February 7, 2007

2007 CanLII 2663 (ON SC)

COURT FILE NO.: 05-CL-5863
DATE: 20070207

2007 CanLII 2663 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc.

AND IN THE MATTER OF *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended, and the *Courts of Justice Act,* R.S.O. 1990 c. C.43, as amended

---

REASONS FOR DECISION

CUMMING J.

Released: February 7, 2007

Tab 11

Ostrander v. Niagara Helicopters Ltd. et al.

(1974), 1 O.R. (2d) 281

ONTARIO
HIGH COURT OF JUSTICE
STARK, J.
30TH OCTOBER 1973

1973 CanLII 467 (ON SC)

Debtor and creditor -- Receiver -- Receiver appointed by debenture holder -- Whether receiver owes fiduciary duty to company -- Position of court-appointed receiver compared.

The duty of a receiver-manager appointed by a mortgagee or debenture holder is to protect and enforce the security of the mortgagee. Unlike a receiver-manager appointed by the Court, he owes no fiduciary duty to the mortgagor. Consequently, a sale of a company's assets under a debenture cannot, if made in good faith, be set aside even though the agent of the debenture holder conducting the sale has a personal interest in the company purchasing the assets.

[Re Newdigate Colliery, Ltd., [1912] 1 Ch. 468: Re B. Johnson & Co. (Builders) Ltd., [1955] 1 Ch. 634: Farrar v. Farrars, Ltd. (1889), 40 Ch. D. 395, refd to]

ACTION to set aside a sale made under a debenture.

B.B. Papazian, for plaintiff.

A.McN. Austin, for defendant, C.R. Bawden.

W.G. Charlton, for defendants, New Unisphere Resources

Limited, Baltraco Limited and Toprow Investments Limited.

R.M. Loudon, Q.C., for defendants, Roynat Limited, Canada Trust Company and Niagara Helicopters Limited.

STARK, J.:-- In spite of the lengthy evidence that was taken in these proceedings continuing over many days, I am satisfied that the real questions involved have become quite narrowed and confined. This result was mainly achieved by the very careful and thorough arguments of all counsel and by their careful review of the evidence. Summarily stated the facts are briefly these. The company known as Niagara Helicopters Limited (hereinafter referred to for convenience as "Niagara"), was founded by the plaintiff Paul S. Ostrander who was the owner of 90% of the stock of the company. This company operated out of the City of Niagara Falls providing charter commercial air services, a flight school, tourist operations and various other services using helicopters. While Ostrander was an experienced helicopter pilot he proved to be an inept financial manager and when the company experienced serious financial difficulties the defendant Roynat was approached for a substantial loan by way of bond mortgage. A debenture dated October 1, 1969, (ex. 1) was entered into between Niagara Helicopters Limited and the Canada Trust Company as trustee, as a result of which Roynat became the single debenture holder. An initial advance of $125,000 was made on November 4, 1969. Two or three months later Niagara defaulted on the loan and the insurance on its aircraft was cancelled. On January 16, 1970, the defendant, C.R. Bawden, was appointed as receiver-manager by virtue of the default provisions contained in the deed of trust. It was admitted by counsel for the plaintiff and was placed on the record that all powers of the trustee were properly delegated to Roynat pursuant to s. 9.2 of the debenture and, in effect, Bawden was appointed receiver and manager as the agent of Roynat for the purpose of protecting and enforcing its security. The defendant Bawden was considered by Roynat to be an experienced receiver-manager, having acted in that capacity on many previous occasions. Bawden took immediate steps to reinstate the insurance, came to the conclusion that the company was a viable operation, although it lacked working

1973 CanLII 467 (ON SC)

capital, and a further $15,000 was advanced under the debenture. Bawden's duties as receiver-manager were then terminated but Roynat insisted that the company retain a financial adviser; and with the consent of Ostrander, indeed it appears with the urging of Ostrander, Bawden acted in this capacity. However, during this period the financial position of Niagara deteriorated mainly because of Ostrander's inability to operate the company efficiently and due also to his frequent absences from the company for various reasons and Roynat became increasingly concerned as to the safety of its security. Thus, ex. 50 indicated that during the year ending December 31, 1970, a loss of $84,000 had been incurred as opposed to a net loss the previous year of $65,000. By February 24, 1971, it was necessary to again call in the loan and once again Bawden was appointed receiver-manager in accordance with the terms of the debenture and was instructed by Roynat to find a buyer for the shares as being the best possibility for all concerned. Bawden had had some previous satisfactory dealings with principals in the defendant company New Unisphere and this company displayed interest in Niagara. Negotiations were opened between New Unisphere and Ostrander, both parties being represented by independent counsel, and an agreement was formalized. The agreement was finally negotiated and signed and appears herein as ex. 20. No evidence was presented to indicate undue influence by Bawden or anyone else with respect to the negotiations and execution of this agreement. Indeed, from Ostrander's standpoint it was a highly desirable agreement in which Ostrander would have received a substantial payment for his shares. It appears from the evidence that Bawden did all he could reasonably do to assist in the completion of this deal and in postponing public sale of the assets as long as this could be done. However, delays occurred, probably caused by both parties in meeting the terms of the agreement, and as the fall of 1971 approached Roynat became increasingly concerned about the position of its security and urged and instructed Bawden to proceed with preparations for the sale of the assets by public tender. Conditions for sale were prepared, advertisements were duly inserted in the newspapers and a closing date fixed for the receipt of bids. The final date for the receipt of bids was September 24, 1971. An attempt was made by one White, a well-known entrepreneur in Niagara Falls resort

1973 CanLII 467 (ON SC)

properties whom Ostrander had succeeded in interesting in his company before the hour when the bids were to be opened to persuade Roynat to accept a sum of money which he believed would be sufficient to pay off the debenture indebtedness. The amount mentioned was in the approximate sum of $150,000 but it was quickly explained to White and his advisers that there were other liabilities to be taken care of and that a total amount exceeding $200,000 would be needed. White's suggestion that he make up the difference by providing some form of security on his other holdings did not appeal to Roynat and it was decided to proceed with the tenders.

Only two tenders for the working assets of the company as listed in the conditions of sale were received. One of these tenders was a hastily written offer which turned out to be ambiguous in meaning, made by White and prepared in the few moments that preceded the opening. The other tender was the Toprow tender, the benefits of which were later assigned to Baltraco. It was admitted by all parties that since the defendant New Unisphere is the sole owner of its subsidiaries Baltraco Limited and Toprow Investments Limited, that the Toprow bid may fairly be regarded as in fact the bid of New Unisphere Limited. After two or three days' consideration, the Toprow tender was accepted, the decision being made by Roynat's representatives acting on its own views and acting as well on the advice of Bawden. I have considered the details of the Toprow tender, which appears herein as ex. 7, and the White tender, ex. 23. In effect, White tendered for the "complete package and as a going concern of Niagara Helicopters Limited Parcels 1-10 of the conditions of sale inclusive, subject to approval of transfer of licences and lease as per your terms of conditions of sale the sum of $151,000." The Toprow tender offered the sum of $150,000 cash for all of the assets offered with the exception of the accounts receivable. These accounts receivable were variously estimated at from $50,000 to $80,000. Under the Toprow tender, Toprow proposed to assume full responsibility for the pilot school and for the student contracts and these obligations were estimated to represent some $30,000. While the Toprow tender made clear that it desired the transfer of the lease and the licences it expressly made its offer not conditional on these being obtained. The

1973 CanLII 467 (ON SC)

White offer, however, expressly conditioned the offer upon approval of the transfer of licences and lease. There was considerable controversy both in the evidence and in the argument as to which of these two offers was the better. Thus, it was submitted that although the White offer did not expressly mention liabilities, that since the words "as a going concern" were included that White would have to assume all liabilities. It was also contended that since the Toprow offer did not require as a condition the transfer of the licences and the lease that Bawden had improperly acted in arranging for the transfer of the licences and lease or attempting to obtain the transfer without receiving consideration for so doing. For the reasons given later I do not consider it necessary to attempt to interpret the true meaning of each of these tenders or to determine which in fact was the better offer. That determination was the sole responsibility of Roynat and in the absence of fraud or bad faith its decision is not open to question.

Basically this action is brought by Ostrander in an attempt to regain possession of Niagara which he has always regarded as his company. He asks that the agreement to sell to New Unisphere or its subsidiaries following the opening of the bid be declared null and void. He asks that Niagara be permitted to discharge the charge on its assets placed as a result of the deed of trust. In effect he asks that the sale be reopened and that a new receiver-manager be appointed. He asks also for damages. He also claims that the fees paid to the receiver are excessive and he asks for a full accounting. He bases all these claims for relief on his allegations that the defendants have conspired against him, have wrongfully converted assets and have committed fraud and breaches of trust. In my view the evidence convincingly shows that all these charges are unfounded and without merit. On the other hand, certain suspicious circumstances and events occurred which required explanation, which threw an aura of suspicion over the event and which in my view placed a burden upon the defendants to provide appropriate answers. I now turn to a consideration of these circumstances.

In the month of August, 1971, Bawden acting as a receiver-

1973 CanLII 467 (ON SC)

manager did three things upon which the plaintiff laid great stress: first, he issued a cheque for $2,000 to New Unisphere on August 3rd which appears to have been cashed later in September. Bawden justified this payment by reason of para. 5 of the agreement between Ostrander and New Unisphere which permitted the receiver-manager to pay the costs of investigation of the assets of the company being conducted by the proposed purchaser up to a maximum of $3,000 subject to certain conditions including a proviso that the purchaser exercise its right to terminate the agreement. This payment appears to have been made prematurely but is justifiable on the grounds that Bawden was doing his best to retain the continued interest of New Unisphere in the agreement. In any event, that deal did abort and in my view this payment then became justifiable. Two other payments were made by Bawden at around this same period of time which in my view were not justifiable, and which should be recredited to Niagara in the final accounting. One was an account in the sum of $307.25 (ex. 102) paid to New Unisphere to reimburse that company for certain aircraft valuations which it had arranged; and the other item which in my view was improper was to relieve New Unisphere of an account receivable of $1,500 for the use of aircraft for experiment with respect to that company's gas and oil operations. In my view these items can be properly adjusted after completion of the sale and the rendering of a final accounting including the fixing of Bawden's own fees and disbursements.

The three matters which I have just mentioned above are of relatively minor significance but a fourth incident occurred which has given me much concern. Commencing in June, 1971, and continuing until November of the same year, Bawden began purchasing for his own personal account through his broker shares in New Unisphere. The total of his purchases amounted to 42,000 shares for a total purchase price of approximately $20,000. These shares represented a 2% interest in the total issued shares of New Unisphere. The shares of that company are listed on the public exchanges. Bawden admitted quite frankly in his evidence that under the circumstances this was a "stupid" thing to do. His own counsel admitted to the Court that, "of all the matters brought before this Court by the

1973 CanLII 467 (ON SC)

plaintiff, this was the only one which has any appearance of substance. There is no question, whatever, that Mr. Bawden should not in the circumstances have been purchasing shares in New Unisphere." Bawden in his evidence contended that his decision to purchase New Unisphere shares had no connection whatever with Niagara, that he does speculate in the market to a considerable extent and that he was interested in this company because of its holdings in certain well known oil producing companies. In placing great stress upon these dealings, the plaintiff submits that Bawden, acting as receiver-manager was in a fiduciary position, that even if there was no actual fraud involved there was constructive fraud, that Bawden had created a conflict between his interests and his duty and that these dealings must vitiate the ultimate deal with Toprow. He argues also that Roynat must be responsible for the misdeeds of its agents. I should hasten to point out that there is not one shred of evidence to indicate that Roynat, Canada Trust or New Unisphere or its subsidiaries had any knowledge of these purchases by Bawden. However, because of the suspicious nature of these circumstances it appeared to me that there was an onus thrown upon the defendants to uphold the validity of the Toprow sale and to satisfy the Court that the decision to make that sale was not in any way affected or influenced by Bawden's foolish purchase of these shares.

My decision might well be otherwise if I had come to the conclusion that Bawden as receiver-manager was acting in a fiduciary capacity. I am satisfied that he was not. His role was that of agent for a mortgagee in possession. The purpose of his employment was to protect the security of the bondholder. Subsequently his duty was to sell the assets and realize the proceeds for the benefit of the mortgagee. Of course he owed a duty to account in due course to the mortgagor for any surplus; and in order to be sure there would be a surplus he was duty bound to comply with the full terms of the conditions of sale set out in the debenture, to advertise the property and to take reasonable steps to obtain the best offer possible. Certainly he owed a duty to everybody to act in good faith and without fraud. But this is not to say that his relations to Ostrander or to Niagara or to both were fiduciary in nature. A very clear

1973 CanLII 467 (ON SC)

distinction must be drawn between the duties and obligations of a receiver-manager, such as Bawden, appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest. The borrower, in consideration of the receipt by him of the proceeds of the loan agrees in advance to the terms of the trust deed and to the provisions by which the security may be enforced. In this document he accepts in advance the conditions upon which a sale is to be made, the nature of the advertising that is to be done, the fixing of the amount of the reserve bid and all the other provisions contained therein relating to the conduct of the sale. In carrying on the business of the company pending the sale, he acts as agent for the lender and he makes the decisions formerly made by the proprietors of the company. Indeed, in the case at hand, Mr. Bawden found it necessary to require that Ostrander absent himself completely from the operations of the business and this Ostrander consented to do. As long as the receiver-manager acts reasonably in the conduct of the business and of course without any ulterior interest, and as long as he ensures that a fair sale is conducted and that he ultimately makes a proper accounting to the mortgagor, he has fulfilled his role which is chiefly of course to protect the security for the benefit of the bondholder. I can see no evidence of any fiduciary relationship existing between Ostrander and Bawden. Mr. Papazian in his able argument put it very forcibly to the Court that the duties and obligations of a receiver-manager appointed by the Court and a receiver-manager appointed under the terms of a bond mortgage without a Court order, were in precisely the same position, each being under fiduciary obligations to the mortgagor. I do not accept that view and I am satisfied that the cases clearly distinguish between them. A good example of the obligation placed upon the Court-appointed receiver-manager is provided by Re Newdigate Colliery, Ltd., [1912] 1 Ch. 468. That case was authority for the proposition that it is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be

1973 CanLII 467 (ON SC)

inconsistent with that duty for him to disregard contracts entered into by the company before his appointment. At p. 477 Buckley, L.J., described the duties of the Court-appointed receiver and manager in this way:

> The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business, and has standing behind him -- I do not know what word to use that will not create a misapprehension, but I will call them "constituents" -- the persons to whom he is responsible in the matter, namely, the mortgagees and the mortgagor, being the persons entitled respectively to the mortgage and the equity of redemption. If we were to accede to the application which is made to us, and to allow the receiver and manager to sell the coal at an enhanced price, the result would be that the enhanced price would fall within the security of the mortgagees and they would have the benefit of it: but, on the other hand, there would be created in favour of the persons who had originally contracted to purchase the coal a right to damages against the mortgagor, the company, with the result that there would be large sums of damages owing.

Lord Justice Buckley then continued with language which further accentuates the difference between the two classes of receiver-managers [at pp. 447-8]:

> It has been truly said that in the case of a legal mortgage the legal mortgagee can take possession if he choose of the mortgaged property, and being in possession can say "I have nothing to do with the mortgagor's contracts. I shall deal with this property as seems to me most to my advantage." No doubt that would be so, but he would be a legal mortgagee in possession, with both the advantages and the disadvantages of that position. This appellant is not in that position. He is an equitable mortgagee who has obtained an order of the Court under which its officer takes possession of assets in which the mortgagee and mortgagor are both interested, with the duty and responsibility of dealing with them fairly in the interest of both parties.

1973 CanLII 467 (ON SC)

It appears to me unfortunate that the same terms "receiver-manager" are customarily applied to both types of offices, when in fact they are quite different. The difference is well pointed out in the case of Re B. Johnson & Co. (Builders) Ltd., [1955] 1 Ch. 634, where it was held that a receiver and manager of a company's property appointed by a debenture holder was not an officer of the company within the meaning of the Companies Act. The language of Evershed, M.R., at p. 644 is in point:

> The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager -- as it is said, "out of court" -- is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment ...

Again, at p. 662, Lord Justice Jenkins stated:

> The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. But the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.

. . . . .

> The duties of a receiver and manager for debenture holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business

1973 CanLII 467 (ON SC)

at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous.

In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realized.

Similar principles are to be found in the case of Deyes v. Wood et al., [1911] 1 K.B. 806.

A similar situation to the case at hand arose in the decision in Farrar v. Farrars, Ltd. (1889), 40 Ch. D. 395. In that case three mortgagees in possession were selling under powers of sale in their mortgage to a company formed for the purpose of buying the property. This company was to some extent promoted by one of the mortgagees who had a substantial interest as a shareholder. It was held in that case the sale could not be set aside on the simple ground that F. was a shareholder in the company since the sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to

1973 CanLII 467 (ON SC)

himself along with other people. But it was also held that there was such a conflict of interest and duty in F., of which the company had notice, as to throw upon them the burden of upholding the sale. It was held that the company had discharged themselves of this burden by showing that F. had taken all reasonable pains to secure a purchaser at the best price. Again in that case the rights and duties of a mortgagee in possession, which is our situation, are dealt with. Chitty, J., at p. 398 said this:

> The first question then is, was the sale a dishonest transaction? A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price but he may proceed to a forced sale for the purpose of paying the mortgage debt ... The mortgagor has no right after the power has arisen to insist that the mortgagee shall wait for better times before selling.

That case went to appeal and Lord Lindley, L.J., at p. 410 used this pertinent language:

> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed.

While I find that the purchase by Mr. Bawden of the shares in New Unisphere, in the amounts and at the times when he did, were purchases which he should better not have made, I cannot find anything in these transactions to impugn the validity of

1973 CanLII 467 (ON SC)

the final sale by tender. I am satisfied that Mr. Bawden and his principal Roynat did the very best they could to protect their own security but at the same time went out of their way to assist Ostrander in so far as his private negotiations had any hopes of success. Other than the tactless purchase of these shares and the minor misjudgment with respect to certain payments with which I have already dealt, I can find nothing censurable in Mr. Bawden's conduct. I am satisfied that the power of sale was exercised in a fair and proper manner and that in the opinion of Roynat and its advisers the better offer was obtained. I do not consider it necessary to analyse in detail the nature of the offers that were being considered because no evidence has been placed before the Court to show that the Toprow offer was a disadvantageous one or that the White offer was a better one. Certainly as far as New Unisphere and its subsidiaries are concerned there is no evidence to indicate that they had the slightest knowledge of the purchases by Bawden and they are in the position of purchasers in good faith without notice of any such wrongdoing, if such it were, and accordingly the sale must stand. No legal or moral stigma of any kind should be attached to any defendant in this action and the most that can be said against Mr. Bawden is that he was guilty of misjudgment in certain respects. There was an aura of suspicion which had to be dispelled by the defendants and which they have succeeded in doing. I do not think the plaintiff should be further penalized than by dismissing his action against the defendants with costs, except that in the case of the proceedings against Bawden who was separately represented, the action should be dismissed without costs. As already indicated, there should be a reference to pass accounts and to fix the receiver-manager's costs. If any questions arise as to the drawing up of the judgment, I may of course be spoken to.

Action dismissed.

1973 CanLII 467 (ON SC)

Court File No.: CV-24-00003312-0000

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

ROYAL BANK OF CANADA	**- and -**	**TRANS GLOBE LOGISTICS INC., ET AL.**
Applicant		**Respondents**

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT BRAMPTON

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: (416) 367-6000
Fax: (416) 367-6749

ROGER JAIPARGAS – LSO No. 43275C
Tel: (416) 367-6266
rjaipargas@blg.com

NICK HOLLARD – LSO No. 83170O
Tel: (416) 367-6545
nhollard@blg.com

Lawyers for the Applicant