Court File No. CV-22-00684100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:

CANADIAN WESTERN BANK

Applicant

- and -

2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Respondents

ABBREVIATED BOOK OF AUTHORITIES
OF THE CORPORATION OF THE CITY OF MISSISSAUGA
(Lift Stay motion returnable July 24, 2023)

July 17, 2023

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INDEX

1995 CarswellOnt 374
Ontario Court of Justice (General Division), Commercial List

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.

1995 CarswellOnt 374, [1995] O.J. No. 1482, 23 O.R. (3d) 781,
28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, 55 A.C.W.S. (3d) 953

HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation v. COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR.

COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR. v. HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation, DONALD BABB, JOHN CALDERWOOD, JOHN EDMONDS, ARNOLD GEORGIAN, GARFIELD WOODS, ROY J. PARKIN and MICHAEL GREEN

R.A. Blair J.

Judgment: May 30, 1995
Docket: Docs. B117/92 and 92-CQ-20023

Counsel: *Rob B. Thibodeau*, for receiver Deloitte & Touche Inc.
Lee A. Pinelli, for Corporation of the town of Flamborough.
John M. Hovland, for Hamilton Wentworth Credit Union Limited, in liquidation.

Subject: Corporate and Commercial; Insolvency; Public; Civil Practice and Procedure; Tax — Miscellaneous; Municipal

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.a General principles
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iii Costs
Municipal law
XXI Tax collection and enforcement
XXI.4 Remedies available to municipality
XXI.4.d Priorities
Municipal law
XXII Tax sales
XXII.1 Nature and scope of legislation

Headnote

Municipal law --- Tax collection and enforcement — Remedies — Municipality — Priorities — Miscellaneous priorities
Municipal law --- Tax sales — Nature and scope of legislation
Receivers — Costs and remuneration — Priorities — Municipality's claim for taxes having priority over receiver's claim for fees and disbursements by virtue of s. 382 of Municipal Act and Municipal Tax Sales Act — Municipal Act, R.S.O. 1990, c. M.45, s. 382 — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

Receivers — Order appointing receiver — Court having jurisdiction to add leave requirement in receivership order but not having jurisdiction to interfere with or abridge scheme set out in Municipal Tax Sales Act as part of process of granting leave — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

The plaintiff was appointed receiver and manager of the assets and property of a debtor company. The only asset of the debtor consisted of a trailer park, which it was operating as an illegal non-conforming use. The estimated market value of the property was $500,000; however, total municipal tax arrears exceeded $559,000. The municipality took the position that it was entitled and obliged to pursue its remedies of sale to collect tax arrears under the *Municipal Tax Sales Act* (Ont.). The receiver argued that the municipality was barred from taking such steps by virtue of a "no proceedings without leave" provision in the receivership order appointing it as receiver and manager. The receiver also argued that it was entitled to payment of its fees and disbursements for preserving the property in priority to the payment of the municipality's taxes and it brought a motion for such a declaration. The municipality brought a cross-motion for leave to exercise its tax sale rights and remedies under the *Municipal Tax Sales Act*.

Held:

The motion was dismissed and the cross-motion was allowed.

A court has jurisdiction to make a receivership order that any party must first obtain leave before commencing any proceedings in respect of the assets of the debtor. The municipality was not, however, to be denied leave in seeking to pursue a statutorily prescribed remedy. The court had no jurisdiction to impose terms of sale different from those set out in the *Municipal Tax Sales Act* as part of the process of granting leave. The Act sets out a complete statutory code respecting the sale of lands for the recovery of municipal tax arrears and for the disposition of the proceeds from such sales. The court had no authority to interfere with or impose a different scheme.

There was no discretion, in view of the provisions of the *Municipal Tax Sales Act* and s. 382 of the *Municipal Act* (Ont.), for a receiver's claim for fees and disbursements to have priority over a municipality's claim for taxes.

A receiver and manager is an officer of the court. That position does not provide it with carte blanche to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. Although a court-appointed receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain. There must be an air of commercial reality to its efforts.

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Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31 —

s. 36

s. 40 [am. S.O. 1994, c. 27, s. 40]

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Interpretation Act, R.S.O. 1990, c. I.11 —

s. 29(1) "person"

s. 29(2)

Municipal Act, R.S.O. 1990, c. M.45 —

s. 382

Municipal Tax Sales Act, R.S.O. 1990, c. M.60 —

s. 1

s. 3 [am. S.O. 1994, c. 27, s. 124(1)]

s. 4 [am. S.O. 1994, c. 27, ss. 124(2), 124(3)]

s. 5

s. 8

s. 9 [am. S.O. 1994, c. 27, s. 124(4)]

s. 9(2)

s. 9(11)

s. 10 [am. S.O. 1994, c. 27, ss. 124(5), 124(6)]

s. 12(6)

s. 18

Regulations considered:

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Municipal Tax Sales Rules,

Reg. 824

Motion for declaration respecting priority of receiver's fees and disbursements over municipal taxes; cross-motion for leave to commence municipal tax sale proceedings.

***R.A. Blair J.*:**

A. Facts

Background

1 These proceedings involve two motions arising in the context of a receivership.

2 The receivership of Courtcliffe Parks Limited has been a particularly tortured, difficult, and expensive process. In this instance, the motions are brought to resolve the competing interests of the receiver, on the one hand, and the corporation of

the town of Flamborough, on the other hand. The receiver seeks protection for its fees and disbursements incurred during the course of the receivership. The municipality seeks to pursue its remedies for the collection of outstanding realty taxes.

3 A trailer park, known as "Courtcliffe Park," in the town of Flamborough, is the only asset of the debtor company; and, thus, the only possible source of funds for either of these purposes is the sale of the trailer park, which is currently being operated and maintained by the receiver and on which 116 mobile homes — most of which are occupied on a year-round nature — are located.

4 Courtcliffe Parks Limited has been in receivership since an order of this court made on May 5, 1992, to that effect. Deloitte & Touche Inc. ("the receiver") was appointed receiver and manager of all of its property, assets, and undertaking. At the time of the original order, Courtcliffe Park — which does not comply with municipal by-laws and zoning regulations — was home for a group of mobile home tenants who were not, for the most part, paying their rent, and it was plagued by extensive safety hazards and operating deficiencies. Significant costs and expenditures were required to rectify serious electrical, environmental, and health problems — dangerous and improper hydro connections, sewage hazards and garbage disposal inefficiencies, and an unsafe water supply, to name some.

5 In May 1992, the receiver took immediate steps to satisfy urgent safety requirements, and in its first report, filed on June 10, 1992, recommended that the operations of Courtcliffe Park be wound down and that all tenants be ordered to provide vacant possession by October 31, 1992. Authority to do so was granted. There ensued very contentious proceedings regarding the collection of rental arrears and the termination of the tenancies. The date for delivering vacant possession was extended. The receiver's efforts to collect rents and to maintain the property continued.

6 In its third report, filed on March 15, 1993, the receiver presented a plan for the sale of the park, which was approved by order dated April 16, 1993. Appraisals were to be obtained, as part of the plan for sale, on both an "as is-where is" basis and on the basis that all necessary rezoning and approvals were granted and received such that the trailer park would be a legal conforming use. Such appraisals were obtained, on June 7, 1993, from Jacob Ellen & Associates Inc. of Hamilton. They indicated that the estimated market value, *under either basis*, was approximately $500,000.

7 In addition to its efforts to deal with the tenants and to maintain the property, the receiver spent considerable time and energy throughout 1993 in attempting to obtain a rezoning approval from the town of Flamborough in order to facilitate the sale of the park as a legally conforming trailer park. The application for rezoning was rejected.

8 Moreover, the receiver's efforts to sell the property have been similarly unsuccessful. Only one offer has ever been elicited. It was in the amount of $300,000 and was not accepted. According to its sixth report, dated August 15, 1994, and filed in connection with these motions, "the Receiver has not subsequently attempted to sell the property and has received little unsolicited interest." Indeed, the receiver states (at p. 22 of the sixth report):

> Based on the foregoing considerations, and the unique nature of the development, it is uncertain if the Receiver would receive an offer in excess of the appraised value of $500,000, regardless of whether the purchaser intended to develop the property as a year-round mobile home park.

Municipal Taxes

9 At the time of the initial receivership order, on May 5, 1992, Courtcliffe Park's municipal tax arrears, including penalties and interest, totalled $255,729.97. Interest accrues on the arrears at 15 per cent per annum. I am advised that the taxes amount to approximately $120,000 per year. Total arrears as at November 8, 1994 (the latest figures the court has been given), stand at $559,773.51, in any event.

10 Simple arithmetic indicates that municipal taxes alone exceed the appraised value of the property.

11 Apart from a minor payment of $2,832.72 on July 16, 1992, the receiver has made no payments on account of municipal taxes; nor has it made any arrangements for payments to be provided. In the meantime, as Mr. Pinelli points out on behalf of the municipality, the receiver has made the following payments, among others:

Utilities:	$202,430.87
Legal Fees & Disbursements	83,910.79
Receiver and Manager Fees & Disbursements	252,071.25
Total	$538,412.91

B. Issues

12 It is the failure to keep taxes current that has led to the present predicament. Two central issues have arisen.

(1) First, the municipality takes the position that notwithstanding the receivership proceedings, it is entitled — indeed, *obliged* — to pursue its remedies of sale in order to collect its tax arrears under the *Municipal Tax Sales Act* R.S.O. 1990, c. M.60. The receiver argues that the municipality is barred from taking any such steps by virtue of the "no proceedings without leave" provision of the receivership order, and that if leave is granted it should only be granted upon terms of sale that are broader than those set out in the *Municipal Tax Sales Act*.

(2) A second issue also arises. The receiver submits that it is entitled to payment of its fees and disbursements, incurred in the process of preserving the property for all creditors — including the municipality — in priority to the payment of the municipality's taxes; and it seeks not only approval of those fees and disbursements, but also a declaratory order establishing such a priority.

C. Law and Analysis

The Receivership Orders

13 By order dated May 5, 1992 — and extended until trial, by order dated May 15, 1992 — Deloitte Touche Inc. was appointed receiver and manager of "the assets, property and undertaking of Courtcliffe Parks Limited or under their control" (collectively, the "assets"). In that capacity, Deloitte Touche Inc. was empowered to do the usual sorts of things that court appointed receivers and managers are empowered to do, including the power

a) to manage, operate and carry on the business of Courtcliffe Parks in all its phases whatsoever;

. . . . .

c) to pay all debts of Courtcliffe Parks which [it] deems necessary or advisable to properly operate, manage and sell the business of Courtcliffe Parks and all such payments to be allowed Deloitte Touche Inc. in passing its accounts *and shall form a charge on the Assets in priority to the mortgage*;

f) to take possession of and control all property owned by Courtcliffe Parks;

g) to enter into an agreement or agreements for the sale of the Assets in whole or in part subject to approval of such sale by this Court;

h) to deal with all tenants and public utilities of Courtcliffe Parks; and

. . . . .

j) to take such other steps as [it] deems necessary or desirable to preserve and protect and realize upon the assets and manage and operate the business of Courtcliffe Parks.

14 The order also contained the customary provision precluding actions or proceedings in respect of the assets or against any of the parties without leave of the court. Paragraph 5 states:

5. This Court Orders that no action or other proceedings (whether through the courts, tribunals, or otherwise) shall be taken or continued in respect of the Assets, Courtcliffe Parks or Deloitte Touche Inc. in relation to Courtcliffe Parks without leave of this Court first being obtained upon seven days' notice being made to Deloitte Touche Inc. and the parties to these proceedings.

Is Leave Required?

15 The municipality argues that leave is not necessary and that paragraph 5 can have no bearing upon the ability of the municipality to pursue its tax arrears remedies under the *Municipal Tax Sales Act*. Mr. Pinelli submits on its behalf that the court has no jurisdiction to abridge or abrogate the statutory rights of a municipality under the *Municipal Tax Sales Act*, supra, or the *Municipal Act*, R.S.O. 1990, c. M.45, s. 382.

16 The issue is not free from difficulty. In general, however, "[w]here any third party has rights paramount to the receiver and manager, such third party must seek leave of the court before initiating or continuing proceedings already taken": Frank Bennett, *Receiverships* (Scarborough, Ont.: Carswell, 1985), at p. 19.

17 I have concluded — whatever may be the effect of other arguments relating to property tax arrears and the operation of the statutory tax sales scheme — that the court has jurisdiction to make an order such as that contained in paragraph 5 above which encompasses steps taken by a municipality pursuant to such a scheme.

18 The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors: *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.), at p. 88; *Re Winmil Holidays Co.* (1984), 10 D.L.R. (4th) 572 (B.C. C.A.), at pp. 579-580. The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with whatever happens to the property that comes under its administration. See Bennett, supra, at pp. 110-111.

19 All of the assets, property, and undertaking of the debtor come under its administration. They remain the property, assets, and undertaking of the debtor, notwithstanding the receivership, until otherwise disposed of. They do not vest in the receiver and manager, and they do not become the property of the municipality simply because the legislation creates a statutory lien. The municipality remains the claimant of a statutory lien or charge, by virtue of s. 382 of the *Municipal Act*. The assets remain under the aegis of the court's administration. An order requiring that leave be obtained before steps are taken that will affect the assets under that administration is therefore, in my view, within the jurisdiction of the court, by virtue of its inherent jurisdiction and by virtue of its statutory jurisdiction respecting the appointment of receivers "where it appears to a judge of the court to be just and convenient to do so": the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

20 Mr. Pinelli submitted that I should read the wording of paragraph 5 of the order narrowly, and hold that it is not broad enough in its language to catch steps taken by a municipality respecting tax arrears. The words "other proceedings" have to be read in context, the argument goes, and should be read together with the words they accompany, such as "action," "courts," and "tribunals" in paragraph 5, and "suits," "administrative hearings," "cases," and "actions in law" in paragraph 4 of the order. The legal principle for this concept is referred to as the ejusdem generis rule. I have little difficulty in concluding, however, that the purpose of paragraph 5 of the receivership order is to preserve the integrity of the court's role as supervisor over the realization and preservation of the assets which have fallen within its administration, and that its language should be read broadly with that objective in mind.

21 I recognize that in other cases, such as *Re Great West Life Assurance Co.*, [1927] 3 W.W.R. 302 (Man. K.B.), the words "other proceeding" have been interpreted to exclude extra-judicial matters, such as foreclosure of mortgages in the land titles or registry offices. In that case Dysart J. concluded that the language "action or other proceeding" did not encompass such steps. He was of the view that "other proceeding" must mean "some process or step in a matter to be brought before, or pending in, this Court" (p. 303). It is clear from the wording of paragraph 5 of the May 5, 1992, receivership order that it is intended

to be broader than the more restrictive "action or other proceeding" because it provides that "no action or other proceedings (whether through the courts, tribunals, *or otherwise*) shall be taken *in respect of* the Assets" [emphasis added] without leave. To my mind, this language is ample to catch "a process or step in a matter" which is taken "otherwise" than through the courts or an administrative tribunal, "in respect of" the sale of the Courtcliffe Park assets for tax arrears.

The Test for Leave, and Its Parameters

22 It has been held that leave to commence proceedings with respect to receivership assets is to be granted unless there is no foundation for the claim or the action is frivolous or vexatious. At the same time, however, the granting of leave is not to be dealt with on a perfunctory basis or given in a carte blanche manner; it calls for a careful examination of the legal and factual issues. See *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.).

23 When what is sought is leave to pursue a remedy which will have a significant impact upon the very assets which form the subject matter of the receivership, the foregoing caveats regarding the granting of leave apply with particular vigour, in my view. Here, of course, the remedy sought will result in the disposition of the only asset which is available to satisfy either the claims of creditors or the claim of the receiver for recovery of its fees and disbursements.

24 Nonetheless, what the municipality seeks to do is to pursue a remedy which is clearly given to it by statute. At whatever level the onus is pitched, it seems to me that the municipality has met it and, accordingly, that leave must be granted.

25 The question remains, however, whether it should be granted upon terms of sale different from those set out in the *Municipal Tax Sales Act*, supra, and, if so, on what terms. This, in turn, raises an additional — and preliminary — question, namely, whether the court has any discretion, in circumstances such as these, to impose, as a term of granting leave, a sale mechanism different than that mandated by the Act.

Does the Court have Jurisdiction To Impose Terms of Sale Different from those Set Out in the Municipal Tax Sales Act?

26 It does not follow that simply because the municipality must seek leave to pursue its remedies under the *Municipal Tax Sales Act*, the court has jurisdiction to impose terms of sale different from those set out in the Act as a part of the process of granting leave. The two matters are different, and raise different considerations, in my view.

27 The court's power to require leave to be obtained relates to its supervisory and administrative jurisdiction over the receivership process and is necessary to preserve the integrity of that process. The proceedings with respect to which leave is granted stand on their own feet, however; and, if the statutory remedy being pursued by the municipality carries with it a mandatory procedure prescribed by statute, the court has no authority to interfere with that statutorily prescribed remedy and procedure.

28 That is precisely the case with the provisions of the *Municipal Tax Sales Act*, it seems to me. Failure by a property owner or tenant to pay property taxes starts a clock ticking under those provisions. If that clock is not stopped, it triggers the operation of a taxpaying time bomb which, with one exception, can only be diffused by payment of the amounts owing to the municipality or by negotiating an extension agreement with the municipality for making such payment.

The Tax Sale Scheme under the Municipal Tax Sales Act

29 The scheme, as set out in s. 1, 3, 4, 5, 8, 9, and 10 of the *Municipal Tax Sales Act*, is as follows.

30 Where tax arrears with respect to improved land in a municipality remain owing for more than three years, the treasurer of the municipality may register a tax arrears certificate against "the title to the land with respect to which the tax arrears are owing." Notice of registration is given to the assessed owner of the land, the assessed tenants in occupation of the land, and to persons appearing on the register of title to have an interest in the land. Before the expiry of one year following the registration of the tax arrears certificate, any person may have the certificate cancelled upon payment of what is defined in the Act as the "cancellation price," that is, upon payment of all outstanding taxes, together with any outstanding penalties and interest and the

municipality's reasonable costs of collection. If the cancellation price is not paid, however, "the land *shall be sold or vested in the municipality* in accordance with section 9 [of the Act]" (s. 5). [Emphasis added.]

31 There exists one possibility for avoiding a sale if the cancellation price is not paid. Section 8 provides that the municipality may authorize an extension agreement with the owner of the land, extending the time for payment on certain terms. That authorization, however, must be in the form of a by-law "passed after the registration of the tax arrears certificate *and before the expiry of the one-year period*" mentioned above. [Emphasis added.] Nothing in the statute permits the authorization of an extension agreement *after* the one-year period has expired.

32 Where, at the end of the one-year period, the cancellation price has not been paid and there is no subsisting extension agreement, s. 9(2) of the Act states clearly that:

> the land *shall* be offered for public sale by public auction or public tender.

33 Regulation 824, promulgated pursuant to s. 18 of the Act, sets out the *Municipal Tax Sales Rules* for such sales.

34 If there is no successful purchaser, the land vests in the municipality. Subsection 9(11) provides that the treasurer is not bound to inquire into or form any opinion of the value of the land before conducting the sale, nor is he or she under any duty to obtain the highest or best price.

35 While, under s. 12(6) of the Act, there is some residual discretion in the treasurer of a municipality — the one "exception" referred to above — to halt proceedings by registering a cancellation certificate if, in his or her opinion, it is not in the financial interest of the municipality to continue or it is not practical or desirable to continue because of some neglect, error, or omission, there is nothing in the statute which permits the court to intervene in such a fashion.

36 Finally, s. 10 dictates the way in which the sale proceeds are to be applied. They shall be applied,

> (a) firstly, to pay the cancellation price;
>
> (b) secondly, to pay all persons, other than the owner, having an interest in the land according to their priority at law; and
>
> (c) thirdly, to pay the owner.

37 In my view, these provisions set out a complete statutory code of procedure respecting the sale of lands for the recovery of municipal tax arrears and for the disposition of the proceeds from such sales. I see no reason to read the mandatory "shall" found in the various foregoing provisions to read the permissive "may." Section 29(2) of the *Interpretation Act*, R.S.O. 1990, c. I.11, as amended, states that the word "shall" is to be construed in the imperative, and while there are circumstances in which the word may be given a different connotation, the court should assume that the legislature, when it uses "shall," intends the provision to be imperative, unless such an interpretation would be inconsistent with the context or render the clause in question irrational or meaningless: see *Public Finance Corp. v. Edwards Garage Ltd.* (1957), 22 W.W.R. 312 (Alta. T.D.).

38 There is nothing in the context of the *Municipal Tax Sales Act* which would require such a reinterpretation of the word "shall." Municipalities must fund their operations and activities on behalf of the public from the public purse. The legislature has clearly directed them to do so, in part, at least, by collecting the taxes due to them (thus, incidentally, reducing the amount of funding that must be directed to the municipalities from provincial sources), and has put in place a strict regime for doing so.

39 The court, in my opinion, has no authority to interfere with or to alter that statutory scheme or to impose a different regime for the ap plication of proceeds. To do so would be to amend the legislation. That is not the court's function. See, for example, *Standard Trust Co. v. Lindsay Holdings Ltd.* (1994), 15 C.E.L.R. (N.S.) 165 (B.C. S.C.), at pp. 172-173.

40 Accordingly, in my view, the court has no jurisdiction in these circumstances to impose terms of sale different from those set out in the *Municipal Tax Sales Act* as a condition of granting leave to proceed.

Receiver's Fees and Disbursements

41 It would seem to follow from the foregoing that there is no discretion in the court to declare the receiver's claim for fees and disbursements to be entitled to priority over the municipality's claim for taxes.

42 This view is fortified by the provisions of s. 382 of the *Municipal Act*, R.S.O. 1990, c. M.45. While the sections of the *Municipal Tax Sales Act*, referred to above, set out the method of enforcement and the statutory scheme for application of the proceeds of sale, it is s. 382 of the *Municipal Act* which provides the statutory source of a municipality's authority to collect realty taxes and to enforce collection against the land in question. Section 382 states:

> *Who liable for taxes, lien on lands. — 382.* The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration.

43 Do these statutory provisions in the *Municipal Act* and the *Municipal Tax Sales Act* preclude a court from awarding a receiver and manager a type of "super priority" over the claims of a municipality for proper taxes, in appropriate circumstances? In my view, they do. A brief review of the principles surrounding the remuneration of a receiver and manager may be helpful to place this decision in context, however.

44 In Ontario, the basic principles applying to the recovery of fees and disbursements by a receiver and manager were restated by Houlden J.A. in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, supra, at pp. 87-92. A receiver and manager must look to the assets under its control for recovery of fees and for reimbursement of its charges and expenses. In the absence of an indemnity agreement to that effect, it cannot look to the secured creditor at whose instance it was appointed, or to other creditors for payment; and, of course, the court has no funds to provide for payment. Moreover, the ability to recover is *generally* confined to the equity in those assets. In order to protect receivers and managers, however, and to ensure that they are fairly remunerated for their efforts — and in order to ensure that there will be people willing to undertake the important task of acting as receiver and manager — there are certain exceptions to the qualification that recovery is generally limited to the equity in the assets which are the subject of the receivership. Amongst these exceptions are the following three:

> 1. if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holder;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property, it may be given priority for such expenditures over secured creditors.

45 See also *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); *Oberman v. Mannahugh Hotels Ltd.* (1980), 34 C.B.R. (N.S.) 181 (Man. Q.B.); *Crédit foncier franco-canadien v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 (Alta. T.D.), affirmed (1966), 56 W.W.R. 623 (note) (Alta. C.A.).

46 Thus, while the claim of a receiver and manager for fees and disbursements will normally be confined to the equity in the assets in question, there are circumstances in which those fees and disbursements may be ordered paid in priority to secured creditors where the assets are insufficient to cover all liabilities. It has even been held that the court may order the fees and disbursements of a receiver and manager to be paid out of trust funds held by the debtor in circumstances governed by statute, where the trust funds were being administered by the debtor and where recovery on behalf of the beneficiaries was a

main reason for the appointment of the receiver and manager: *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (C.A.), at p. 389 and p. 398.

47 In none of the foregoing cases, however — and in none that my own research reveals — has a receiver and manager been granted priority over municipal realty taxes, although in numerous instances such priority has been given over secured creditors. The reason, I conclude, is because the statutory scheme in place forbids it.

48 Section 382 of the *Municipal Act* is quite clear:

> The taxes due upon any land ... are *a special lien on the land in priority to every claim*, privilege, lien or encumbrance *of every person* except the Crown. ... (Emphasis added.)

49 Mr. Thibodeau argued that the receiver is not a "person" within the meaning of that section and, consequently, that the provisions can have no application to preclude the court from awarding priority to the receiver's fees and disbursements. I cannot accept this argument. Nothing in the relevant statutes excludes a receiver and manager as a "person" for these purposes. In fact, only the Crown is excluded: expressio unius, exclusio alterius. Moreover, the receiver is a corporate entity, and thus a "person" as defined by the *Interpretation Act*, supra, s. 29(1). "Person," in my view, is simply the generic word used by the legislature to describe those making claims against the land, of whatever type or origin. What s. 382 provides for is a special lien in favour of a municipality for realty taxes due, in priority to all other claimants, except for the Crown. The receiver is clearly in the category of claimant and falls easily into what is contemplated by the language of the section. Tortuous arguments about whether or not it is a "person" are unnecessary.

50 One note in passing may be helpful to support this interpretation. In this matter, the only receivership asset of note is the land comprising the Courtcliffe Parks trailer park. The evidence indicates it is unlikely that the land will be sold for more than the municipal tax "cancellation price." If it were to be the case that it did, however, one would expect the receiver to be asserting a claim to be second in line for the application of the proceeds under s. 10 of the *Municipal Tax Sales Act*. To do so, it would have to be "a person" other than the owner having an interest in the land. Would the receiver accede to an argument in such circumstances that it was not entitled to recover from the excess proceeds over and above the realty taxes, because it was not a "person" as contemplated by the Act? It seems unlikely to me that it would so so.

51 Accordingly, I am of the opinion that the statutory scheme enacted through the *Municipal Act* and the *Municipal Tax Sales Act* for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.

52 While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case — and the understanding in the industry — concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be made by a receiver and manager. As Mr. Justice Houlden pointed out in *Robert F. Kowal Investments v. Deeder Electric Ltd.*, supra, at pp. 91-92, a receiver and manager is generally given priority over security holders for such payments. He cited the following passage from the judgment of James L.J. in *Re Regent's Canal Ironworks Co.; Ex p. Grissell* (1875), 3 Ch. D. 411 (C.A.) (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, *paying rates and taxes, which would be necessary to prevent any forfeiture*, or putting a person in to take care of the property. (Emphasis added.)

Discretion

53 I should add, before concluding, that if I am in error in arriving at the foregoing conclusions, and there is some discretion in the court to grant the receiver priority over the municipality for its fees and disbursements, I would not have granted such an order in any event, in the circumstances of this case, except to a limited extent. I would have been prepared to grant the receiver

priority only to the extent of its fees and disbursements (including its costs for the "necessary preservation and improvement" of the property) incurred before the Jacob Ellen & Associates Inc. appraisals obtained in June 1993.

54 There is no doubt that when the receiver was appointed, immediate emergency measures were required to place the trailer park in a position where it did not pose a hazard to the health and safety of its existing occupants. Moreover, it was reasonable, in my view, for the receiver to determine to wind down the operations of Courtcliffe Parks and to put it in a position to be sold. Carrying out these functions turned out to involve a great deal of time, effort, and expense, and the participation in a number of court proceedings.

55 In his affidavit filed in support of the receiver's motion, Bruce K. Robertson, who is the file manager of the receivership, deposes:

> I unequivocally state to this Court that the time and disbursements spent by the Receiver and its legal counsel relates (sic) almost exclusively to the maintenance, management, preservation and preparation of the subject property of Courtcliffe Parks Limited situated in the Town of Carlisle being carried on as a trailer park. The requirements upon the Receiver in this receivership have been extensive and extremely time consuming in view of the nature of the receivership, the attacks that have been made by supposed interested parties on the receivership and the requirements which have been tremendous with respect to dealing with each and every individual tenant of the Courtcliffe Parks property. As can be determined from the previous five reports filed by the Receiver and the approximate nine previous court appearances, the material for which was all prepared by the Receiver and its counsel to protect, preserve, maintain and prepare the subject property, the demand upon the Receiver's time and that of its legal counsel has been extensive, continuous and expansive.

56 As the judge who has presided over the receivership and been the recipient of the materials referred to, I have no hesitation in accepting what Mr. Robertson has said with respect to the time and efforts of the receiver and its counsel, and the purposes of those endeavours. That is not the end of the matter, however.

57 The receiver argues that it should be protected vis-à-vis the municipality's claim for taxes because the fees it has earned and the moneys it has expended have been incurred (i) to preserve and realize the assets for the benefit of all the creditors, including the municipality; and/or (ii) for the necessary preservation or improvement of the property.

58 A receiver and manager is the officer of the court. That position does not provide it with a carte blanche, however, to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. While a receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain: *Standard Trust Co. v. Lindsay Holdings Ltd.*, supra, at p. 174. There must be an air of commercial reality to its efforts.

59 Here, it must have been apparent to all involved upon receipt of the appraisals in mid-1993 that the receivership assets were unlikely to yield very much more than the outstanding property tax obligations existing at the time. Certainly, the total of those tax obligations plus the then existing fees and disbursements of the receiver exceeded the estimated recovery from the property — *regardless of whether it was sold on an "as is-where is" basis or on an improved basis, after all necessary rezoning approvals had been obtained (assuming they could be obtained)*.

60 One wonders how anything other than an orderly wind-down of the trailer park and a tax sale could be justified, after that point.

61 Assuming, without concluding, that some other approach could be justified in the circumstance, the receiver had other ways of protecting itself and of ensuring that the municipality did not pursue its tax sale remedies under the *Municipal Tax Sales Act*. It could have paid current taxes to prevent the three-year period, which gives rise to the registration of a tax arrears certificate under the Act, from running. It could have negotiated an extension agreement with the municipality, under s. 8 of the Act, to prevent the one-year period leading to a mandatory sale from expiring. It could have sought an indemnity agreement from the secured creditor. However, it did none of these things.

62 Although there have apparently been scattered volleys back and forth between the receiver, or its solicitors, and the municipality, or its solicitors, it is apparent that the receiver decided to ignore the tax arrears certificate and its implications, and to proceed on the basis that it could put the trailer park on its financial feet and obtain rezoning approval for a going concern sale. This ignores the reality that a going concern sale will not — even on the receiver's own estimate — yield enough to recoup more than the amount claimed by the municipality.

63 The receiver has also submitted that the municipality's assessments are erroneous and that they will be appealed. No steps have been taken to launch such an appeal, though, and the time within which an appeal lies has elapsed under the *Assessment Act*, R.S.O. 1990, c. A. 31, ss. 36 and 40.

64 Thus, while I would be inclined — if I had the discretion to do so — to grant the receiver some form of priority with respect to its disbursements incurred for the purposes of "necessary preservation and improvements" of the trailer park prior to June 1993, and perhaps for its related fees, the extent of that priority, I think, is something that would have to await the results of the tax sale. Only then could the court's discretion, in balancing the interests of the receiver, the municipality, and the secured creditor, and in considering all of the circumstances, be properly exercised.

65 I would not be prepared to make a blanket order granting the receiver priority over the municipality's claim for property tax arrears for its fees and disbursements in the circumstances here prevailing.

Approval of the Receiver's Fees and Disbursements

66 For similar reasons, I am of the view that approval of the receiver's fees and disbursements should await the final disposition of the property, and I make no order in that respect at this time.

D. Conclusion

67 For the foregoing reasons, the receiver's motion is dismissed and the cross-motion of the corporation of the town of Flamborough seeking leave to exercise its statutory tax sale rights and remedies pursuant to the *Municipal Tax Sales Act*, R.S.O. 1990, c. M.60, as amended, is allowed. An order is also granted directing the receiver to serve the corporation of the town of Flamborough with all materials in relation to all motions brought regarding the receiver's management of Courtcliffe Parks Limited.

68 Although the town was unsuccessful with respect to its argument concerning the need for the granting of leave for it to proceed, the substantial issues on these motions related to the terms upon which it would be able to proceed with its tax sale rights and remedies, and to the question of whether the receiver was entitled to priority with respect to its fees and disbursements. The town has been successful on these issues and, accordingly, is entitled to its costs of the motions. I will fix the costs if counsel are unable to agree upon them. Written submission may be made in that regard within 30 days of the release of these reasons, if necessary.

Motion dismissed; cross-motion allowed.

CANADIAN WESTERN BANK v. 2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Court File No. CV-22-00684100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at **Brampton**

ABBREVIATED BOOK OF AUTHORITIES OF THE CORPORATION OF THE CITY OF MISSISSAUGA

(Lift stay motion returnable July 24, 2023)

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