File No. CI 23-01-43002

THE KING'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT,* C.C.S.M. c. C280

BETWEEN:

FIRST NATIONAL FINANCIAL GP CORPORATION,

Applicant.

- and -

5684995 MANITOBA LTD., 6315402 MANITOBA LTD. and K&P PROPERTIES INC.,

Respondents.

MOTION BRIEF OF THE RESPONDENTS 5684995 MANITOBA LTD and K&P PROPERTIES INC HEARING DATE: NOVEMBER 2nd, 2023

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PART I: LIST OF DOCUMENTS RELIED UPON BY RESPONDENT

1. The Affidavit of Patrick Penner, affirmed October 21st, 2023;
2. The Affidavit of Sonia Pacheco sworn September 27, 2023; and
3. The Affidavit of Tamara Hines, sworn October 27, 2023.

PART II: LIST OF AUTHORITIES

TAB

1. Section 243 of the *Bankruptcy and Insolvency Act*;

2. Section 55 of *the Court of King's Bench Act*;

3. *Visser v. Godspeed Aviation Ltd.* (2020 BCSC 1241)

4. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010 BCSC 477)

PART III: POINTS TO BE ARGUED AND ARGUMENT

1. The issue to be determined is whether this Honourable Court ought to appoint a receiver to manage the affairs of the Respondent corporations, and the property known as 737 Sargent Avenue in Winnipeg, Manitoba ("the Property"). This brief represents the position of 5684995 MANITOBA LTD and K&P PROPERTIES INC (as noted previously, this does not include 6315402 Manitoba Ltd.), collectively "these Respondents" hereafter.

Overview

2. The Applicant assumes its entitlement to the order for receivership, for little reason more than arrears on the debts. Counsel for the Applicant used the term "inevitable" in reference to its expected outcome.

3. These Respondents submit that the Applicant's entitlement should not be so readily assumed. While it is a serious matter that there are arrears, the Applicant still has the onus to prove that it has met

the legal test. A receivership appointment remains an extraordinary remedy, one that is not simply warranted as a matter of course. The Applicant has other remedies available (such as foreclosure or issuing a Statement of Claim) to address the arrears and the sale of the Property. These Respondents submit that upon consideration of all the criteria this Honourable Court ought to conclude that the Applicant has not cleared the threshold to discharge its onus that a receivership appointment is just, or convenient.

Legal Principles

4. The criteria to be considered for the appointment of a Receiver are well established. These Respondents do not take issue with the legal authorities and general principles of law set out in the Applicant's brief. These Respondents do, however, submit that *all* of the criteria ought to be considered, and differ as to certain points of emphasis from the Applicant's position. Further, these Respondents differ in how the principles cited apply to the facts of this particular case.

5. The starting point is that the Court may appoint a receiver if it considers it to be just or convenient to do so.

Section 243(1) of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 ("BIA") [TAB 1]

Section 55 of the *Court of King's Bench Act*, S.M. 1988-89, c. 4 ("Act") [TAB 2]

6. The case law repeatedly includes a list of criteria to be considered. Whether the source is from *Bennett on Receivership* or *Houlden & Morawetz* text, the list is essentially identical. The criteria, alphabetized from (a) to (p), are set out in several of the Applicant's authorities, as well as at paragraph 50 of *Textron Financial* (Tab 3). Briefly summarized, the criteria are as follows:

a) whether **irreparable harm** might be caused if no order were made …;
b) the **risk to the security holder** …;
c) the **nature of the property**;
d) the apprehended or actual **waste** of the debtor's assets;
e) the **preservation and protection of the property** pending judicial resolution;
f) the **balance of convenience** to the parties;
g) the fact that the creditor has **the right to appoint a receiver under the documentation provided for the loan**;
h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter **difficulty with the debtor** and others;
i) the principle that the **appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly**;
j) the consideration of whether a court appointment is **necessary** to enable the receiver to carry out its' duties more efficiently;

k) the **effect of the order upon the parties**;
l) the **conduct of the parties**;
m) the **length of time** that a receiver may be in place;
n) the **cost** to the parties;
o) the likelihood of **maximizing return** to the parties;
p) the goal of **facilitating the duties of the receiver**.

7. A further principle, one not highlighted in the Applicant's material, and expressed in the case law in two slightly different ways, is in regards to which party bears the onus. In *every* case it is the Applicant, rather than the Respondent, that bears the onus of establishing that a receiver is required.

Visser v. Godspeed Aviation Ltd (2020 BCSC 1241) at paragraph 48

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. at paragraphs 53 and 54

8. A similar point has been made, in slightly different language, to state that it is not permissible to begin the assessment with the presumption that a creditor is entitled to a Court appointed receiver.

Visser v. Godspeed Aviation Ltd (2020 BCSC 1241) at paragraph 30

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. at paragraph 55

Factual Context

9. As with all matters before this Honourable Court, careful consideration has to be given to the particular facts of the case. The evidence available to be relied upon is contained in three affidavits, listed above.

10. The Applicant's position is rooted almost entirely in the fact that the Respondents have fallen into arrears in regards to the payments related to the Property. Notably, the Applicant has put forward no direct evidence as to the state of the Property. What little evidence it has put forward regarding the status or management of the Property is hearsay, and to some extent less than that. The Applicant also has put forward no evidence as to what steps it anticipates a Court appointed receiver might take, or how it might manage the Property in a different way than these Respondents have been.

11. These Respondents, in the evidence of Patrick Penner, have set out more detailed facts regarding this Property, as well as some of their experiences in another receivership situation, one which was referred to by counsel for the Applicant. Certain facts are

undisputed:

A. the Property is in a troubled area of Winnipeg, one which requires a relatively high level of supervision;

B. Mr. Penner remains actively engaged in securing and repairing the Property;

C. Mr. Penner is in the midst of advancing an insurance claim related to the fire, which he anticipates would assist in paying towards the arrears owed to the Applicant; and

D. Significant progress has been made towards rectifying the fire related issues.

12. It is also undisputed that appointing a receiver will result in considerable costs, which impact all of the parties with an interest.

Submission

13. Applying the factors set out in the legal authorities to the facts of this case should give this Court considerable pause prior to appointing the receiver.

14. Beginning with the first factor identified in the lists set out in the

case law, the issue is whether irreparable harm might be caused if no order were made. This does not support the Applicant. The asset is real estate, and insurance is in place. Any additional losses would be purely financial, and though the Respondents are corporations the materials show that Mr. Penner has a personal covenant.

15. The next four criteria (as set out at b, c, d and e), contemplate the risks as to the particular nature of the property. A brief analysis of the facts in this case would favour the Respondent's position that a receiver is not warranted. The secured property is real estate, which is insured, and which the Respondent is actively engaged in repairing and securing. Unlike many of the asset portfolios in the case law submitted by the Applicant, in this case there is no risk of chattels simply disappearing. Moveable assets like vehicles (*Bank of Montreal v. Carnival National Leasing*), cattle (*Linden Leas*), or retail inventory (*Nygard*) pose a far greater risk of waste. No evidence before this Court suggests that the receiver would do better than the Respondent has been doing.

16. The balance of convenience consideration is the sixth element to

be considered. It has also been applied by the Manitoba courts in determining what is *just*. The balance of convenience consideration requires an assessment of the relative impact on the parties, and determination as to which party would suffer the greater harm. This analysis resembles the test for an injunction, in accordance with section 55 of *The Court of King's Bench Act*.

17. The evidence does not identify any harm that the Applicant would suffer if a receiver were not appointed. Notably, the lack of a receivership appointment would not prevent the Applicant from moving forward with other remedies available to it. Foreclosure proceedings have been commenced, and it can sell the Property through that process. It can issue a Statement of Claim, if it sees fit.

18. On the other hand, the Respondents would be effectively crippled by such an order. It would put an end to the extensive efforts Mr. Penner has been making, with some degree of success, in completing repairs and rendering the Property habitable again. All matters would be taken out of the Respondents' control. It is

therefore submitted that the balance of convenience favours the Respondents.

19. It is acknowledged that (g), the seventh factor, considering whether there was documentation which contemplated the appointment of a receiver, is a factor which favours the Applicant. However, it must be emphasized that this is but one factor, and it merely *relaxes* the burden on the Applicant to demonstrate the need for the extraordinary relief.

20. Factor (h) queries whether the creditor has a basis to anticipate difficulty in dealing with the debtor. Mr. Penner, the individual primarily acting for the Respondents, has acted in good faith and been making ongoing efforts that serve the interests of both the creditor and the debtor. Moving forward with obtaining insurance proceeds, repairing the Property, and hiring security services are all actions which have required extensive efforts by Mr. Penner, and which improve the financial viability of the Property.

21. Item (i) in the listed criteria emphasizes that the appointment of a

receiver is *extraordinary relief* that should be granted *cautiously* and *sparingly.* Contrary to the posture of the Applicant, the Court has an obligation to carefully consider the negative impact on <u>all</u> parties that will be impacted, including the Respondents and Mr. Penner personally. An order of this nature should not simply be granted as a routine matter of course, the Applicant must demonstrate a real need for the order. This too would be a factor that would weigh against granting the requested order.

22. Points (j), (m) and (p) are related, in that each of those pertain to the role of the receiver. It is submitted that none of those are significant factors in this case.

23. The factor (l) requires the Court to consider the conduct of the parties. The evidence demonstrates extensive good faith efforts by Mr. Penner to preserve and improve the condition of the Property.

24. Items (n) and (o) require the Court to consider the cost of the receivership and maximizing the return to the parties. Notably, the court has an obligation to consider the return to <u>all</u> parties, not

simply the creditor. The Applicant's position focuses exclusively on realizing the balance owed to it as quickly as possible, without consideration for the interests of any other parties. Though there are arrears on the debt, those other interests remain a relevant consideration. It is obvious that appointing a receiver will substantially increase costs, thus decreasing any available surplus which could be rendered to the Respondents, and increasing the excess debt which may impact Mr. Penner's personal covenant obligations.

Conclusion

25. To summarize, the onus is on the Applicant to establish that the Receivership Order would be just or convenient under the *Act* and the *BIA*. The Respondents submit that the Applicant has not provided sufficient evidence to discharge the onus justifying this extraordinary relief. Appointing a receiver is not more just nor convenient than allowing the Respondents to continue making progress in repairing, securing and managing insurance claims related to the Property.

26. It is therefore submitted that this Honourable Court should not grant the Applicant's request to appoint the receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF OCTOBER, 2023.

SMITH NEUFELD JODOIN LLP

GRANT M. DRIEDGER
COUNSEL FOR THE RESPONDENTS

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

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

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver
In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"
Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to December 7, 2022
Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

End of Document

firs

Manitoba Statutes
The Court of King's Bench Act
Part X — Interlocutory Proceedings (ss. 55-63)

S.M. 1988-89, c. 4, s. 55

s 55.

Currency

55.

55(1)Injunctions and receivers

The court may grant a restrictive or mandatory interlocutory injunction or may appoint a receiver or receiver and manager by an interlocutory order where it appears to the judge to be just or convenient to do so.

55(2)Terms on injunction or appointment

An order under subsection (1) may include such terms as are considered just.

Currency

Manitoba Current to S.M. 2022, c. 8 and Man. Reg. 126/2022 (October 14, 2022)

End of Document

2020 BCSC 1241
British Columbia Supreme Court

Visser v. Godspeed Aviation Ltd.

2020 CarswellBC 2070, 2020 BCSC 1241, 322 A.C.W.S. (3d) 550

Gerald John Visser aka Gerry Visser (Plaintiff) and Godspeed Aviation Ltd., Shorebird Enterprises Inc., and Island Express Air Inc. (Defendants)

Master Muir

Heard: July 29, 2020
Judgment: August 24, 2020
Docket: New Westminster S228343

Counsel: T. Evans, for Plaintiff
W. Ryan, for Defendants

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

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
In February 2019, plaintiff owned shares in defendant G Ltd. — G Ltd. owned 80 per cent of shares in defendant I Inc. — Remaining 20 per cent were owned by plaintiff's spouse V — Plaintiff and V agreed to sell shares in G Ltd. and I Inc. (Shares) to defendant S Inc. for sum of $5,741,725.10 — S Inc. executed promissory note and general security agreement (GSA) and G Ltd., I Inc. and company owned by I Inc. provided guarantees for indebtedness and executed GSA — S Inc failed to make payment as required — Plaintiff claimed default accelerated remaining amount owing, which was alleged to be $2,741,725.10 — In March 2020, S Inc. commenced action against plaintiff and V for breach of agreement and misrepresentation — In April 2020, plaintiff issued notices of intention to enforce security — Plaintiff retained Receiver pursuant to terms of GSA to enforce terms of GSA by seizing assets of S Inc. — S Inc. refused to cooperate with Receiver by providing necessary documents and allowed steps to be taken without authority or consent of Receiver — Plaintiff commenced action and brought application for order appointing receiver over all assets, undertakings and property of S Inc., G Ltd. and I Inc. — Application dismissed — GSA clearly permitted plaintiff to appoint Receiver in case of default — There was no risk to security or any potential irreparable harm — Although there had been some interference with Receiver, it did not rise to level of requiring court to intervene — Allowing application would overwhelmingly prejudice defendants — Plaintiff failed to discharge onus required for court appointment of receiver.

Table of Authorities

Cases considered by *Master Muir*:

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

The Toronto Dominion Bank v. Blo Plastix Inc. (2014), 2014 BCSC 2673, 2014 CarswellBC 4364 (B.C. S.C.) — considered

Statutes considered:

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

s. 244(1) — considered

Law and Equity Act, R.S.B.C. 1996, c. 253
s. 39 — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 10-1 — considered

APPLICATION by plaintiff for order appointing receiver over all assets, undertakings and property of defendants.

Master Muir:

INTRODUCTION

1 This is an application by the plaintiff for an order appointing Alex Ng of D. Manning & Associates Inc. as receiver of all of the assets, undertakings, and property of Shorebird Enterprises Inc. ("Shorebird"), Island Express Air Inc. ("Island Air"), and Godspeed Aviation Ltd. ("Godspeed") (collectively "the defendants"), and for solicitor and client costs to the plaintiff payable forthwith in any event of the cause.

BACKGROUND

2 In February 2019, the plaintiff owned the shares of Godspeed. Godspeed was the owner of 80% of the shares of Island Air and Susan Visser, who I believe is the plaintiff's spouse, owned the other 20%.

3 Godspeed and Island Air owned various assets, including a hanger, a fueling station, and various aircraft. As well, Island Air had obtained Abbotsford Aircraft Maintenance Ltd. ("AAM") by virtue of an amalgamation.

4 In or around January 2018, Eddie Au, Andrew Lee, and Paul Lui (collectively, the "Au Group") were considering the purchase of the shares of Godspeed and Island Air (collectively, the "Shares") from the plaintiff.

5 It is alleged to have been verbally agreed between the plaintiff and the Au Group that the Au Group could operate Godspeed, Island Air, and AAM (collectively, the "Companies") until July 2018 (the "operation period"), during which time due diligence would be conducted prior to completion of the potential purchase of the Shares. It is alleged that during the operation period, Shorebird, through the Au Group, had full access to the Companies, their assets, and their business and financial records.

6 Subsequently, the plaintiff and Susan Visser agreed to sell the Shares to Shorebird and the parties executed a share purchase agreement dated for reference July 2018 (the "Agreement").

7 The closing date for the Share sale was July 31, 2018. The purchase price was $5,741,725.10, payable in various installments. Shorebird executed a promissory note and a general security agreement (the "GSA") and the Companies

provided guarantees for the indebtedness and executed the GSA.

8 There was an addendum to the Agreement dated July 12, 2018. There was also an amending agreement entered into in or around August 2019, dated for reference July 30, 2019.

9 On December 1, 2019, it is alleged that Shorebird failed to make a payment as required. That is alleged to be a default that operated to accelerate the remaining amount owing, which is alleged to be $2,741,725.10.

10 On March 18, 2020, Shorebird commenced an action against the plaintiff and Susan Visser (New Westminster Registry Action S225693) (the "S225693 Action"), alleging breaches of the Agreement and misrepresentation, including fraudulent misrepresentation, on the basis that the assets were defective and, in particular, that the airplanes were not serviceable or airworthy.

11 In the S225693 Action, Shorebird seeks damages for breach of contract and alleges that it suffered loss and incurred costs, including for storage, lost profits and revenues, opportunity costs, and increased maintenance expenses. There is also a claim of breach of trust and fraud, a claim that the Agreement was void *ab initio* and not enforceable and for "return of the trust funds provided by the plaintiff to the defendants."

12 On April 20, 2020, the Plaintiff issued notices of intention to enforce its security under s. 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, [*BIA*] to the defendants and AAM.

13 On May 13, 2020, a notice of seizure and bailiff's warrant were posted on the premises operated by the defendants. Although there is an error in the notice of seizure, where, in its body, it references the Business Development Bank of Canada and Mountain Cat Excavating Services Ltd. rather than the parties herein, both the warrant and the notice are clearly referable to the security in this matter.

14 On May 15, 2020, the plaintiff attended the defendants' premises and found that two of the planes were not there. One is allegedly being held in storage at Qualicum Beach Airport due to a debt said to be owed by the defendants.

15 On May 20, 2020, the plaintiff retained Alex Ng of D. Manning & Associates Inc. (the "Receiver") to act as a receiver pursuant to the terms of the GSA, and to enforce the GSA by seizing and securing Shorebird's various assets.

16 In or about May 27, 2020, it is alleged the defendants attempted to cancel the airline's insurance policies without the knowledge or approval of the Receiver.

17 On May 28, 2020, it is said the power to the fueling station was shut off and notices were placed in and around the fueling station advising that the fuel pump was no longer in operation, without the authority or approval of the Receiver.

18 On May 29, 2020, it is alleged someone gave PetroValue Products Canada Inc. access to the fueling station to allow it to recover its fuel, without the authority or approval of the Receiver.

19 On May 29, 2020, counsel for the defendants advised counsel for the plaintiff that he required access to the defendants' premises to collect some documents needed for the litigation.

20 The Receiver advised the plaintiff at that time that Shorebird was refusing to produce the Journey Logs and Maintenance Logs for the aircraft. It is said that the aircraft are essentially worthless without the Journey Logs and Maintenance Logs.

21 The Receiver agreed to grant access to the defendants to obtain documents on certain terms, including that the Journey Logs and Maintenance Logs first be turned over to the Receiver.

22 A meeting time was arranged, but as the Journey Logs and Maintenance Logs were not received by the Receiver, access was not granted.

23 On June 22, 2020, the plaintiff commenced this action.

PRELIMINARY APPLICATION

24 The defendants made a preliminary application to adjourn this hearing, as there is a pending application scheduled for August 27, 2020 for an order that the action before me and the S225693 Action be consolidated or tried at the same time.

25 I denied the adjournment and ordered the plaintiff's application to proceed on the basis that the issues were discrete.

POSITIONS OF THE PARTIES

The Plaintiff

26 The plaintiff relies on Rule 10-1 of the *Supreme Court Civil Rules*, s. 243(1) of the *BIA*, as amended, and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, as amended.

27 This statutory framework essentially allows the appointment of a receiver by the court where it is just and convenient to do so.

28 The plaintiff relied on the principles set out in *The Toronto Dominion Bank v. Blo Plastix Inc.*, 2014 BCSC 2673 (B.C. S.C.) at paras. 29 and 30:

> [29] The factors to be considered in appointing a receiver were considered in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, and *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477. In *Textron*, Mr. Justice Wilcock makes reference to *Maple Trade* and the criteria applied by Mr. Justice Masuhara in that decision, and refers to it at para. 50:
>
> > [50] Mr. Justice Masuhara held:
> >
> > > There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
> > >
> > > a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
> > >
> > > b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> > >
> > > c) the nature of the property;
> > >
> > > d) the apprehended or actual waste of the debtor's assets;
> > >
> > > e) the preservation and protection of the property pending judicial resolution;
> > >
> > > f) the balance of convenience to the parties;
> > >
> > > g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
> > >
> > > h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

[30] Mr. Justice Wilcock also referred to the criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 199) ("Bennett") and to certain of the case authorities and concluded at para. 55:

> . . . the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in *Cal Glass* [*Royal Bank v. Cal Glass Ltd.* (1978), 8 B.C.L.R. 345, 94 D.L.R. (3d) 84] when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

29 The plaintiff asserts that the defendants and AAM are refusing to acknowledge the legitimacy of the Receiver's private appointment and are actively defying it.

30 The plaintiff says the appointment of the Receiver is necessary for the following reasons:

1. To date, the Debtors have refused to acknowledge the legitimacy of the Receiver's private appointment and are actively defying it;

2. To date, the Debtors have withheld log books and maintenance records;

3. To date, the Debtors have negotiated with third parties as if there was no Receivership in place;

4. The insurance will expire at 11:59 PM on June 27, 2020. In fact Debtors cancelled the insurance without informing the Receiver;

5. To date, the Debtors have advised that they will comply if there is a Receivership appointment;

6. The aircraft are worthless without the log books and maintenance records; and

7. One aircraft is incurring storage fees in Qualicum Beach but cannot be released without the log books and maintenance records.

The Defendants

31 The defendants' first submission is that the appointment of the receiver was unlawful as, having elected to seize and sell the assets under the notice of seizure and bailiff's warrant, the plaintiff is estopped from taking possession, seizing and selling pursuant to the Agreement.

32 The second position taken by the defendants was that I should not condone the behaviour of the Receiver in agreeing to meet with a defendant representative to allow the defendants access to their documents and then failing to show or resiling from that agreement.

33 The third position taken by the defendants, as I understood it, was that I should not grant the order as to do so would impact the *status quo* and lend the court's assistance to the plaintiff and potentially prejudice the defendants, where the legal position of the parties is very much in doubt due to the cross-actions.

34 The defendants pointed out that all of these assets are in hangers within the control of the plaintiff. The planes cannot be flown and, therefore, the status quo is preserved and there is no prejudice to the plaintiff.

35 The defendants argued that their inability to pay the purchase price agreed was directly due to the breaches of contract of the plaintiff in failing to provide airworthy planes, resulting in the defendants being unable to operate at the expected capacity.

36 The defendants point out that this is not a case of an institutional lender. This is a situation where there is a dispute between a buyer and a seller. The allegations are most serious. If the court agrees with the defendants, the Agreement might be held to be *void* ab initio. Or, in the alternative, enforced with a considerable set-off for damages. To lend the weight of the court to enforcement of the security of the plaintiff would prefer the rights of the plaintiff over the rights of the defendants and, they submit, would be patently unjust.

ANALYSIS

37 I note that the arguments of the defendants are not addressed fulsomely or perhaps at all in the application response. They had to be gleaned from the affidavit material and submissions of defendants' counsel. Objection was not taken, however, and so I have considered all the points raised.

38 I do not accept the defendants' position on estoppel.

39 The GSA specifically provides in s. 10(3) as follows:

> (3) **Other Legal Rights**. Before and after Default, the Secured Party will have, in addition to the rights specifically provided in this Agreement, the rights of a secured party under the Personal Property Security Act as well as the rights recognized by law and in equity. No right of the Secured Party will be exclusive of or dependent upon or merge in any other right and one or more of such rights may from time to time be exercised independently or in combination.

40 I am satisfied that this clause permits the plaintiff to exercise all rights at law or under the GSA without having to select one to the exclusion of others.

41 As to the failure of the Receiver to attend to allow the defendants' representative to copy needed documents, that, in my view, is adequately explained by the condition placed on the meeting that the Journey Logs and Maintenance Logs be turned over to the Receiver first. As that had not occurred, it seems to me that the Receiver was justified in concluding that there was no agreement.

42 It is the third point that I consider to be most important here. The argument is similar to that discussed in *Royal Bank v.*

Cal Glass Ltd. (1978), 94 D.L.R. (3d) 84 (B.C. S.C.). That decision was referenced in the *Toronto Dominion Bank* case relied upon by the plaintiff at para. 30.

43 In the *Royal Bank* decision, the court considered this issue as follows:

> [20] Despite the broad discretion granted by s. 30 of the *Laws Declaratory Act*, it seems obvious that interlocutory relief of the type sought on this application ought to be granted only for one purpose: to maintain the status quo, pending determination of the rights of the parties at trial.
>
> [21] The plaintiff says the status quo will not be maintained if it is obliged to stand by until trial, five months hence, and see the value of the security depreciated by uncertainty as to the power of the receiver-manager and inability to sell the undertaking except under the cloud of contested title. The defendant says the status quo, will not be maintained if the standing of the receiver-manager is given sanction by the court, or the company's undertaking disposed of, before the trial takes place. . . . The applicant must discharge the onus of establishing that it is just and convenient that the court preserve the status quo for it, rather than for the respondent, until the issues between them have been resolved at trial. The status quo cannot be assured for both.

44 Similarly, here, the plaintiff argues that he is entitled to realize on his security and obtain the payment, which he says is owed. He says the assistance of the court is required and points to various actions on the part of the defendants.

45 Those allegations primarily focus on the withholding of the log books and maintenance records, without which, presumably, the planes cannot be sold. The potential danger of the cancelled insurance has, I gather, been dealt with.

46 The defendants say that granting the order sought would prejudice their ability to advance their claim and ultimately realize on any judgment obtained. They argue that there is no risk to the security and no reason to lend the court's assistance to the plaintiff.

47 Looking at the factors I have to consider, I do not see any risk to the security or any potential irreparable harm here. Although there has been some interference with the Receiver, in my view, it does not rise to the level of requiring the court to intervene.

48 Looking at balancing the convenience or interests of the parties convinces me that allowing the application would overwhelmingly prejudice the defendants. I have concluded that the plaintiff has not discharged the onus required for the court appointment of a receiver.

49 As a result, the plaintiff's application is dismissed.

COSTS

50 The defendants will have their costs of this application in the cause.

Application dismissed.

End of Document

2010 BCSC 477
British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

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

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

Willcock J.

Heard: February 10, 2010
Judgment: April 9, 2010
Docket: Vancouver S100268

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

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient

Headnote

Debtors and creditors --- Receivers — Appointment — General principles
Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff demanded payment from C Ltd. and NHLP, issued notice of intention to enforce security under s. 244 of Bankruptcy and Insolvency Act, and made demand upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for, inter alia, order appointing receiver — Application granted in part — Just and convenient to grant receivership order — As parties stipulated in their contracts that plaintiff would be entitled to appoint receiver or apply for court-appointed receiver in event of default, relief sought not extraordinary — Defendants owed plaintiff significant sum, and had not reduced principal debt — No dispute as to amount of debt, nor that defendants were in default — No imminent prospect of repayment of principal from operations — There had not been full disclosure of defendants' refinancing plans — Interim plan to make partial payments would not indemnify plaintiff against interest

accumulating in interim — No assurance interim payments could be made — There was risk to plaintiff's equity and doubt regarding prospect of recovery of principal — Defendants' plans did not provide for indemnity to plaintiff for losses incurred on ongoing basis — There was inadequate provision to minimize irreparable losses lender would incur — No persuasive evidence appointment of receiver would cause defendants undue hardship — Plaintiff should not have to leave its interests in hands of defendants.

Debtors and creditors — Receivers — Order appointing receiver
Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff, commercial lender, lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff made demand upon C Ltd. and NHLP for payment, and issued notice of intention to enforce security under provisions of s. 244 of Bankruptcy and Insolvency Act — Demand was also made upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for order appointing receiver, and that receiver have conduct of sale of hotel, subject to court approval — Application granted in part — Balancing rights of parties, it was just and convenient to grant receivership order — Order appointing receiver would not authorize receiver to have conduct of sale of hotel — As conduct of sale precluded redemption, order sought was inconsistent with affording defendants redemption period — Special circumstances did not exist such that plaintiff should have order for sale before judgment and consideration of appropriate redemption period — It was not clear that value of security was diminishing — To contrary, there was some evidence that profitability and therefore value of hotel was likely to increase in interim — Some net income was being generated from operations — Receiver would be authorized to engage only in such sales as would occur in ordinary course of business of hotel.

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s. 39(1) — considered

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s. 66 — considered

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R. 57 — pursuant to

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

Willcock J.:

Introduction

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

Background

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

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

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

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

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

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

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

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

(b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;

(c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;

(d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");

(e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

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

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

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

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

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

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

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

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and

interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

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

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

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

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

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

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

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

Issues

19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so

2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

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

Applicable Law

Court-Appointed Receivers

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

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

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

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

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

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

25 The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be

> sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

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

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

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

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

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

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

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

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

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

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

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

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

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

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd.*, (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7

C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

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

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

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

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

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

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

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

43 The defendant owed a significant sum of money;

44 There appeared not to be a dispute with the fact of the size of the indebtedness;

45 The defendant was in default;

46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

47 There were concerns with respect to the financial statements of the defendant; and

48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The

position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

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

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding

that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088(Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> . . . . .
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

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

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

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

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

Order for Sale Before Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

approval of the sale. The court held:

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

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

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

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

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

67 At p. 234:

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

68 Further, Bennett notes at p. 245:

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

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

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

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

71 At p. 154 he added:

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

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

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

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

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

Discussion

Appointment of a Receiver

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

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

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

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

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

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

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

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

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

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

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

Order for Sale

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

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

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

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

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

