COURT FILE NUMBER	2003-06728
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)	**ROMSPEN MORTGAGE LIMITED PARTNERSHIP AND ROMSPEN INVESTMENT CORPORATION**
DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM)	**3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD., LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. AND DANIEL ALEXANDER WHITE**
PLAINTIFFS BY COUNTERCLAIM	**3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD, LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. and DANIEL ALEXANDER WHITE**
DEFENDANTS BY COUNTERCLAIM	**ROMSPEN MORTGAGE LIMITED PARTNERSHIP, ROMSPEN INVESTMENT CORPORATION, RICHARD WELDON and WESLEY ROITMAN**

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
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COURT FILE NUMBER	1903-21473
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANTS	**LOT 11 LIMITED PARTNERSHIP by its general partner LOT 11 GP LTD., ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES**

	INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. AND DANIEL ALEXANDER WHITE.
RESPONDENT	**ROMSPEN INVESTMENT CORPORATION**
DOCUMENT	**BENCH BRIEF OF THE PLAINTIFFS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Borden Ladner Gervais LLP** 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Solicitor: Kevin E. Barr / Robyn Gurofsky Telephone: (403) 232-9786 / (403) 232-9442 Facsimile: (403) 266-1395 Email: kbarr@blg.com / rgurofsky@blg.com File No. 443063.000012

BENCH BRIEF OF THE PLAINTIFFS, ROMSPEN MORTGAGE LIMITED PARTNERSHIP and ROMSPEN INVESTMENT CORPORATION
Application for Appointment of Receiver before
The Honourable Madam Justice D.L. Shelley (Commercial List)
Set to be Heard November 4, 2021 at 2:00 pm

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Solicitors for the Respondents

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I. INTRODUCTION

1. Romspen Mortgage Limited Partnership ("**RMLP**") and Romspen Investment Corporation ("**RIC**") (collectively, "**Romspen**") submit this Bench Brief in support of their Application for Appointment of Receiver and Manager filed on October 25, 2021 (the "**Application**"). The Application was most recently before this Honourable Court on June 2, 2021 at which time it was adjourned by consent so as to permit the parties, among other things, the opportunity to secure more complete expert evidence. While the preparation of expert evidence remains ongoing, recent events, particularly the receipt of notices of public auction of the secured lands from the City of Edmonton due to in excess of $2,000,000 in unpaid taxes, have rendered the hearing of Romspen's application urgent. For the purposes of the hearing, the only relief that Romspen is seeking in respect of this Application is the appointment of a Receiver and Manager.

2. Specifically, Romspen urgently seeks an order (a "**Receivership Order**") pursuant to the *Bankruptcy and Insolvency Act* ("***BIA***")[1] and *Judicature Act*[2] appointing MNP Ltd. ("**MNP**") as Receiver and Manager over the business, property and undertakings of Lot 11 GP Ltd. ("**GP**"), Lot 11 Limited Partnership ("**LP**"), Eco-Industrial Business Park Inc. ("**Eco-Industrial**"), Absolute Energy Resources Inc. ("**Absolute Energy**") and Absolute Environmental Waste Management Inc. ("**Absolute Environmental**") (together, the "**Debtors**").

3. In connection with a loan agreement dated April 27, 2018 (the "**Loan Agreement**") and entered into between RMLP and 3443 Zen Garden Limited Partnership ("**Zen Garden**"),[3] each of the Debtors gave guarantees and security to Romspen over assets located in the Province of Alberta (the "**Alberta Guarantees**" and the "**Alberta Security**", respectively). The Alberta Security includes general security agreements from each of the Debtors in

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***") [**TAB 1**].
[2] *Judicature Act*, RSA 2000, c J-2 [**TAB 2**].
[3] Affidavit of Wesley Roitman filed November 16, 2020 (the "**7th Roitman Affidavit**") at para 29. A complete copy of the Loan Agreement is appended to the Affidavit of Wesley Roitman filed March 31, 2020 (the "**1st Roitman Affidavit**") at para 16 and Exhibit "B".

favour of RMLP, and mortgages (the "**Mortgages**") on lands located in Edmonton (the "**Edmonton Lands**") granted by GP and Eco-Industrial in favour of RMLP.[4]

4. Zen Garden defaulted on the Loan Agreement in the State of Texas and was ultimately petitioned into involuntary bankruptcy in Texas by its trade creditors. As Zen Garden was in default of the Loan Agreement, Romspen issued Notices of Default to the Debtors in respect of the Alberta Security and Alberta Guarantees.[5] As at March 26, 2020, the total amount outstanding under the Loan Agreement, Alberta Security, and Alberta Guarantees was USD $96,760,975.69.[6]

5. On April 20, 2020, an order was issued in the US bankruptcy proceedings, among other things, allowing Romspen's claim in the amount of USD $96,495,021.72 as of the petition date and declaring the Loan Agreement and related security as valid and enforceable. [7]

6. In addition to Zen Garden's default, which constitutes a cross-default by the Debtors, GP and Eco-Industrial are also separately and independently in default of the terms of the Mortgages, due to their failure to remit property taxes, and their failure to maintain operations at the Edmonton Lands.[8]

7. On April 2, 2020, Associate Chief Justice Nielsen granted an order allowing Romspen to appoint an interim monitor over the Debtors.[9] MNP has acted in that capacity since April 7, 2020.[10]

8. The appointment of a Receiver and Manager is now urgent. As set out in the Third Report of Interim Monitor appended to the Affidavit of Wesley Roitman ("**Roitman**") sworn on October 19, 2021 and filed October 25, 2021 (the "**10th Roitman Affidavit**"),[11] the Debtors

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[4] Affidavit of Wesley Roitman filed April 20, 2020 (the "**3rd Roitman Affidavit**") at Exhibits "A"-"L".
[5] 7th Roitman Affidavit at para 50; 1st Roitman Affidavit at para 28 and Exhibit "C"; Affidavit of Wesley Roitman filed April 1, 2020 (the "**2nd Roitman Affidavit**") at para 5 and Exhibit "A".
[6] 1st Roitman Affidavit at para 36 and Exhibit "G"; 7th Roitman Affidavit at para 70.
[7] Affidavit of Wesley Roitman filed October 25, 2021 (the "**10th Roitman Affidavit**") at para 19 and Exhibit "C".
[8] 1st Roitman Affidavit at para 35; Affidavit of Wesley Roitman filed June 15, 2020 (the "**6th Roitman Affidavit**") at paras 16 and 18 and Exhibit "E"; 7th Roitman Affidavit at para 51-53 and Exhibits "24" and "25"; 10th Roitman Affidavit at Exhibit "B".
[9] 7th Roitman Affidavit at para 73.
[10] 10th Roitman Affidavit at Exhibit "A".
[11] 10th Roitman Affidavit at Exhibit "A".

have ceased all business operations at the Edmonton Lands and have no cash flow, they have failed to maintain the structures and property on the Edmonton Lands and are allowing them to waste, they have failed to provide adequate reporting to MNP in its capacity as Interim Monitor (including Canada Revenue Agency payroll and GST statements), and they have incurred property tax obligations that have resulted in the City of Edmonton issuing Notifications of Public Auction for the Edmonton Lands, with the auction set to take place on November 25, 2021.[12]

9. In light of the Third Report of Interim Monitor, and the substantial other evidence before the Court, it is just, convenient, and indeed necessary to appoint a Receiver and Manager to prevent further significant erosion of Romspen's security and the elimination of Romspen's Mortgage interests through the impending free and clear sale of the Edmonton Lands at public auction. For these reasons, and those set out in more detail below, Romspen requests that a Receivership Order be granted.

II. EVIDENCE ON THIS APPLICATION

10. The facts relied upon in this Application are set out in detail in the 10th Roitman Affidavit. The 10th Roitman Affidavit attaches the Third Report of Interim Monitor, and also incorporates by reference Roitman's prior filed affidavits, which include:

(a) Affidavit of Roitman filed March 31, 2020 (the "**1st Roitman Affidavit**");

(b) Affidavit of Roitman filed on April 1, 2020 (the "**2nd Roitman Affidavit**");

(c) Affidavit of Roitman filed on April 20, 2020 (the "**3rd Roitman Affidavit**");

(d) Affidavit of Roitman filed on April 22, 2020 (the "**4th Roitman Affidavit**");[13]

(e) Affidavit of Roitman filed on April 28, 2020 (the "**5th Roitman Affidavit**");

[12] 10th Roitman Affidavit at Exhibit "B".
[13] The 3rd Roitman Affidavit and the 4th Roitman Affidavit are the same document. The document was submitted electronically during the early stages of the Covid-19 filing process and, likely due to an unintentional oversight, was filed twice. The issue was previously brought to the attention of counsel for the Debtors.

(f) Affidavit of Roitman filed on June 15, 2020 (the "**6th Roitman Affidavit**");

(g) Affidavit of Roitman filed on November 16, 2020 (the "**7th Roitman Affidavit**");

(h) Affidavit of Roitman filed on November 19, 2020 (the "**8th Roitman Affidavit**"); and

(i) Affidavit of Roitman filed on December 21, 2020 (the "**9th Roitman Affidavit**").

III. FACTUAL BACKGROUND

11. The factual background of this matter is set out in extensive detail in each of the affidavits described above, and Romspen's prior briefs filed in this action. For the purposes of this Application, Romspen briefly summarizes the key facts relating to the security, defaults, and the Interim Monitor's observations below.

The Loan Agreement, Alberta Security, and Alberta Guarantees

12. On April 27, 2018, RMLP, as lender, and Zen Garden, as borrower, entered into the Loan Agreement.[14] The Debtors were signatories to the Loan Agreement as guarantors, and each separately granted the Alberta Guarantees in favour of RMLP.[15] In addition, as further security for Zen Garden's obligations under the Loan Agreement, the Debtors granted a series of instruments including the Mortgages, assignments of leases and rents and general security agreements, and Alberta Guarantees in favour of RMLP.[16]

13. The Mortgages include:

(a) a first-priority USD $40,000,000 mortgage granted by GP, in its capacity as general partner for LP, over lands legally described as:

MERIDIAN 4 RANGE 23 TOWNSHIP 53
SECTION 17
ALL THAT PORTION OF THE NORTH WEST QUARTER

[14] 7th Roitman Affidavit at para 29. A complete copy of the Loan Agreement is appended to the 1st Roitman Affidavit at para 16 and Exhibit "B".
[15] 3rd Roitman Affidavit at paras 11-15 and 41, and Exhibits "H" – "L".
[16] 7th Roitman Affidavit at paras 4-10 and 39, and Exhibits ""A" – "G".

WHICH LIES EAST OF THE RIGHT BANK OF THE NORTH SASKATCHEWAN RIVER
AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT EDMONTON ON 25 APRIL, 1955 CONTAINING 45.84 HECTARES (113.26 ACRES) MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS;[17]

and,

(b) a first-priority USD $40,000,000 mortgage granted by Eco-Industrial over a number of lands adjacent to those described above (which, together, comprise the Edmonton Lands).[18]

14. Absolute Environmental carries on the business of oilfield and industrial waste disposal on the Edmonton Lands, including through the use of two injection wells operated at Absolute Environmental's facilities on the Edmonton Lands.[19]

Defaults on the Loan Agreement, Alberta Security, and Alberta Guarantees

15. On October 11 and 23, 2019, Romspen's counsel in Texas, Foley & Lardner LLP,[20] issued Notices of Default under the Loan Agreement, on the basis that Zen Garden and the guarantors under the Loan Agreement had failed to make monthly service payments, misapplied funds that were advanced under the Loan Agreement, permitted Texas property forming security for the Loan Agreement to waste, and failed to maintain adequate insurance.[21]

16. On October 11, 2019, counsel for Romspen in Alberta, Borden Ladner Gervais LLP, issued to the Debtors a Notice of Intention to Enforce Security pursuant to the *Bankruptcy & Insolvency Act* (the "**Demand and Notice**"),[22] on the basis that Zen Garden's default under Loan Agreement triggered an automatic default by the Debtors under the Alberta Security

[17] 3rd Roitman Affidavit at Exhibit "A";
[18] 3rd Rotiman Affidavit at Exhibit "C".
[19] 10th Roitman Affidavit at Exhibit "A".
[20] Clifton Dugas II, previously of Polsinelli, relocated his practice to Foley & Lardner and continued to act for Romspen.
[21] 7th Roitman Affidavit at para 49; 3rd Roitman Affidavit at paras 16-17 and Exhibits "M"-"N".
[22] 7th Roitman Affidavit at para 50; 1st Roitman Affidavit at para 28 and Exhibit "C"; 2nd Roitman Affidavit at para 5 and Exhibit "A".

and Alberta Guarantees.[23] Each of the Mortgages,[24] general security agreements,[25] and Alberta Guarantees[26] contained cross-default provisions, including in the event of default under the Loan Agreement.

17. The Debtors were also independently in breach of the Alberta Security at the time that the Demand and Notice was issued as a result of having failed to pay outstanding taxes on the Edmonton Lands. At the time that the Demand and Notice was issued, outstanding tax obligations in respect of the mortgaged lands exceeded CDN $800,000.00.[27] As set out in the 10th Roitman Affidavit, that amount has now increased to over CDN $2,000,000.[28]

The Third Report of Interim Monitor and Municipal Tax Auction

18. As set out in the Third Report of Interim Monitor, the Debtors have failed to provide critical financial information requested by the Interim Monitor in order to carry out its mandate, including, among other things:

    (a) Information relating to funds transferred by Alberta Environmental and Eco-Industrial to Symmetry Asset Management Inc. ("**Symmetry**"), a related corporation controlled by the individual defendant Mr. White, and the signed agreement relating to such transfers;

    (b) Confirmation of bank accounts used by Alberta Environmental and Eco-Industrial;

    (c) Current bank statements;

    (d) Accounts receivable and collections; and

    (e) Canada Revenue Agency payroll and GST statements for Absolute Environmental and Eco-Industrial.[29]

[23] 7th Roitman Affidavit at para 51.
[24] 3rd Roitman Affidavit at Exhibits "A" and "C", clauses 10, 33, 41, and Schedule B, clause 18(a)(i).
[25] 3rd Roitman Affidavit at Exhibits "B" and "D"-"G", clause 11.1(1).
[26] 3rd Roitman Affidavit at Exhibits "H"-"L", clause 3.4.
[27] 1st Roitman Affidavit at para 35; 7th Roitman Affidavit at para 51 and Exhibit "24".
[28] 10th Roitman Affidavit at para 14 and Exhibit "B".
[29] 10th Roitman Affidavit at Exhibit "A".

19. Additionally, MNP confirmed that Alberta Environmental's operations on the Edmonton Lands have ceased. The Debtor's contact person failed to provide requested supporting documentation in relation to the shut down of operations, in relation to the repairs required at the facility to permit operations to resume, and failed to provide any concrete timeline as to when the repairs would be completed to permit operations to resume. Further, MNP observed that most of Alberta Environmental's prior revenue had been transferred to Symmetry, with only nominal sums being retained in Alberta Environmental's accounts.[30]

20. MNP attended on site at the Edmonton Lands on October 6, 2021, and observed that there was nobody on site, it was open and accessible, and the facility buildings were dilapidated and uninhabitable.[31] It is a separate event of default under the Mortgages to fail to maintain the Edmonton Lands in good condition, to commit any act of waste, or to leave the property vacant for a period of more than 10 days.[32]

21. Based on its review and observations, MNP concluded that it is unable to determine whether the Debtors have the financial resources to repair or maintain the facilities and continue operations, and that an independent inspection is recommended given the lack of information shared by the Debtors.[33]

22. Finally, on October 5, 2021, the City of Edmonton posted Notifications of Public Auction in respect of the Edmonton Lands due to the unpaid property taxes. The public auction is scheduled to be held on November 25, 2021.[34]

23. As of October 19, 2021, the Debtors continue to owe Romspen $81,693,163.27 (which exceeds the value of the Mortgages), together with interest, fees and costs continuing to accrue.[35]

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[30] 10th Roitman Affidavit at Exhibit "A".
[31] 10th Roitman Affidavit at Exhibit "A".
[32] 3rd Roitman Affidavit at Exhibits "A" and "C", Schedule B, clauses 18(a)(xviii-xx).
[33] 10th Roitman Affidavit at Exhibit "A".
[34] 10th Roitman Affidavit at Exhibit "B".
[35] 10th Roitman Affidavit at para 5.

IV. ISSUES

24. The sole issue in this application is whether it is just or convenient to grant a Receivership Order in respect of the property, business and undertakings of the Debtors, including a stay of the pending municipal tax auction and all other necessary preservation relief.

V. ANALYSIS

The Test for the Appointment of a Receiver and Manager

25. This Court has discretion to appoint a receiver pursuant to both section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*.[36] Under either legislation, the test to be applied by the Court is whether the appointment of a Receiver and Manager is "just or convenient".[37]

26. In *Paragon Capital*,[38] Justice Romaine held that in analyzing whether a receiver is "just or convenient" the Court may consider the factors enumerated in *Bennett on Receiverships*.[39] The applicability of those factors depends on the particular factual matrix. Factors relevant to Romspen's Application in this case include:[40]

    (a) 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;

    (b) The nature of the property;

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

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

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[36] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 47 [**TAB 3**]; *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127 at para 6 [**TAB 4**].
[37] See *BIA*, s 243(1) [**TAB 1**] and *Judicature Act*, s 13(2) [**TAB 2**].
[38] *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("***Paragon Capital***") [**TAB 5**].
[39] *Paragon Capital* at para 27 [**TAB 5**].
[40] *Paragon Capital* at para 27 [**TAB 5**]; *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 at para 51 [**TAB 6**]; *Schendel Management Ltd, Re*, 2019 ABQB 545 at paras 44-45, 48 [**TAB 7**].

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

(f) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(g) The conduct of the parties;

(h) The likelihood of maximizing return to the parties; and

(i) The goal of facilitating the duties of the receiver.

27. The procedural requirements for the appointment of a Receiver and Manager under section 243(1) of the *BIA* are satisfied in this case. Romspen is a secured creditor in respect of each of the Debtors in accordance with the Alberta Security and Alberta Guarantees, and Romspen issued its Demand and Notice under section 244 of the *BIA* more than ten days prior to this application. Finally, the Debtors are each insolvent persons within the meaning of section 2 of the *BIA*, given their failure to meet their accelerated obligations in accordance with the Demand and Notice.

The Appointment of a Receiver and Manager is Just, Convenient, and Necessary

28. The appointment of a Receiver and Manager over the Debtors' business, property, and undertakings is urgently needed to preserve Romspen's Alberta Security and to facilitate the orderly sale of the Debtors' property.

29. As noted above, a municipal tax sale of the Edmonton Lands is scheduled for November 25, 2021. The total amount of outstanding property taxes as of October 5, 2021 is $2,089,878.74.[41]

30. If the public auction proceeds, the municipality's sole consideration will be the recovery of the outstanding municipal taxes. The City of Edmonton would have no incentive to maximize the sale value of the Edmonton Lands over and above the amount of the

[41] 10th Roitman Affidavit at Exhibit "B".

outstanding tax amounts, or to take into account the interests of other creditors, including Romspen (whose Mortgages on the Edmonton Lands total USD $80,000,000). A sale by auction is not in the interests of any stakeholders, including the Debtors, who will be responsible for a significant deficiency in the event the tax sale is allowed to proceed.

31. In contrast to a public tax auction, the appointment of a Receiver and Manager will ensure that the interests of all creditors are considered, and that the business and undertakings of the Debtors, including their business operations on the Edmonton Lands, and the sale of the Debtors' property, can be managed and conducted in an orderly manner with a view to maximizing value for all creditors.

32. In addition to the urgent need for a Receivership Order in light of the pending public tax auction, the following factors further demonstrate that the appointment of a Receiver and Manager is just, convenient, and necessary:

(a) The Alberta Security, including the Mortgages[42] and the general security agreements,[43] provide a contractual right to appoint a Receiver;

(b) There is actual ongoing waste of secured assets, given the cessation of operations and apparent vacancy and abandonment of the facilities on the Edmonton Lands. The Third Report of Interim Monitor demonstrates that the Debtors are not adequately protecting their properties, including two key disposal wells on the Edmonton Lands that are in disrepair, and that there are no ongoing business operations;[44]

(c) The Debtors have to date been uncooperative and unwilling to provide sufficient information for MNP, as Interim Monitor, to carry out its mandate, and a Receiver and Manager is needed to investigate and manage the business and finances of the

[42] 3rd Roitman Affidavit at Exhibits "A" and "C", Schedule B, clause 11.
[43] 3rd Roitman Affidavit at Exhibits "B" and "D"-"G", clause 13.1.
[44] 10th Roitman Affidavit at Exhibit "A".

Debtors, including the repair and maintenance of the facilities on the Edmonton Lands;[45]

(d) The secured property at issue consists of both real and personal property under the Mortgages and general security agreements, in addition to the Alberta Guarantees. Administering the property is likely to be time consuming and complex and is best suited to a professional firm such as MNP, who would be accountable to the Court;

(e) Appointing MNP as Receiver and Manager would best balance the interests between Romspen, the Debtors, and other creditors by maximizing the value recovered from the secured property and businesses, and minimize the need to resort to the Alberta Guarantees, including the personal guarantee granted by Mr. White; and

(f) Given the acrimonious relationship between the parties, it is likely that Romspen would face difficulty in enforcing its security on its own, particularly given the impending tax auction, and it is likely that further disputes and litigation would arise in the course of that enforcement, leading to an inefficient use of judicial resources and an increased cost to the parties.

33. The Debtors have, in the past, contested the validity of the Loan Agreement and the Alberta Security (although they have tendered no evidence on this issue). Given the factors identified above, a Receivership Order should still be granted in the circumstances. Disputes as to the validity of security or the amount of debt are not a bar to the granting of a Receivership Order, when a receivership remains necessary to preserve the value of the property, business, and undertakings for the benefit of all stakeholders and to determine stakeholder priorities.[46] Once a Receiver and Manager is appointed, the Receiver and Manager, "being a neutral third party, can provide the court with an unbiased and impartial opinion on the validity, enforceability, and priority of their respective security."[47] Indeed, the appointment of a Receiver and Manager can, and in this case will, help to bring order

[45] 10th Roitman Affidavit at Exhibit "A".
[46] *Halex Capital Inc v Natural Energy Systems Inc*, 2020 ONSC 7910 ("***Halex***") at paras 5-6 and 25-28 [**TAB 8**].
[47] *Halex* at para 27.

to the kind of "chaos"[48] the Debtors have sought to cause by disputing the security, which is critical given the fast-approaching scheduled public auction.

34. In any event, Romspen has established a strong case as to the validity of the Loan Agreement and the Alberta Security, which is sufficient for the appointment of a Receiver and Manager, particularly in circumstances where a business as a going concern is being eroded.[49] In this case, on June 19, 2020, Judge Mott of the United States Bankruptcy Court granted an order expressly confirming the validity of the Loan Agreement and other "Loan Documents" (defined in the Loan Agreement to include the Alberta Security and Alberta Guarantees),[50] and expressly confirming the amount of the outstanding debt of "not less than $96,495,021.72 as of the Petition Date".[51] It is not open to the Debtors to argue that the debt is not owed, or that the security documents are invalid, and doing so simply amounts to an attempt to convolute the issues before the Court and delay Romspen's ability to recover on the significant debt owed. Any such argument by the Debtors should be rejected.

35. Courts have, in the past, granted a Receivership Order in circumstances where debtors have (a) failed to properly maintain the secured collateral;[52] (b) ceased business operations with no cash flow;[53] (c) failed to provide sufficient financial and other reporting to a monitor;[54] and (d) incurred priority obligations, like property taxes.[55] In this case, all of these factors are present, demonstrating the clear justice, convenience, and necessity of granting a Receivership Order in the circumstances before the Court.

VI. CONCLUSION

36. Based on all the foregoing, Romspen respectfully requests that a Receivership Order appointing MNP as Receiver and Manager be granted, as set out in Romspen's application.

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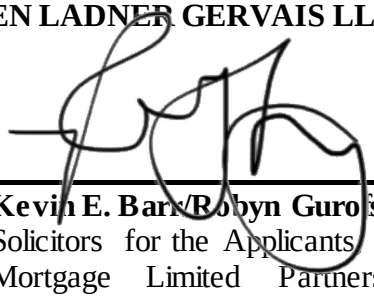
[48] *Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527 at paras 9-10 [**TAB 9**].
[49] *Cascade Divide Enterprises, Inc v Laliberte*, 2013 BCSC 263 at paras 45 and paras 70-83 [**TAB 10**].
[50] 1st Roitman Affidavit at Exhibit "B", Schedule 1.
[51] 10th Roitman Affidavit at para 19 and Exhibit "C")
[52] *Strategic Financial Corp v 1402801 Alberta Ltd*, 2012 ABQB 292 at para 16 [**TAB 11**].
[53] *Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19 at paras 7-8 and 38-39 [**TAB 12**].
[54] *Alexander v 2025610 Ontario Ltd*, 2012 ONSC 3486 at paras 36-42, 48-49 and 52 [**TAB 13**].
[55] *Ontario Securities Commission v Paramount Equity Financial Corporation et al*, 2018 ONSC 4326 at paras 31 and 33 [**TAB 14**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF OCTOBER, 2021

BORDEN LADNER GERVAIS LLP

Per: 

Kevin E. Barr/Robyn Gurofsky
Solicitors for the Applicants, Romspen Mortgage Limited Partnership and Romspen Investment Corporation

VII. LIST OF AUTHORITIES

TAB NO.	CASE CITATION
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Judicature Act*, RSA 2000, c J-2
3.	*Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53
4.	*BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127
5.	*Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430
6.	*Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65
7.	*Schendel Management Ltd, Re*, 2019 ABQB 545
8.	*Halex Capital Inc v Natural Energy Systems Inc*, 2020 ONSC 7910
9.	*Forjay Management Ltd v 0981478 BC Ltd*, 2018 BCSC 527
10.	*Cascade Divide Enterprises, Inc v Laliberte*, 2013 BCSC 263
11.	*Strategic Financial Corp v 1402801 Alberta Ltd*, 2012 ABQB 292
12.	*Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19
13.	*Alexander v 2025610 Ontario Ltd*, 2012 ONSC 3486
14.	*Ontario Securities Commission v Paramount Equity Financial Corporation et al*, 2018 ONSC 4326

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

(1.1) 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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(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.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) 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.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) 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).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

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

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

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

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) 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

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

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.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

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

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

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absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

2015 SCC 53, 2015 CSC 53
Supreme Court of Canada

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.

2015 CarswellSask 680, 2015 CarswellSask 681, 2015 SCC 53, 2015 CSC 53, [2015] 3 S.C.R. 419, [2016] 1 W.W.R. 423, 259 A.C.W.S. (3d) 215, 31 C.B.R. (6th) 1, 391 D.L.R. (4th) 383, 467 Sask. R. 1, 477 N.R. 26, 651 W.A.C. 1

Attorney General for Saskatchewan, Appellant and Lemare Lake Logging Ltd., Respondent and Attorney General of Ontario and Attorney General of British Columbia, Interveners

Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: May 21, 2015
Judgment: November 13, 2015
Docket: 35923

Proceedings: reversing *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.); affirming *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.)

Counsel: Thomson Irvine, Katherine Roy, for Appellant
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Michael S. Dunn, Daniel Huffaker, for Intervener, the Attorney General of Ontario
R. Richard M. Butler, Jean M. Walters (written) for Intervener, the Attorney General of British Columbia.
Jeffrey M. Lee, Q.C., Kristen MacDonald — Amicus curiae

Abella, Gascon JJ. **(Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 Prior to 2005, receivership proceedings involving assets in more than one province were complicated by the simultaneous appointment of different receivers in different jurisdictions. Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver. This appeal involves a constitutional challenge to provincial farm legislation on the grounds that it conflicts with this national receivership regime. For the reasons that follow, we see no such conflict.

Background

2 Lemare Lake Logging Ltd., a secured creditor, brought an application pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA), for the appointment of a receiver over substantially all of the assets except livestock of its debtor, 3L Cattle Company Ltd, a "farmer" within the meaning of *The* Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1 (SFSA). 3L Cattle contested the appointment and argued that Lemare Lake had to comply with Part II of the SFSA before seeking the appointment of a receiver under s. 243(1).

3 Part II of the SFSA provides that, before starting an action with respect to farm land, a creditor must serve a "notice of intention", engage in mandatory mediation, and prove that the debtor has no reasonable possibility of meeting its obligations or is not making a sincere and reasonable effort to meet its obligations. This includes an action for a receivership order pursuant to s. 243(1) of the BIA.

foundations of receivership law generally (ch. 17) or in his specific comments on the 2005 and 2007 legislative reforms that led to the amendments to s. 243 (pp. 466-67).

44 It is against this backdrop that *amicus* submits that s. 243 must be read. According to *amicus*, this evidence proves that the purpose of s. 243 is to establish an effective national receivership remedy, one which is timely and flexible, and applies uniformly across the country.

45 This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

46 Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.

47 In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose:*COPA*, at para. 66; see also *114957 Canada Ltée*.

48 This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121(S.C.C.), where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of security interests prescribed by provincial legislation. Unlike the self-executing remedy at issue in that case, where the bank could seize the chattel upon default without the need to go to court, the appointment of a s. 243 receiver is not mandatory. More importantly, in contrast with *Hall*, the s. 243 receivership remedy cannot be said to create a "complete code": p. 155. Nothing in the text of the provision or the *BIA* more generally suggests that s. 243 is meant to be a comprehensive remedy, exclusive of provincial law. The provision itself recognizes that a receiver may still be appointed under a security agreement or other provincial or federal laws, and creates no right to the appointment of a national receiver: s. 243(2)(b). As this Court observed in *COPA*, at para. 66, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission".

49 Any uncertainty about whether s. 243 was meant to displace provincial legislation like the *SFSA* is further mitigated by s. 72(1) of the BIA, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

This too demonstrates that Parliament has explicitly recognized the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the *BIA*: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123(S.C.C.), at paras. 46-47.

50 Other provisions of the *BIA* further support a more narrow reading of s. 243's purpose. Notably, s. 47 of the BIA empowers a court to appoint an interim receiver where a notice of intention to enforce a security was sent or is about to be sent under s. 244(1). Where there is an urgent need for the appointment of a receiver, the *BIA* thus provides a mechanism for the appointment of an interim receiver. As Bennett has observed:

> In practice, a secured creditor may apply for an interim receiver under subsection 47(1) for a short term, and then apply under section 243 for a full receivership and, before the appointment of the interim receiver expires or, alternatively, apply for an extension under subsection 47(1)(c).
>
> (Frank Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 883)

While s. 48 of the BIA provides that ss. 43 to 46 do not apply to individuals whose principal occupation is farming, the provision does not exempt farmers from the operation of s. 47. This shows that Parliament thinks farmers generally warrant special consideration, but not in cases where an interim receiver under s. 47 is found to be warranted. Promptness and timeliness is a concern that Parliament appears to have addressed precisely through the interim receivership regime. The potential conflict, if any, between s. 47 of the BIA and Part II of the SFSA is not, however, at issue in this appeal.

51 The legislative history of s. 243 of the BIA further supports a narrow construction of the provision's purpose focussed on the establishment of a national receivership regime. The purpose of a court-appointed receiver, generally, "is to preserve and protect the property in question pending resolution of the issues between the parties": Bennett, at p. 6, citing *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada)* (1995), 169 A.R. 138 (Alta. C.A.). While historically receivership law was primarily a remedy for secured creditors, the legislative regulation of receiverships has resulted in many significant rights also being given to the debtor and other interested parties as well: Wood, at p. 459.

52 Part XI of the BIA was added to the Act in 1992, bringing under federal law various aspects of receivership law that had previously applied to insolvent debtors at common law or under provincial legislation: S.C. 1992, c. 27, s. 89. In discussing the rationale for Part XI's adoption, Pierre Blais, the then-Minister of Consumer and Corporate Affairs and Minister of State (Agriculture), suggested that Part XI was enacted "to impose duties of disclosure and good faith on secured creditors and receivers and to require that a secured creditor give a debtor notice before enforcing its security": *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., October 29, 1991, at pp. 4177-78. He further noted, in the context of a discussion about the legislation more generally, that he had "made a point of consulting closely with [his] provincial counterparts to ensure [the federal] regime meshes smoothly with existing or planned provincial ones": p. 4180.

53 Although the 1992 legislation did not create a national receivership remedy, it amended the *BIA* in two ways that are particularly relevant to this appeal. First, it codified a 10-day notice period under s. 244 for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor. As Professor Wood explains, the requirement of a notice period developed initially at common law as a way to protect against the potential abuse of power by secured creditors: p. 474. The introduction in 1992 of a statutory notice period largely eliminated uncertainty associated with the common law rule: Wood, at p. 476. The purpose of the s. 244 notice requirement is "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs":, Janis P. Sarra, Geoffrey B. Morawetz and L. W. Houlden, The 2015 Annotated Bankruptcy and Insolvency Act (2015), at p. 1054; see also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, No. 7, 3rd Sess., 34th Parl., September 4, 1991, at p. 12, Ron MacDonald (Vice-chairman of the Committee). Second, the 1992 amendments gave the courts expanded authority when appointing interim receivers under the *BIA*: Wood, at p. 461-62; Bennett, at pp. 841-42. This new regime was intended "to prevent the prejudice that might otherwise be caused by the imposition of [the] new statutory notice period": Wood, at p. 461.

54 The 1992 legislation provided for parliamentary review of the *BIA* in three years' time: s. 92. In 1993, an advisory committee was established to identify further necessary amendments: Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (2007), at p. 3. Although s. 243 remained unchanged when

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's

affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of

the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the 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:

> [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.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

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

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 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.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 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.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

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2014 ABQB 65
Alberta Court of Queen's Bench

Alexis Paragon Limited Partnership, Re

2014 CarswellAlta 165, 2014 ABQB 65, [2014] A.W.L.D. 1428, 237 A.C.W.S. (3d) 300, 9 C.B.R. (6th) 43

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA")

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA")

In the Matter of a Plan of Compromise or Arrangement and reorganization of Alexis Paragon Limited Partnership and the Petitioners Listed in Appendix "A" (Collectively the "Company")

In the Matter of applications by the Company for, inter alia, a continuation of proceedings under the CCAA, a stay and the addition of Alexis Casino LP as an applicant

Silver Point Finance, LLP Applicant (Respondent) and Paragon Canada Alexis, ULC; Alexis Paragon Limited Partnership; Paragon Tamarack Alexis General Partnership; and Paragon Alexis Holdings, Inc., Respondents (Applicants) and Alexis Trustee Corporation, Alexis Nakoda Sioux Nation and Alexis Casino Limited Partnership Respondents (Interveners)

D.R.G. Thomas J.

Heard: January 24, 2014
Judgment: January 31, 2014
Docket: Edmonton 24-1823083, 24-1823084, 24-1823085, 24-1823086

Counsel: Mr. Michael J. McCabe, Q.C. for Paragon Group
Mr. Darren R. Bieganek, Q.C. for Alexis Group
Mr. Charles P. Russell, Mr. Logan Willis for Silver Point
Mr. Kent Rowan, Q.C., Ms Stephanie Wanke for PWC

***D.R.G. Thomas J.*:**

I. Introduction

1 These are my decisions on the applications described in Schedule "A" argued in a common hearing on January 24, 2014 Terms used in this decision including 'Alberta Gaming Regulator', 'Alexis Group', 'Paragon Group' and 'Silver Point' are defined in Schedule "B". Relationships between Silver Point, the Paragon Group and the Alexis Group are shown in Schedule "C".

2 The essence of the Paragon Group applications are for a stay pursuant to s. 11.02(3) of the *CCAA*, for a period of 30 days, to give it an opportunity to develop and file a plan of arrangement under the *CCAA*. Silver Point opposes the Paragon Group applications for a stay and continuation under the *CCAA* and ask instead, for a receiver/manager to be appointed. The Alexis Group also responds to the *CCAA* applications by the Paragon Group and intervenes to support Silver Point in its receivership application. The Paragon Group opposes the appointment of a receiver.

3 The applications of the Paragon Group are dismissed and a receiver manager is appointed.

II. Background

by the Alberta Gaming Regulator, despite many requests that it do so over the last several years. Further, the Alexis Group complains of the failure of the Paragon Group to maintain its debt obligations with Silver Point in good standing. The Alexis Group assert that the relief sought under the *CCAA* by the Paragon Group is more of a defensive tactic than a bona fide effort to restructure, as referred to in the case of *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163 (Ont. S.C.J. [Commercial List]), at para. 58.

38 I am not prepared to find that the Paragon Group is not acting in good faith here. There is evidence the Paragon Group and its principals have continued to inject capital into the operation of the Casino to keep it afloat and that is not disputed. The applications by the Paragon Group appears to be acts of desperation akin to 'Hail Mary' passes, rather than a series of activities demonstrating bad faith. I accept that the Paragon Group has established that it is acting in good faith in making these applications.

(C) Due Diligence

39 Under the third limb of the *Tallgrass* test, the Paragon Group must show that it has acted at all times with due diligence. I take this to mean that the Applicants must have taken steps in a timely way to deal with the financial problems arising from its defaults under the borrowing arrangements with Silver Point and in addressing operational problems in the Casino, such as the continuing high overheads which have apparently upset the Alberta Gaming Regulator.

40 The evidence shows that the problems of high overheads and the defaults on the Silver Point debt have been of longstanding. The Paragon Group has not been duly diligent in addressing and resolving the issues which have been raised by the Alexis Group, including the failure to reduce the overall indebtedness to a level which could be supported by revenues from the Casino operation, the making of satisfactory standstill arrangements with Silver Point and reducing, in a significant way, the overhead and operating costs in the Casino to levels consistent with other Alberta rural casinos and also in maintaining a robust relationship with the all-important Alberta Gaming Regulator and the departments of the Alberta Government responsible for aboriginal relations. I make no observation or comment in respect to the alleged failure by the Paragon Group to construct a hotel.

41 In conclusion on the third limb of the test, I am not satisfied that the Paragon Group has been acting with due diligence in addressing the various issues which it faced with its major creditor, Silver Point, and in dealing with the operational issues which have apparently constrained the revenues available to meet its debt obligations and profits which could go to the Alexis Group.

42 For all these reasons, I find that the Paragon Group has not satisfied all aspects of the test outlined in s. 11.02(3) of the CCAA, a test which must be met before this Court can make the order applied for. The application for a stay is denied and all other applications by the Paragon Group are dismissed.

VI. Decision on the Receivership Application by Silver Point

43 Silver Point is the first-ranking secured creditor of the Paragon Group and as of December 31, 2013 the Paragon Group and each of the entities making up that group jointly and severally owed Silver Point approximately $82 million dollars. It is indicated that these amounts are owed pursuant to a first-ranking secured loan which matured over 15 months ago and remains unpaid.

44 Under s. 243 of the *BIA* and s. 13(2) of the *Judicature Act*, this Court may appoint a receiver or a receiver and manager where it is just and convenient to do so on such terms as it may consider just. Under s. 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give directions on any matter relating to the duties of a receiver. I will deal with the objections by the Paragon Group to the appointment of the receiver/manager before dealing with the Silver Point application on the merits.

45 In response to the Silver Point receivership application the Paragon Group raises an alleged breach of a fiduciary duty owed by the Alexis Group to the Paragon Group through the Alexis Paragon Limited Partnership and the contractual arrangements such as the Casino Management Agreement. This breach is said to be constituted by the involvement of the Alexis Group in developing the Proposed Transaction with Silver Point.

46 It is not clear whether there is a fiduciary duty owed by any of the Alexis Group entities to the Paragon Group. The wording in the various agreements indicates that he parties did not intend to create partnerships so no duty could arise on that traditional basis. Further, it appears that the Paragon Canada Alexis, ULC entity is an agent of the Alexis Casino LP for the purposes of management. The Alexis Group argues that it is the subservient participant in these various arrangements and owes no fiduciary duty to the Paragon Group.

47 Even if there is a fiduciary duty and the Proposed Transaction constitutes a breach thereof the Alexis Group is not the applicant on the receivership application which is made by Silver Point. The Alexis Group merely intervenes to support that application.

48 The Paragon Group attempts to fill this gap by alleging a conspiracy between the Alexis Group and Silver Point which is the applicant for the appointment of a receiver/manager.

49 While a theoretical tort of conspiracy may exist, it is not a cause of action which I am prepared to deal with and make findings on in this type of chambers application. A full trial would be needed to determine that type of claim.

50 Further, the Paragon Group has been aware for some time that their relationship with the Alexis Group has come to an end. All participants were seeking solutions to their badly damaged business arrangements. I do not see anything illegal or improper on the part of Silver Point and Alexis Group in discussing ways to cut their losses and preserve the Casino operation and move on. I see no misconduct on their part which would create an equity in favour of the Paragon Group which in turn would block the granting of the equitable remedy of imposing a receivership structure on this failed business arrangement. Accordingly, I reject this set of arguments from the Paragon Group and move on to deal with the merits of the Silver Point receivership application.

51 The factors which I must consider to determine whether it is appropriate to appoint a receiver pursuant to either s. 243(1) of the *BIA*, or s. 13(2) of the *Judicature Act* include, *inter alia*, the following as customized to this case:

> (a) Silver Point has a contractual right to appoint a receiver - the Paragon Group have committed contractually in the loan agreement to the appointment of a receiver on the application of Silver Point.
>
> (b) Risk of harm to Silver Point if a receiver is not appointed — the preservation of the gaming license is critical and the renewal of the license to provide workers to the Casino is also on a short fuse. It is appropriate to appoint a receiver to preserve these critical assets of this business.
>
> (c) Risk to Silver Point from a sizeable deficiency - Silver Point is prepared to accept a $48 million dollar loss as part of the Proposed Transaction referred to above. There is a sizeable deficiency and it is growing.
>
> (d) The nature of the property — the Casino is located on the Alexis Reserve and the First Nation is prepared to allow a receiver to enter to manage the Casino and take possession of related property. There is evidence that the proposed receiver manager Alvarez & Marsal is in discussions with the Alberta Gaming Regulator and that it will be able to preserve the all important gaming licenses.
>
> (e) Length of the receivership process — the operation of the Casino should be stabilized and the jobs of the 80+- employees must be preserved. It appears that the 'Proposed Transaction' can be closed within a very short timeframe following the appointment of a receiver manager and the operations can be put on a more stable footing and the 80+- jobs can be saved.
>
> (f) Costs to the parties minimized if a receiver is appointed — the appointment of a receiver, as with the appointment of a monitor under the *CCAA*, can involve expending significant amounts on professional fees. Silver Point is prepared to absorb these costs and it appears the appointment of a receiver/manager and the closing of the Proposed Transaction will keep these types of expenses to a minimum.

52 In the result and for these reasons, I am satisfied on the materials put before me that the appointment of Alvarez & Marsal as the receiver manager is just and convenient and meets the requirements of s. 243 (1) of the *BIA* and s. 13(2) of the *Judicature Act*. Accordingly, all stays are lifted and Alvarez and Marsal shall be appointed as the receiver/manager in accordance with the modified template order provided.

Order accordingly.

Schedule"A" — Summary of Applications

The applications by the Paragon Group are for:

1. An abridgment of time.

2. A direction that the proceedings commenced by the Paragon Group under Part III of the *BIA* through the filing of Notices of Intention ("NOI") shall be taken up and continued under the *CCAA*.

3. A stay of all proceedings taken or that might be taken against the Paragon Group.

4. Restraining any further proceedings in any action, suit or proceedings against the Paragon Group.

5. Prohibiting the commencement of or proceeding with any other action, suit or proceeding against the Paragon Group.

6. The adding of the Alexis Casino LP as an applicant to this matter or, alternatively, directing that Alexis Casino LP continue its operations in the ordinary course pending further order of this Court or expiry of the stay, if granted.

The applications by Silver Point are for:

1. Termination of the NOI Stay referred to in s. 50.4(8) of the *BIA* in respect of the Paragon Group.

2. Lifting the NOI Stay pursuant to section 69.4 of the BIA, if and to the extent necessary, to permit Silver Point to file a statement of claim and a receivership application.

3. Appointing Alvarez & Marsal Canada Inc. ("*Alvarez & Marsal*") as the receiver and manager (the "*Receiver*") over all of the undertakings, property and assets of some of the entities in the Paragon Group pursuant to section 243(1) of the BIA, section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "*Judicature Act*"), and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "*PPSA*").

4. Appointing Alvarez & Marsal as trustee of the Paragon Group in lieu of PwC pursuant to s. 57.1 of the *BIA*

Schedule"B" — Defined Terms

1. 'Alberta Gaming Regulator' means the Alberta Gaming and Liquor Commission.

2. 'Alexis Group' means Alexis Trustee Corporation, Alexis Nakota Sioux Nation, Alexis Casino Limited Partnership, Alexis Casino Corporation and Alexis Land Management Corp.

3. 'FNDF' means the First Nation's Development Fund.

4. 'Paragon Group' means Alexis Paragon Limited Partnership, Paragon Canada Alexis, ULC, Paragon Tamarack Alexis General Partnership and Paragon Alexis Holdings, Inc.

5. 'Silver Point' means Silver Point Finance, LLC.

Schedule"C" — Existing Entity Structure

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

***M.J. Lema J.*:**

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the Bankruptcy and Insolvency Act (BIA) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) BIA, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

- Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

- after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

- the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

42 In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on "proposal deemed refused" application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the Judicature Act. Schendel opposes.

Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*[13], Romaine J held:

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

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

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

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 [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

. . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
    - the Proposal is not viable;
    - the Debtors operate at a loss;
    - the Proposal will not be approved by [ATB]; and
    - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

• a receiver should be appointed only where it is "just and equitable in the circumstances";

• "jurisdiction to appoint a receiver ought to be exercised sparingly";

• per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";

• ATB has not provided evidence to support its receiver-related arguments; and

• more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

• Schendel is a large enterprise with complex construction projects underway;

• coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

• recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

• ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

• Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

• ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

• as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

2020 ONSC 7910
Ontario Superior Court of Justice

Halex Capital Inc. v. Natural Energy Systems Inc.

2020 CarswellOnt 19024, 2020 ONSC 7910, 326 A.C.W.S. (3d) 542, 85 C.B.R. (6th) 256

HALEX CAPITAL INC. (Applicant) and NATURAL ENERGY SYSTEMS INC. (Respondent)

Dietrich J.

Heard: December 3, 2020
Judgment: December 17, 2020
Docket: CV- 20-00649326-00CL

Counsel: Mike Shakra, Joshua Foster, for Applicant
Kurt R. Pearson, for Moving Party, Douglas Hallett

***Dietrich J.*:**

Overview

1 The Respondent, Natural Energy Systems Inc. ("NES"), was incorporated as a vehicle to commercialize unique waste-to-energy technology. NES owns proprietary and patented processes for converting organic materials, including organic waste, into a methane product gas with a high-energy content value. The patents for this technology are the principal assets of NES and require regular renewal in various countries. NES has no employees, no operations, and no revenue.

2 Douglas Hallett is the founder and a shareholder of NES. Mr. Hallet, together with another, now deceased shareholder of NES, invested considerable time and money into inventing this technology.

3 The Applicant, Halex Capital Inc. ("Halex"), is a shareholder and creditor of NES. Dragan Matovic is the chairman and CEO of Halex. Since 2015, he has also been the chairman and CEO of NES. He is a director of both companies.

4 Halex has made a number of loans to NES. On January 31, 2020, it entered into a general security agreement ("GSA") with NES with respect to loans made in 2019 and 2020. These loans are reflected in a consolidated promissory note dated January 31, 2020 issued by NES in the principal amount of $175,000. The GSA gives Halex a security interest in all of NES's present and after-acquired property.

5 Mr. Hallett also has a GSA with NES, which he obtained in 2014. He claims this GSA gives him security over NES's technology and the patents. He disputes the validity of Halex's GSA. Halex, meanwhile, disputes the validity of Mr. Hallett's GSA, or, alternatively, disputes the quantum of the property secured.

6 There are other disputes between Mr. Hallett and NES regarding alleged breaches of a unanimous shareholder agreement signed in 2008 (the "USA"). These disputes, including Mr. Hallett's removal from the board of directors, the suspension of his shareholder rights, and the authority of NES to grant Halex a GSA, are the subject of an ongoing arbitration. The arbitration commenced on January 28, 2020 pursuant to an arbitration agreement between NES and Mr. Hallett. It is Mr. Hallett's position that the issue of the validity of Halex's GSA is squarely before the arbitrator and ought to be resolved in that context. Halex submits that it is not a party to the arbitration.

7 Dragan Matovic agreed to participate in the arbitration as a director of NES. Mr. Matovic was also the principal of Halex. Despite this agreement, and despite Mr. Matovic's participation in several conference calls with the arbitrator, after years of litigation, Halex brought an application to appoint a receiver over all the property of NES on November 13, 2020.

8 Mr. Hallett sought an adjournment of the receivership application, which was granted on terms that include the appointment of Baigel Corp. as Interim Receiver until December 3, 2020, when the merits of the application would be heard.

9 Today, on the return of Halex's application to appoint a receiver, Mr. Hallett brings a motion for an order staying the receivership application. He asserts that the issues at the root of the application are disputes between Mr. Hallett and Halex as shareholders and ought to be resolved through arbitration in accordance with the USA.

10 For the reasons that follow, I decline to stay the application to appoint a receiver. A stay in these circumstances, in which it appears that no party to the arbitration is prepared to front the costs of the arbitration on behalf of NES, is not appropriate. Absent a receivership, there is no plan for the preservation of NES's intellectual property through patent renewals. If the property is not preserved, the interests of all of the stakeholders in NES will be compromised.

Mr. Hallett's Motion

11 Mr. Hallett brings a motion for an order staying the Applicant's motion to appoint a receiver and an order referring all of the issues raised to arbitration in accordance with the USA. Alternatively, he seeks dismissal of Halex's application for receivership.

12 Mr. Hallett asserts that Halex is a shareholder and is governed by the Dispute Resolution clause in the USA. That clause provides that the shareholders agree to arbitrate "all disputes and questions whatsoever which shall arise between any of the parties in connection with this Agreement ... or as to any other matter in any way relating to this Agreement."

13 I am satisfied that Halex is a shareholder under the USA even though it was not an original shareholder and has not signed the USA. Halex meets the definition of "Shareholder" in the USA, which is "any person who from time to time owns Shares." Mr. Matovic admits that Halex is a holding company, and, under the USA, a "Holding Company" is a permitted transferee. The USA provides that every issue of shares shall be subject to the condition that the subscriber, if not a party, agrees to be bound by the USA and become a party in accordance with the USA. Also, the USA requires that all share certificates of NES be endorsed with a legend stating that, among other things, any transferee of the securities evidenced by the certificate is deemed and required to be a party to the USA. On examination, Mr. Matovic refused to answer whether the share certificate issued to Halex included the endorsement. Based on this refusal, I am prepared to draw the inference that it did. I find that Halex is bound by the USA.

14 Mr. Hallett asserts that the issues relating to the GSA fall within the Dispute Resolution clause in the USA as a matter "relating to the USA." He points to the resolution of NES's Board of Directors in respect of the GSA granted to Halex on January 30, 2020, when it issued the consolidated promissory note. That resolution specifically refers to the USA and the article thereunder that provides that "each loan share [*sic*] be secured." There is no dispute that "share" in this sentence is meant to be "shall."

15 I agree that this specific reference to the USA in the resolution regarding Halex's GSA could bring that GSA dispute within the scope of the Dispute Resolution clause of the USA. In the result, the issues relating to it would be arbitrated along with the other issues included in the arbitration agreement. Further, in the arbitration, Mr. Hallett is relying on pleadings he prepared for the action NES brought against him, which ultimately went to the ongoing arbitration. In those pleadings, Mr. Hallet raises the validity of the GSA given to Halex.

16 Mr. Hallett asserts that the receivership application is nothing more than a continuation of the shareholder dispute that has been ongoing since 2015 and has already been referred to arbitration. Mr. Matovic's own evidence is that there are "legal and factual issues" relating to the validity of Mr. Hallett's security under his GSA, as compared to Halex's GSA. However, Mr. Matovic asserts that Halex is not a party to the arbitration agreement. He asserts that Halex has initiated the receivership proceedings pursuant to its GSA and the promissory notes, which do not contain an arbitration provision or refer to the USA.

Analysis of Mr. Hallett's Motion

17 Based on the evidentiary record, I am satisfied that it is at least arguable that the dispute with respect to the validity and priority of Mr. Hallett's GSA and Halex's GSA is covered by the arbitration agreement. It would therefore be appropriate to stay the receivership application to permit the arbitrator to determine whether the dispute regarding the Halex GSA falls within his jurisdiction and whether Halex is a party to the arbitration: *King Valley Estates Inc. v. Wong et al.*, 2019 ONSC 4809 (Ont. S.C.J.) , at para. 13; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (Ont. C.A.) , at para. 21; and *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1 (Ont. C.A.), at para. 7.

18 The difficulty in this case is that there is no evidence to suggest that NES has the resources to pay for the ongoing arbitration, or for counsel to represent it in the arbitration. NES is unrepresented in the proceedings before the court today. Mr. Hallett has not offered to front the costs of the arbitration on behalf of NES. His evidence is that "someone" should pay on behalf of NES. Halex has refused to cover any further costs of NES unless it is guaranteed a priority charge in the context of a receivership. A stay under these circumstances could well lead to NES losing its most valuable asset through failure to renew the patents for want of funds. This result is not in the interests of any of the stakeholders. A stay of the proceedings exposes NES to the possibility that it would be petitioned into bankruptcy by one or more of its creditors.

Halex's Application

19 Halex asserts that the appointment of a receiver is necessary and appropriate because NES has not responded to its demand for payment. On July 2, 2020, Halex demanded $265,000 on account of loans made to NES, plus unpaid interest, fees, and costs in connection with the consolidated promissory note. It claims that NES has had ample time to meet the demand. Halex also asserts that NES has no active business, operations, or revenue, and that Halex has been the primary source of funding for NES. According to Halex, as of October 30, 2020 NES had just $1,634.71 in its only bank account.

20 Mr. Hallett says that the equitable remedy of a receivership should not be granted to Halex because NES issued the consolidated promissory note knowing that NES could not pay the initial sum, or any future sum purportedly included. He also contends that Mr. Matovic and Halex are in a conflict of interest in seeking to have a receiver appointed over the property of NES. This is because Halex is a shareholder of NES and Mr. Matovic is a shareholder, officer, and director of NES, as well as the chairman, director, and CEO of Halex. Mr. Hallett asserts that Mr. Matovic loaned money to NES at least in part to fund the litigation against Mr. Hallet, and with the specific intention of precipitating the insolvency and receivership of NES.

21 Mr. Hallett further maintains that Halex has not proven that it advanced all of the amounts purportedly secured, that its security is not properly perfected, and that Halex purposely created a default necessary to appoint a receiver. Mr. Matovic denies this allegation and asserts that the loans by Halex reflected in the consolidated promissory note prevented NES from having to make an assignment in bankruptcy or from being petitioned into bankruptcy. The loans also permitted NES to maintain its intellectual property.

22 Mr. Hallett submits that Mr. Matovic was not acting in good faith because he was in a conflict of interest regarding the granting of the Halex GSA. Accordingly, Halex should be denied the equitable remedy it seeks. Mr. Matovic's evidence is that he acknowledged his conflict of interest and recused himself from voting on the resolution to approve the GSA with Halex. This evidence is corroborated by a letter from another director of NES, G. Paul Greenwood.

The Interim Receiver's First Report

23 Baigel Corp., a licensed insolvency trustee, became the Interim Receiver pursuant to the Interim Order of Koehnen J. made on November 13, 2020. That Order authorizes the Interim Receiver to take any necessary steps to preserve the property of NES.

24 According to the First Report of the Interim Receiver, the assets of NES (not including the value of the intellectual property or an appeal involving the Canada Revenue Agency) had a value of about $80,000. Of this amount, $75,700 is represented by an HST refund, which has not been applied for. Apart from Mr. Hallett and Halex, who assert that they are secured creditors,

the Interim Receiver lists nine creditors in its First Report, whose debts are unsecured. The total amount shown as owing to these unsecured creditors is $1,034,190.

Analysis of Halex's Application

25 Based on the evidentiary record, I am satisfied that the receivership proceedings were commenced to preserve the value of NES for the benefit of all of its stakeholders, including Mr. Hallett, and to determine stakeholder priorities. It appears that NES does not and likely will not have the resources to properly market and sell its assets to satisfy its obligations. It is, therefore, unlikely that NES will be able to repay or refinance amounts owing to Halex or any of its other creditors without a court-supervised receivership.

26 At the time the Interim Receiver was appointed, the costs to maintain NES's suite of approximately 39 patents was estimated by NES's intellectual property counsel, Bereskin & Parr LLP, to be $46,263.80. Koehnen J. authorized the Interim Receiver to borrow up to $75,000 to pay expenses, including outstanding legal fees and fees to preserve the patents. The Interim Receiver borrowed sufficient funds to preserve NES's intellectual property.

27 On the evidentiary record before me, I am inclined to exercise my discretion to appoint Baigel Corp. as the receiver in this matter. It is just and convenient to do so in light of the fact that Halex has made a demand for payment on its promissory notes, has not withdrawn that demand, and payment has not been made. It appears that Halex has been the only source of funding for NES latterly, and there is no alternative source of financing available. Under these circumstances, it is not obvious how NES will repay or refinance the amounts owing to Halex or any of its other creditors, or arrange for the appropriate marketing and sale of its assets absent a receiver. I acknowledge that the dispute between Mr. Hallett and Halex regarding their respective GSAs will be an issue in the receivership. I am satisfied that a court-appointed receiver, being a neutral third party, can provide the court with an unbiased and impartial opinion on the validity, enforceability, and priority of their respective security.

28 As long as the value of the intellectual property is preserved, NES's principal asset can be monetized and sold. Mr. Hallett will have an opportunity to purchase the asset in a sales process conducted by the receiver.

Disposition

29 An Order shall issue appointing Baigel Corp., licensed insolvency trustee, as Receiver, with security, over all of the present and after-acquired assets, undertakings, and properties of Natural Energy Systems Inc. pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. The Order is effective as of the date of this endorsement and it is not required that it be entered.

Costs

30 I have reviewed the Costs Outline or Bill of Costs submitted by each of the parties. Halex seeks full indemnity costs of $136,658, all-inclusive, for its costs on its initial application and on this application for receivership. Had Mr. Hallett succeeded on his motion and this application, he would have sought costs of $36,887.63, all inclusive, on a full indemnity basis. In my view, this matter involves a commercial dispute in which I find the equities are divided. Mr. Hallett, the founder of NES, and the only surviving inventor of its principal asset, has lost the opportunity to have his claims heard at arbitration. The loss comes through what could accurately be described as the school of hard knocks in the business world. NES, under the leadership of Mr. Matovic, whose holding company, Halex, is a significant creditor of NES, abandoned the arbitration at a critical time. Halex then moved to appoint a receiver. Neither Mr. Hallett nor NES could or would fund the arbitration. Halex was successful in its receivership application. Altogether, including consideration of the costs thrown away at arbitration, I conclude that no costs should be awarded for the application hearings.

Application granted; motion dismissed.

2018 BCSC 527
British Columbia Supreme Court

Forjay Management Ltd. v. 0981478 B.C. Ltd.

2018 CarswellBC 766, 2018 BCSC 527, [2018] 9 W.W.R. 357, 11 B.C.L.R. (6th) 395, 291 A.C.W.S. (3d) 177, 59 C.B.R. (6th) 304

Forjay Management Ltd. (Petitioner) and 0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijar, Mohan Vilkhu, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd. (Respondents)

Fitzpatrick J.

Heard: March 12-16, 2018
Judgment: April 4, 2018
Docket: Vancouver H170498

Counsel: Kibben Jackson, Daniel Byma, Layne Hellrung, for Petitioner and Reliable Mortgages Investment Corp.
Daniel Nugent, Janet Kwong, for The Bowra Group Inc.
Robert Cooper, Q.C., Nicolas Hooge, Eric Aitken, for 0981478 B.C. Ltd. and Mark Chandler
Kimberley Robertson, Thomas Boyd, for Kaur Group
Clinton Calwell, for Verne and Lorna Calwell, Margaret Cook, Marian Mahoney for herself and Mitsui Saito, Janet Milbradt, Purchasers for themselves or by agent
Ewan MacLeod, for Brigitte Osborn, Jacqueline and Earle Morriss, James and Judy MacLeod
Diego Solimano, for PeeverConn Properties Inc., Richard and Jacqueline Johnston
Amanda Pereira (A/S) (Agent), for Rebecca Darnell for Lucas Giuriato, Karen McIntosh, Gerrit and Thelma Smidt, Sheila Sharples and Susan Ternes
Steven Roxborough, for Josef and Maria Tomica
Patrick Selinger, John Wiebe, for David and Laurie Brummitt, Gary and Karen Janzen, Walter and Elsje Bisschop, Gopal Naidu, John Roberts, Guy and Myrena Bishop, Rosalie Hersch, Jagtar Kainth, Jordana Charlton, Thomas and Julie Wiebe
Trevor Hande, for Ingrid Kraus, Shannon Smyth, Gerald and Nicola Quinn, Rajeev and Dinsheet Gupta, Strephanie Fahlman, Alvin Los and Emily Rook, Colton Sommerville and Jessica Niven, Karen Batke, Drew St. Cyr, Frances Hansen, Allison Richardson, Elyse Vroom, Vitalii Lavrinovitch and Suk Da Kim, Kelly and Brigitte Burke, Gary and Linda Newton, Lisa McGhee, Warren Kindellan, David and Heather Ray, Nolan Killeen and Alisyn Burns, Alexandra Schoenit, Frederick and Joanne West, Doug and Laurie Lakusta, and Timothy Lamb
Joni Worton, Sandra Wilkinson, for Superintendent of Real Estate
Matthew Nied, Jeremy Shragge, for 625536 B.C. Ltd.
Gordon Plottel, Amanda Baron, for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust
Sanjeev Patro, for Baramundi Investments Ltd.

Ronald Argue, for Zuheir Abrahams Inc.
Travis Brine, for Morris Kadylo

***Fitzpatrick J.*:**

INTRODUCTION

1 This receivership proceeding concerns a 92-unit strata condominium project, known as "Murrayville House", located in Langley, B.C. (the "Development").

2 In October 2017, I appointed The Bowra Group Inc. as receiver manager of the Development (the "Receiver"). At that time, the respondent developer 0981478 B.C. Ltd. ("098") and various purchasers were parties to a number of pre-sale contracts. However, despite the Development being ready for occupancy in August 2017, by the time of the receivership, none of the sales had completed. The Development remains vacant at this time.

3 The Receiver undertook an extensive review of the pre-sale contracts toward determining the status of those contracts. In addition, the Receiver has taken steps such that it is in a position to move forward toward monetizing the Development for the benefit of all stakeholders.

4 The Receiver now seeks directions from this Court as to how to proceed.

5 The crux of the application before me is whether the Receiver should complete 40 of the pre-sale contracts executed by 098, being ones that it describes as "without issues". Alternatively, the Receiver recommends that the strata units, which are the subject of those 40 pre-sale contracts, be marketed and sold as soon as possible.

6 A substantial number of pre-sale purchasers (even some who are not within the 40 that are the subject of this application) and the Superintendent of Real Estate (the "Superintendent") support the Receiver's recommendation to complete these sales. Conversely, the major secured creditors, 098 and 098's principal, the respondent Mark Chandler, oppose the completion of the sales. They argue that these contracts are not valid and enforceable and, alternatively, even if they are, the Receiver should disclaim the contracts to allow a market sale of the units.

THE RECEIVER AND ITS RECOMMENDATIONS

7 On August 25, 2017, Forjay Management Ltd. ("Forjay") and Canadian Western Trust Company in trust and HMF Home Mortgage Fund Corporation ("CWT/HMF") commenced these foreclosure proceedings seeking to enforce their mortgage security against 098, the Development and Mr. Chandler, a guarantor of the indebtedness. Forjay and CWT/HMF's security ranks second in priority as against the Development.

8 When Forjay's foreclosure was filed, there were significant issues already affecting the Development. These included legal proceedings and certificates of pending litigation ("CPLs") which had been registered against the lands. In addition, regulatory action had been taken, as I will discuss in more detail below, arising in part from the suggestion that 098 had sold some of the units multiple times. The house of cards quickly disintegrated from there. The insurer under the new home warranty program then took steps toward terminating coverage.

9 Further complicating matters were that significant issues arose as between the stakeholders after Forjay's foreclosure was filed. For example, 098 disputed the amounts owing under various mortgages, including that of Forjay and CWT/HMF; and, various secured creditors disputed the priority, validity and/or amounts claimed under other security.

10 Some order was brought to this chaos by the appointment of the Receiver on October 4, 2017 (the "Receivership Order"). On October 12, 2017, that Order was amended to clarify that the appointment was not only over the lands, but also all of 098's assets, undertaking and property relating to the Development.

11 Relevant to this application, paragraph 3 of the Receivership Order grants broad powers to the Receiver in relation to the Development and in relation to various contracts entered into by 098, including the pre-sale contracts:

> c) to manage, operate and carry on the business of the Debtor [098], including the powers to enter into agreements, incur any obligations in the ordinary course of business . . . ., or cease to perform any contracts of the Debtor;
>
> . . .
>
> h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
>
> . . .
>
> k) to market any or all of the Property, including advertising and soliciting in offers in respect of the Property or any parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court;

12 After its appointment, the Receiver began immediate efforts to put itself in a position to begin marketing and selling the units in the Development, all with substantial borrowings provided by Forjay. Those efforts included: filing a new disclosure statement, in accordance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"); obtaining coverage under the statutory new home warranty program; confirming that Langley was permitting occupancy of the Development (later confirmed to have been effective on August 8, 2017); completing the outstanding construction; and otherwise ensuring that all other matters relating to the Development were moving toward completion.

13 While these efforts were underway, the Receiver's other major task was to review the substantial number of pre-sale contracts that 098 had entered into prior to the receivership. The Receiver's efforts were discussed in its First Report to the Court dated November 16, 2017. That Report, updated to today's information, revealed various anomalies or issues:

> a) 098 had entered into 151 pre-sale contracts for 91 units, meaning a number of the units had been sold more than once. A chart prepared by the Receiver indicates some units had been sold two or three times and one had been sold four times;
>
> b) in 56 of the pre-sale agreements, 098 had been paid the full purchase price and the purchaser had received a promissory note;
>
> c) a substantial majority of the contracts (79) provided for a credit or discount of between 10 and 100% of the purchase price from that indicated in a price list issued by 098's sales centre which was operational from March 2015 to May 2016 (the "Price List");
>
> d) many pre-sale contracts had been signed after the closure of the sales centre in May 2016 and after market values had substantially increased beyond those indicated in the Price List; and
>
> e) some pre-sale contracts had been signed prior to the issuance of 098's disclosure statement, contrary to *REDMA* requirements.

14 From this analysis, which led to its recommendations, the Receiver identified various "standard" pre-sale contracts dated from April 2015 to May 2016 that were "without issues" and which it considered "valid". In summary, those contracts are described as having the following characteristics:

> a) they were entered into after 098's issuance of a disclosure statement;
>
> b) a deposit of between 3 and 10% of the purchase price had been paid and was held in trust by a law firm;

2013 BCSC 263
British Columbia Supreme Court

Cascade Divide Enterprises Inc. v. Laliberte

2013 CarswellBC 384, 2013 BCSC 263, [2013] B.C.W.L.D. 4186, [2013] B.C.W.L.D. 4463, [2013] B.C.W.L.D. 4466, 1 P.P.S.A.C. (4th) 10, 225 A.C.W.S. (3d) 996

Cascade Divide Enterprises, Inc. and Next Layer Inc., Plaintiffs and Benoit Laliberte, Communication Teliphone Navigata-Westel Inc., Fiducie Residence Jaam, 0865944 B.C. Ltd., Navigata Communications Ltd. and Teliphone Corporation, Defendants

Teliphone Navigata-Westel Communication Inc., Plaintiff and Cascade Divide Enterprises Inc., Defendant

Fitzpatrick J., In Chambers

Heard: January 31, 2013; February 1, 2013
Judgment: February 1, 2013
Docket: Vancouver S130606, S130592

Counsel: W.C. Kaplan, Q.C., R.W. Millen, for Plaintiffs in action S130606, Defendant in action S130592
K.E. Siddall, S. Boucher (A/S), for Defendants in action S130606, Plaintiff in action S130592

***Fitzpatrick J., In Chambers*:**

Introduction

1 These actions involve a number of disputes arising out of the conduct of the parties both prior to and after a significant transaction involving the sale of assets of a telecommunications business in late 2012 by Cascade Divide Enterprises, Inc. ("Cascade") to Communication Teliphone Navigata-Westel Inc. ("TNW").

2 TNW is one of the defendants in the action commenced by Cascade to enforce the security. There are also various subsidiary companies, the defendants 0865944 B.C. Ltd. and Navigata Communications Ltd., which were originally subsidiaries of Cascade until the closing of the transaction.

3 The defendant Mr. Benoit Laliberte is the president and principal of TNW. I understand that he is also now the president and principal of 0865944 B.C. Ltd. and Navigata Communications Ltd. Mr. Laliberte is an undischarged bankrupt. The final defendant is Fiducie Residence Jaam, which I understand is a family trust of which Mr. Laliberte is a beneficiary.

4 There are written agreements between the parties relating to the sale; they provide for the granting of security by TNW for obligations arising under those agreements. Cascade alleges that TNW is in default of the agreements and that the security can be enforced as a result.

5 There are two applications before me.

6 In the action commenced by Cascade, it seeks an order appointing a receiver over TNW. In addition, Cascade seeks certain injunctive relief relating to what are said to be obligations arising out of the sale agreements. In the action commenced by TNW, it seeks an order staying enforcement of the security granted by TNW in favour of Cascade pursuant to the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*PPSA*"). TNW says that there are *bona fide* triable issues regarding the allegations of default and that accordingly, the appointment of a receiver is not appropriate in the circumstances.

7 This application has been brought by both parties on an urgent basis, and on the basis of the evidence, I am satisfied that urgency has been made out. I am therefore giving these reasons orally so as not to delay matters. Despite the brevity of these reasons, I have considered all the evidence presented on the application, together with the extensive arguments and authorities advanced by both parties.

Factual Background

(a) Prior to the Asset Purchase Agreement

8 Cascade was formerly engaged in the provision of voice, data and broadband internet services. The plaintiff Next Layer Inc. ("Next Layer") is a wholly-owned subsidiary of Cascade and provides various co-location, network and data services, including cloud computing, for businesses across Canada. "Co-location" services are services provided to customers who co-locate their data servers in Next Layer's premises in a dedicated space provided by Next Layer, which is accessible either on a shared or exclusive basis to the customer.

9 The evidence regarding the operations and business of Cascade and Next Layer prior to the sale is of some importance on this application. Cascade formerly carried on the business of providing telecommunication services, including voice, data and internet services, to service providers and end users (the parties describe this as the "Business"). In addition, Cascade provided various co-location, network and data services to its customers directly.

10 In 2011, Cascade created a subsidiary, Next Layer, to separate the co-location services from the Business. In early 2012, Next Layer acquired the necessary assets from Cascade to provide the co-location services. Next Layer intended to expand its co-location business into a comprehensive data centre business that would complement the telecommunication service offerings of Cascade. Over time, it was intended that it would be capable of standalone operations. At this time, Cascade continued to provide only telecommunication services to its customers through the Business.

11 The co-location services were very integrated with the Business due to the fact that Next Layer customers typically subscribed to internet conductivity services and, in some cases, voice services, all of which were provided by Cascade to Next Layer.

12 In January 2012, Cascade and Next Layer executed a Master Telecommunication Services Agreement whereby Cascade agreed to provide Next Layer with the necessary connectivity services on a wholesale bundled basis, which enabled Next Layer to provide the co-location services. The agreement provided that Next Layer would obtain services at the lowest price. The benefits under this agreement were mutual, in that Next Layer received wholesale telecommunication services for resale to its customers and Cascade received further sales by the marketing of those services by Next Layer along with its co-location services.

13 Cascade and Next Layer were also highly physically integrated. Next Layer and Cascade shared office space in Burnaby. Some of Next Layer's servers and other equipment were located in Cascade premises, and all were serviced by Cascade employees. One of the critical aspects of this integration was that Next Layer's billing system and information database, including customer contracts and billing records, were commingled with Cascade's billing and accounting systems.

14 In January 2012, Cascade and Next Layer also executed a Support Service Agreement. By this Agreement, Cascade agreed to provide various technical and general administrative support services to Next Layer for a three-year term for a flat fee of $10,000 per month. Cascade invoiced Next Layer for these services.

15 Pursuant to the Support Service Agreement, Cascade was responsible for all billing and accounting matters in respect of Next Layer customers. Next Layer was provided with customer receipt reports from Cascade on an as-needed basis. These reports were provided as requested by Next Layer employees, sometimes on a daily or weekly basis.

16 Customers were generally invoiced on the 1st or the 15th of the month, with payment due 30 days thereafter. The customers were sent a single monthly invoice by Cascade for both the co-location services and the telecommunication services. All amounts were remitted to Cascade. Cascade was also responsible for collecting all HST from Next Layer customers, holding it in a separate bank account and remitting amounts on a monthly basis to the Canada Revenue Agency ("CRA").

17 As part of the physical integration, the computer systems containing customer information, usage information and other information of Next Layer's business were operated by Cascade's employees. After January 2012, Next Layer had access to this information through Cascade on an as-needed basis.

18 In order to sort out how amounts collected by Cascade from customers would be allocable to Next Layer for its operations, the parties agreed to an allocation formula. This formula also addressed how to compensate Cascade for its costs associated with providing the telecommunication services to Next Layer customers.

19 In the first instance, all customer receivables were deposited into Cascade's accounts. Thereafter, what the parties have called the "original" formula provided that if a customer used co-location services, all revenue from that customer, whether for co-location or telecommunication services, was allocated to Next Layer. To the extent that the customers used telecommunication services, Next Layer would pay Cascade for the cost of providing those services plus 50% of the profit relating to those services.

20 Next Layer emphasized that its portion of the allocated revenue is its sole revenue source and that this allocated revenue was accounted for by Cascade on a monthly basis. The original allocation formula was primarily designed by Tim Sansom, Cascade's former Chief Financial Officer. Mr. Sansom, as CFO, also implemented the original allocation, and this revenue was reported in Next Layer's financial statements, the preparation of which was overseen by Mr. Sansom while he was at Cascade. Mr. Sansom is now an employee of TNW.

(b) The Asset Purchase Agreement

21 The central issues in this litigation relate to the sale by Cascade of a portion of the Business to TNW on November 30, 2012, pursuant to an Asset Purchase Agreement (the "APA"). By reason of that sale, Cascade sold to TNW certain assets " which essentially involved Cascade's operating assets relating to the Business " for $6.44 million. There was also substantial related documentation arising from the sale. In particular, certain parties were to provide to Cascade guarantees or indemnities supported by security against assets for payment of the purchase price and compliance with obligations arising under the various agreements. Most importantly, for the purposes of this application, TNW provided security to Cascade in the form of a general security agreement ("GSA"). That GSA has, as far as I am aware, been properly registered in this jurisdiction and perhaps others.

22 Pursuant to the APA:

a) TNW acquired the operating assets necessary to conduct the Business. Those assets were described in the preamble to the APA and included accounts receivable, leased premises, contracts, leased equipment, business records and pre-paid expenses;

b) Cascade retained the assets relating to the co-location services, which of course included Next Layer's business operations. Accordingly, Cascade retained all of its shares in Next Layer and the Business, assets of Next Layer, and Cascade's right and interest in certain leases and shares; and

c) TNW assumed all of the rights and obligations under certain contracts, including the Support Services Agreement. Various other agreements were also assigned by Cascade to TNW. One of the issues arising on this application related to a lease held by Cascade for the premises in Burnaby. These premises were used as Cascade's head office and were shared with Next Layer pursuant to the Support Services Agreement. Next Layer also located its facilities there.

23 The payment schedule under the APA provided for the purchase price to be paid in a number of periodic payments:

a) $500,000 at closing;

b) $940,000 on December 14, 2012; and

c) commencing December 15, 2013, the remaining balance of $5 million was to be paid annually by five equal instalments, together with interest.

24 The APA was originally scheduled to close on December 15, 2012. I understand that some urgency arose in respect of that closing, principally because Mr. Laliberte insisted that the financial health of Cascade was such that the closing had to occur as soon as possible so that efforts could be made to restructure the operations and return Cascade to better financial health.

25 As far as I understand, in the weeks leading up to the closing, there was some due diligence done by TNW's employees, including Sandeep Panesar and Mr. Laliberte himself. I also understand that in the weeks leading up to the closing, TNW employees worked closely with Cascade employees. Many of these employees, including Mr. Sansom, the CFO of Cascade who later became the CFO of TNW, have provided affidavits on this application. Mr. Sansom was part of a group of high-level management employees of Cascade who moved over to TNW immediately after the closing and presumably are now fully employed by TNW.

26 Given the shortened period of time in which the APA had to close, various documents that were intended to be exchanged between the parties were not prepared in time. Accordingly, there was also a further agreement between the parties called a Post-Closing Agreement, by which certain documents, including various security documents, were to be provided no later than December 18, 2012.

Disputes Between the Parties

27 There are many disputes between the parties. I will deal with them individually.

(a) The December 2012 Payment

28 The first dispute relates to the second payment due under the APA on December 14, 2012. As I indicated earlier, the amount due and owing at that time in relation to the purchase price was $940,000. There was an e-mail sent from Mr. Laliberte to Cascade just immediately prior to that date which indicated that payment would be made; however, only $140,000 was eventually paid by TNW on or just after the due date.

29 TNW later alleged that the short payment of $800,000 arose from a situation relating to one of Cascade's accounts receivable. As a result, there was substantial evidence on this application concerning the circumstances of the account receivable associated with TransPacific Telecom Group Inc. ("TransPacific").

30 I do not intend to review all of that evidence in detail, but I will generally describe the issue. It appears that TransPacific began doing business with Cascade in early 2012. Services were provided by Cascade and payments were made by TransPacific. I understand that as of the end of October 2012, which would have included billings to September, TransPacific had fully paid up or, in fact, had slightly overpaid. In any event, it appears that there were substantial services provided to TransPacific prior to the sale, in both October and November 2012, such that eventually, a receivable of approximately $718,000 was owing to Cascade at the time of the closing of the APA.

31 TNW points to certain clauses in the APA by which it says there was either an agreement or a representation by Cascade that all accounts receivable were "valid, enforceable and collectible accounts in full":

Section 3.01(11)

Financial Statements. The Financial Statements have been prepared in accordance with Canadian generally accepted accounting principles, are true, correct and complete in all material respects and present fairly the consolidated financial

condition of the Vendor as of the respective dates indicated therein. Without limiting the generality of the foregoing, the gross revenue as set forth on the Financial Statements is equal to $32,000,000.

. . .

Section 3.01(13)

Accounts Receivable. The accounts receivable included in the Purchased Assets arose from bona fide transactions in the ordinary course of the Business have not been discounted (except for customary, early payment discounts consistent with past practice and are valid, enforceable and collectible accounts in full (subject to set-off and a reasonable allowance, consistent with past practice, for doubtful accounts as previously disclosed in writing to the Purchaser).

[Emphasis added.]

32 Evidence presented by TNW on this application from former employees of Cascade (who are now employees of TNW) is said to support the contention that it was well known by Cascade that the receivable owing from TransPacific was a "bad debt".

33 In light of that evidence, TNW now alleges that there was a breach of the representation in the APA concerning the TransPacific account being 'collectible account in full', or alternatively, that there was a fraudulent misrepresentation in respect of that debt. TNW now argues that the collectability — or rather, uncollectability — of this debt was not disclosed to TNW prior to closing. TNW also provided evidence that it had made unsuccessful efforts to collect the TransPacific debt in full.

34 I questioned counsel for TNW in terms of the interpretation of the words "collectible accounts in full". As I understand it, TNW takes the position that this phrase essentially amounts to a guarantee by Cascade that all accounts receivable owing as at the end of November would be paid in full. Further, it contends that this "guarantee" relates to not only what might have been considered "bad" or problem debts prior to that date, but also to what might have been considered a good debt as of the closing but which later became a "bad" or problem debt for whatever reason.

35 Cascade says that TNW knew of the accounts receivable levels prior to the closing. There is evidence that Mr. Panesar did in fact receive an accounts receivable listing prior to the closing which, on the first entry, clearly identifies TransPacific as having a large amount due and owing to Cascade. There is also evidence that Mr. Panesar was involved in an e-mail exchange just prior to the closing, at which time he questioned certain Cascade employees about whether $200,000 that was to be paid by TransPacific had in fact been received.

36 I conclude from this evidence that it is abundantly clear that TNW was aware of the account receivable levels well before closing and that TNW was also aware of Cascade's efforts to collect the amounts outstanding from TransPacific. That evidence casts considerable doubt on TNW's ability to allege fraud on the part of Cascade by arguing that Cascade hid from TNW the true status of the TransPacific receivable. As counsel for TNW points out, I am not to make a determination in respect of those matters on this application, but I must at this time consider the merit, or perhaps lack of merit, of arguments that might be advanced at the end of the day.

37 I also note that, in support of TNW's contention that the TransPacific debt was considered a "bad debt", various TNW employees (who were formerly employed by Cascade) have taken pains to outline in detail what they say was happening at Cascade in respect of the TransPacific matter. It is quite curious that those same employees did not comment at all on the level of discourse between them and TNW employees during the due diligence period in respect of that same receivable.

38 Further, there is also little evidence from TNW in terms of its efforts to collect the TransPacific debt. There was evidence of a proposal by TransPacific to provide a promissory note, a proposal which was not satisfactory to TNW. But there was no further evidence from TNW on this application as to what happened after that point in time. There is, however, uncontradicted evidence from Cascade that a TNW employee has indicated fairly recently that TNW has had some success in collecting a substantial portion of the receivable owing by TransPacific.

39 The more significant argument on the part of Cascade relating to the TransPacific matter, the allegations of breach of contract or fraudulent misrepresentation, and the ability of TNW to set off any amounts owing as a result arise from the APA in Section 5.06. That clause provides:

> [TNW] shall not be entitled to set-off the amount of any Claim (whether submitted under Article 5 as damages or by way of indemnification or otherwise) against any other amounts payable by [TNW] to [Cascade] whether under this Agreement (including, without limitation, under Article 6) or otherwise.

40 The definition of "Claim" in the APA is very broad, meaning "any claim, demand, action, lawsuit, proceeding, arbitration or investigation, in each case, whether asserted, threatened, pending or existing." As earlier stated, the argument advanced by TNW is that there was a breach of contract, which, as Mr. Kaplan points out, would quite likely be squarely met by what I consider to be the plain meaning of Section 5.06. TNW asserts, however, that there are issues with respect to the interpretation of Section 5.06. In the first instance, it says that the clause does not apply to these circumstances (and by that, I take it to mean the ability of TNW to set-off claims). It is acknowledged that there is no claim for legal set-off, since TNW's claim is not a liquidated debt. TNW contends, however, that it has a claim for equitable set-off, in accordance with the principles set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.). I acknowledge if a valid claim exists, then generally speaking, equitable set-off may be available to TNW in these circumstances.

41 However, even if a claim for equitable set-off was available to TNW, again, I consider that the plain meaning of Section 5.06 would meet any such claim. TNW asserts that there is ambiguity in Section 5.06. But based on the plain meaning of the words in that Section, I quite frankly do not see it.

42 TNW's alternate argument is that even if Section 5.06 precludes the exercise of any right of set-off, the court may not enforce such a clause where fraud is involved. In that regard, TNW relies on the decision of *British Columbia (Attorney General) v. Malik*, 2009 BCCA 202 (B.C. C.A.). At paras. 43-50, the court acknowledges that in certain circumstances, particularly in respect of an equitable claim such as fraud, courts may ignore the contractual arrangements between the parties.

43 Cascade argues that within a normal commercial situation, the court will not usually depart from the clear wording of the contract and, in particular, the court will enforce clauses by which the parties have expressly agreed that no set-off will be exercised, citing in support *KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp.*, 2003 BCSC 164 (B.C. S.C.) and *Royal Bank v. Parmar*, 2005 BCSC 1155 (B.C. S.C. [In Chambers]).

44 In this case, both parties are sophisticated parties. Further, this was clearly a situation where the parties had significant legal advice in the formulation of their agreement and, given the substantial documentation that accompanied the closing, also in the recording of their agreement. The allegations of fraud are advanced by TNW based on what I consider to be a fairly weak argument. In light of all the circumstances brought to light at this time, following *Parmar* and *KKBL*, I see no reason to depart from holding the parties to their bargain. There is no clear indication of fraud on which I might follow the *Malik* reasoning.

45 Accordingly, with respect to the $800,000 amount owing, I find that Cascade has presented a strong case.

(b) Allocation of Next Layer Revenue

46 I have already referred to the pre-existing arrangements between Cascade and Next Layer concerning the manner in which the revenue from the shared customers were to be recovered, paid and allocated between them.

47 Critical to the allocation was that if there were any co-location services provided to a shared customer, all of the proceeds would be paid to Next Layer and there was to be a remittance back to Cascade of the cost of providing the telecommunication services plus 50% of the profits relating to those services. It is also the case that if there were any receivables owing from Next Layer to Cascade, by reason of services being provided to Next Layer, there would be a billing of those expenses to Next Layer and then a later remittance by Next Layer back to Cascade.

48 This was the basis upon which Cascade and Next Layer operated prior to the closing of the transaction on November 30, 2012. Certain former employees of Cascade (now employees of TNW) gave evidence attempting to disparage the validity of that practice or method of allocation. I consider that whether this allocation was something that should have been done is rather beside the point; the fact is it was done.

49 Cascade submits that it was this very practice that was incorporated into the APA. Counsel for TNW submits, quite correctly, that there was no specific delineation of that allocation procedure in the APA. However, the APA did reference the financial statements and the assumptions on which those financial statements were created. The evidence is clear that those financial statements and the assumptions were on the basis of the original allocation formula that was in place prior to the closing of the transaction. Mr. Griffiths, the CFO of Next Layer, commented that it was on that basis that he expected that the allocation would continue simply as before.

50 TNW takes the position on this application that there was no agreement between the parties concerning the allocation of revenue to Next Layer as at the date of the closing, in accordance with the APA. TNW also made certain submissions that, in any event, even if there was an "original" allocation, sometime in November prior to the closing, the parties agreed to what is called the "new" allocation.

51 There are a number of difficulties with TNW's position. There is a suggestion in the evidence from Mr. Sansom to the effect that Mr. Laliberte alleges that he orally made this "new" agreement with the representatives of Cascade prior to the closing. That portion of the affidavit is very oddly worded; and while Mr. Samson says that Mr. Laliberte "advised" of such an agreement, there is no evidence as to *who* Mr. Laliberte is said to have advised of that agreement. I do, however, acknowledge that Mr. Panesar also says that this "new" agreement arose from a meeting between himself, Mr. Laliberte and two representatives of Cascade, including the Chairman.

52 Cascade and Next Layer very much dispute that they entered into any "new" agreement with TNW prior to the closing.

53 Another difficulty with this "new" agreement is that it is directly contrary to the financial statements that are expressly referenced in the APA and related documentation.

54 A further difficulty is that the APA included an "entire agreement" clause in Section 7.08 which expressly precludes any reliance on prior agreements, including any oral agreements; and as in the usual fashion, it indicated that whatever agreements the parties intended to and did make in respect of this transaction were in writing, as found in the APA. This is not an unusual clause. And again, there was a specific reference to the Next Layer financial statements in Section 3.03 of the APA and that TNW expressly acknowledged that the gross revenue set forth in those financial statements are at a certain level. The assumptions within those financial statements lead back to the original allocation that was in place between Cascade and Next Layer prior to the closing.

55 Perhaps the best response to TNW's current contention regarding this "new" agreement is the evidence from Mr. Laliberte himself. He sent an email to the Chairman of Cascade and Next Layer on the eve of the closing on November 29, 2012, stating:

> Don't worry about the intercompany we will follow the existing agreement. Revenue, asset and liability will be mutually agreed today in the agreement and nothing will change. Revenue of next layer and Oncall will be immediately forwarded to your account, but you will have to pay back to us the cost as per the agreement on a timely matter. Tim will deal with this for at least the next 6 months.
>
> John, AT THE END OF THE DAY IT IS A QUESTION OF TRUST AND GOOD FAITH!!

56 It is difficult to interpret the above statement by Mr. Laliberte, save and except that he understood that the allocation was to be exactly as was in place between Cascade and Next Layer just prior to the closing. That understanding would have not only included a calculation based on the original allocation; most importantly, it would have also included that there would

be no set-off before that allocation was made and that there would be a billing addressed to Next Layer by TNW in the usual course of business, which would be paid by Next Layer.

57 Once more, I acknowledge TNW's argument on this issue, and I do not intend to resolve that issue on this interlocutory application. For the purposes of considering the relief sought today, however, I consider that Cascade has a strong case in support of its position that the allocation between the parties was to be in accordance with the original allocation.

(c) HST / Lease Obligations

58 There was some discussion during submissions regarding the amounts that are owed to the CRA for HST prior to the closing. I will not delve into that issue to any great degree because counsel for TNW indicated during argument that TNW now agrees that those amounts should have been, and will be, paid by TNW. I will, in any event, address this issue within the context of the court order to be granted.

59 The lease was also a very contentious matter. The evidence indicates that the lease in Burnaby where both Cascade and Next Layer had their head offices was to be taken over by TNW. Obligations under the lease were addressed within the context of the Assignment and Assumption Agreements.

60 Notwithstanding those agreements, almost immediately after the closing, Mr. Laliberte on behalf of TNW chose to take a different tack with the landlord. TNW moved from the premises shortly after the closing and indicated to the landlord that there would have to be negotiations on the outstanding obligations that remained under that lease.

61 I do not comment negatively on TNW's decision to move. There are often good reasons to move to less expensive accommodations towards lessening expenses. Counsel for TNW has explained that this decision was made to help rationalize or restructure Cascade's operations, in the hopes of improving the financial health of the Business.

62 Mr. Laliberte's approach in relation to the lease is a somewhat curious one, particularly in light of his comments to certain Cascade employees on December 2, 2012 that things were going to get "rocky" in the days following his taking over the operations of Cascade, addressing certain operational matters, and effecting the "turn around" of the Business.

63 The difficulty with his approach was that it brought about a default under the lease. A notice of default under the lease was issued by the landlord, noting defaults to the extent of $67,000. The consequences of those defaults have fallen upon the shoulders of Cascade, who of course remains the principal obligant under the lease at this time. Quite clearly, the substantial contractual obligations that were put in place between Cascade and TNW were intended to avoid this very result. TNW assumed liability for this contract so that Cascade would not be met with defaults under its contracts without having any resources to cover those obligations after having transferred the Business away to another party with only the promise of payment to come.

(d) Post-Closing Matters

64 Various documentation, including security agreements, was not provided at the time of the closing. There was, however, good reason for that, namely, the closing happened very quickly. In any event, the parties agreed to a later deadline of December 18, 2012 for providing these further documents. This deadline was not met, and the further security documents were not provided.

65 I did not take from TNW's submissions that there was any difficulty conceptually in providing those documents. Counsel for TNW referred to an ongoing dialogue between counsel towards having those documents put in a proper format, and once finalized, having those documents executed.

(e) Transition Issues

66 This is a critical issue from the point of view of Cascade and Next Layer, and it is principally driven by the circumstances of Next Layer and its interdependence on Cascade (and now TNW) in terms of continuing with its ongoing operations.

67 The interdependence that existed between Next Layer and Cascade was not an issue because they were run essentially by the same parties. The interjection of TNW in terms of Next Layer's operations has, however, introduced into the mix a level of vulnerability on the part of Next Layer that is being sorely tested.

68 Consistent with documenting the terms upon which the sale was to occur, the process of the transition was addressed by the parties in a written document called the Transition Agreement. Conceptually, the idea was that the parties would move "as soon as practicable" to provide Next Layer with the means of obtaining its documentation and information that was in the possession of Cascade (and now TNW) for the purpose of enabling Next Layer to move forward towards establishing its own standalone operation.

69 The overwhelming evidence from Cascade, which is supported to some extent by the evidence of TNW, is that the transition is happening neither as it should nor as quickly as it should.

70 There is considerable evidence from all the parties concerning the past and continuing dialogue regarding the outstanding matters. What particularly emerges from that evidence, and which is undisputed, is that TNW has been expressly denying Next Layer certain of its information and has been expressly denying Next Layer access to its information and data which it otherwise would have been able to obtain through its arrangements with Cascade. It was this past practice of access to the Next Layer information and data which was intended to be continued through the transition period.

71 A further issue arising in this transition period relates to TNW's failure to remit monies to Next Layer in accordance with the original allocation formula, as discussed above. The Transition Services Agreement provided that funds collected by TNW were to be held in trust for Next Layer and were required to be remitted within 72 hours.

72 Lastly, another troubling aspect of the transition is that there is evidence that TNW is interfering with Next Layer employees. Various Next Layer and Cascade employees recount a strange series of meetings in January 2013 which Mr. Laliberte, Mr. Panesar and Mr. Stearman (also a former employee of Next Layer) attended. There is some dispute about what happened at those meetings, but there is no dispute on certain events at those meetings. What I take from that evidence is a clear indication that Mr. Laliberte was, at least, making various disparaging comments about Next Layer and Cascade to their employees, by which he questioned the solvency of Next Layer and Cascade and their ability to survive as a business. In addition, during some of those meetings, Mr. Laliberte was actively recruiting Next Layer employees to join TNW. The recruitment of Next Layer employees is somewhat curious in the sense that it does not appear that TNW was at all in the co-location business prior to the closing in November 2012. However, the inference from the evidence is that perhaps TNW sees that that is a business that it wishes to get into and that acquiring the Next Layer employees would assist it greatly in that respect.

73 Cascade advances the proposition that there is a strong inference from the evidence of the actions of TNW and its employees upon which to conclude that TNW, and particularly Mr. Laliberte, are engaged in a concerted campaign to weaken Next Layer and Cascade so as to allow TNW to pick off Next Layer's employees, and perhaps Next Layer's assets, for its own benefit. That is very much disputed by TNW. Taking all of the evidence on this application in its totality, however, I do consider that there is a strong inference from the evidence to suggest that this is, in fact, what is happening here. Again, I refer to the e-mail from Mr. Laliberte referring to the "rocky" road ahead that he anticipated by reason of his business strategies or tactics. The only thing that he perhaps forgot to mention is that, in addition to other parties, Cascade and Next Layer would also be asked to walk that same "rocky" road with him.

74 With respect to the transition issues, again, while there is some dispute between the parties on many of those issues, I intend to approach them on the basis of respecting the bargain between the parties as evidenced by the extensive documentation executed by them.

Receivership

75 As indicated earlier, the first action was commenced by Cascade and Next Layer seeking enforcement of the security given by TNW, which security is admittedly in place. The second action was commenced by TNW against Cascade on or about the

same date as the first action. This latter action is more defensive in the sense of seeking a stay of enforcement of the acceleration of payment of the debt, which in fact was demanded by Cascade based on the alleged defaults. Alternatively, TNW seeks a stay of enforcement of the security held by Cascade. Based on submissions by Cascade's counsel, Cascade is not pressing that the security should be enforced based on an acceleration of the entire purchase price owing under the APA; rather Cascade seeks enforcement only in respect of the $800,000 that is owed from December 2012.

76 The statutory basis upon which to appoint a receiver is well set out by the parties. The *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39, allows the appointment of a receiver where it is just and convenient. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243 (the "*BIA*"), similarly provides for the appointment of a receiver on that basis.

77 Two decisions of this Court set out the factors that are to be considered in appointing a receiver: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) and *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]). Although the factors referenced in *Maple Trade* and *Textron* may guide the court in terms of what is to be considered on such an application, the overarching is to consider all the circumstances in deciding whether it is just and convenient to appoint a receiver.

78 TNW's application for a stay of enforcement proceedings is brought pursuant to s. 63(2)(d) of the *PPSA*, which provides that the court may grant an order staying the enforcement of rights under security instruments. Similar to the *Law and Equity Act* and *BIA* provisions, this section allows the court to exercise its discretion in appropriate circumstances.

79 I will note at the outset that there are substantial triable issues. They have been advanced by both TNW and Cascade, and as counsel for TNW says, they have not been tested at trial. There have been no cross-examinations on the affidavits presented. However, I approach this application on the basis that certain circumstances have emerged, and I am satisfied that interim relief is necessary in those circumstances.

80 The first factor set out in para. 25 of *Maple Trade* is whether irreparable harm might be caused if no receivership order were made. I should say at the outset that TNW has proposed what it considers a compromise in terms of the receivership sought by Cascade in respect of the $800,000 that was due on December 14, 2012. TNW has offered to pay that amount into court, which it says will provide security for that amount until the matter of its TransPacific set-off/fraud claim is determined. Accordingly, TNW says that no irreparable harm will be caused to Cascade for that reason and that it is fair to pay the amount into court.

81 I do not intend to go through each of the *Maple Trade* factors in detail, although an important consideration is that a receivership is extraordinary relief which should be granted cautiously and sparingly. Accordingly, if the court can fashion a remedy that avoids receivership, then that is certainly something that should be considered. Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.

82 Given the positions of the parties, in my view, the issue comes down to this: should the $800,000 stay in court or should it be paid to Cascade in accordance with the terms of the APA? I have decided in the circumstances that it should be paid to Cascade. I say that because, in my view, to do otherwise is not fair in the circumstances, where such payment was to be made in accordance with the APA and in light of the clear wording of Section 5.06 of the APA. In addition, if TNW should succeed in its arguments at the end of the day, there is no prejudice that will be suffered, because TNW will still owe $5 million to Cascade even after this amount is paid. The $5 million receivable can stand as substantial security in respect of the claim relating to the TransPacific receivable should TNW prevail at the end of the day.

83 Accordingly, I am ordering that: (i) TNW pay the $800,000 to Cascade, and I will later address by what date; and (ii) failing payment, a receivership order is granted. TNW apparently has the money, and as I said, there is no prejudice in the event

of payment. TNW and Mr. Laliberte can decide in fairly stark terms whether the payment is to be made, which will dictate what consequences flow from any default.

Injunctive Relief

84 The request for injunctive relief principally arises from the transition issues that I have already discussed. The well-known authorities that govern the test to be applied on this aspect of the application are *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) and *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), aff'd [1991] S.C.J. No. 7 (S.C.C.). The three-part test includes considering: firstly, whether there is a serious question to be tried; secondly, whether the applicant will suffer irreparable harm if the application were refused; and thirdly, whether the applicant will suffer greater harm from the refusal of the remedy than the respondent would suffer from the granting of the remedy. In *Wale*, the court chose to collapse the second and third aspects of the test into one, considering together the balance of convenience and the issue of irreparable harm.

85 I have already stated my conclusions with respect to the two major issues, that is, the set-off issue and the allocation issue. In my view, Cascade has more than met the low burden of showing that there is a serious issue to be tried. I also find that Cascade has shown that there is a serious issue to be tried with respect to its cause of action relating to the interference with Next Layer employees.

86 Turning to the irreparable harm and balance of convenience tests, the Court in *RJR-MacDonald* indicates that the factors will vary from case to case and that there is no set formula by which to decide the matter. TNW submits that this is just a matter of money and that money will solve the problems at the end of the day. That is in stark contrast to the position of Cascade and Next Layer, who submit that this is not about money. Rather, they say that Next Layer's very survival depends on a quick resolution of these transition issues, so that they can continue their efforts to separate the two operations and finish the transition so as to reduce and ultimately eliminate the current interdependence with TNW which places both Cascade and Next Layer in a vulnerable position.

87 I do note that Next Layer employees have given evidence that had they known how the transition period would be dealt with by TNW, as they know now, they would have taken more serious steps to address the transfer of information and documentation prior to the closing date. I return to Mr. Laliberte's comment about the trust that was intended to be in place between the parties, which given the way things have turned out, was not worthy of consideration.

88 The authorities are clear that the survival of a business is a factor that will be considered in the context of irreparable harm. This was particularly addressed in the *RJR-MacDonald* decision. This issue was also recently considered in *Edward Jones v. Voldeng*, 2012 BCCA 295 (B.C. C.A.) at para. 41, where the court refers to *RJR-MacDonald*, stating that "irreparable harm refers to the nature of harm suffered rather than its magnitude." However, Mr. Justice Chiasson goes on to say that:

> [41] ...if an applicant were able to show that its business potentially would be destroyed by the conduct of a defendant it might be open to argue that such "magnitude" of damage would be irreparable.

89 It goes without saying that it is advantageous to have a weak opponent. I would reiterate the submissions of Cascade concerning its allegations of a campaign on the part of TNW to put Cascade and Next Layer in as vulnerable a position as possible. Again, I consider that there is a fair inference to be taken from the evidence that that is, in fact, what is happening here.

90 There is substantial evidence to support that TNW is in breach of the various agreements: (i) the failure to pay the $800,000; (ii) the failure to pay the CRA; (iii) the failure to pay the landlord, and the issues with the landlord which have negatively affected Cascade; (iv) the admitted refusal by Mr. Panesar to provide to Next Layer certain information and documents and access to that information; and (v) the refusal to pay Next Layer in accordance with the original allocation.

91 Furthermore, there are the negative representations to employees that were admittedly made by Mr. Laliberte. In addition, there were efforts by TNW to recruit Next Layer employees. TNW did not deny this, but suggested that the employees it was

trying to entice across were not in fact that valuable. This begs the question, however, as to why it was trying to entice them across in the first place.

92 All of these factors suggest that TNW made these efforts in an attempt to intentionally weaken Next Layer and Cascade, and it is evident that they had that effect to some degree.

93 In particular, I would note affidavit #1 of Mr. Williams at para. 35, as to the harm that he says is being suffered by Cascade and Next Layer by reason of the actions or inactions taken by TNW. I agree with Cascade and Next Layer that the harm that has been brought to bear on the operations of Next Layer has more than adequately established that there is the risk of irreparable harm being visited upon Next Layer and hence, Cascade.

94 I do not agree with TNW's submissions that damages would be an adequate remedy at the end of the day. It is evident that if Next Layer does not survive, then TNW would more than likely be dealing with the trustee in bankruptcy or perhaps a receiver. For TNW, from a negotiating point of view, this would clearly be better than dealing with Cascade and Next Layer directly.

95 On the other hand, there is no prejudice to TNW by abiding by the bargain that it made in respect of the transition, which was clearly addressed by the parties in the documentation before me.

96 I acknowledge that the allocation issue remains somewhat of an issue from TNW's point of view with respect to this so-called "new" agreement. But the evidence before me today strongly indicates that the parties agreed to the original allocation that was in place between Cascade and Next Layer. As I said, that was more than evident from Mr. Laliberte's own e-mail. I would emphasize again that if there is any issue in that respect at the end of the day, the $5 million still yet to be paid under the APA will stand as more than adequate security in respect of any recovery that TNW may be entitled to.

97 I conclude that there is no prejudice if Next Layer is able to enforce the Transition Agreement. This transition can take place as soon as possible and in accordance with the bargain of the parties.

98 There has been some discussion on this application concerning the *status quo*. TNW is not able to assert on this application that the *status quo* is that which arises from a departure from the agreements. That is simply an untenable position. The *status quo* that must be respected at this time, until such time as the parties establish something to the contrary, is the bargain. That bargain, as I said, is evident from the substantial written documentation and agreements that the parties have taken time, trouble and expense to put together to evidence their agreement. Accordingly, the *status quo* is in accordance with that documentation, not with any other agreements which TNW may allege are in place. I do not accept that breaches of the agreements — which appear to be the basis upon which Mr. Laliberte prefers to do business — are the basis upon which to establish the *status quo*.

99 If this transition can be done as soon as possible, which is no doubt the intention of Next Layer at this point in time, the allocation issue will become less important as that matter is sorted out.

Disposition

100 Accordingly, I am granting the orders sought by Cascade and Next Layer on this application. Cascade has produced draft forms of the orders which TNW's counsel has reviewed. Both parties have made submissions on changes to the drafts. I have considered submissions on these further changes to the draft orders and the changes are approved.

2012 ABQB 292
Alberta Court of Queen's Bench

Strategic Financial Corp. v. 1402801 Alberta Ltd.

2012 CarswellAlta 1845, 2012 ABQB 292, [2013] A.W.L.D. 610, 221 A.C.W.S. (3d) 852

Strategic Financial Corp., Plaintiff and 1402801 Alberta Ltd., Defendant

T.F. McMahon J.

Heard: April 27, 2012
Judgment: May 2, 2012
Docket: Calgary 1201-03137

Counsel: Sean F. Collins, Walker W. MacLeod, for Plaintiff
Christopher D. Simard, for Defendant
Josef G.A. Kruger, Q.C., for 571764 Alberta Ltd., Newel Post Developments Ltd.
Travis Lysak, for Proposed Receiver, Price Waterhouse Cooper

***T.F. McMahon J.*:**

1 The Plaintiff, Strategic Financial Corp. ("Strategic Financial"), applies for the appointment of a Receiver-Manager for land and a building known as the Barron Building in downtown Calgary, Alberta. The building is 11 storeys in height and is vacant but for a movie theatre which is not currently operating. The Defendant, 1402801 Alberta Ltd. ("140"), owns the land and building. When it purchased the land in 2008, it assumed a first mortgage in the principle amount of $16 million. Strategic Financial now holds that mortgage by assignment from a prior holder.

2 Both Strategic Financial and 140 are controlled by one Riaz Mamdani who is also a director of both companies. 140 is separately represented on this application and, while consenting to it, does not advocate for or against the appointment of a Receiver-Manager.

3 The application is opposed by Newel Post Developments Ltd. ("Newel Post") and 571764 Alberta Ltd. ("571"). Newel Post was the previous owner of the building. It retains an encumbrance against title pursuant to a development agreement. 571 is the lessee of the theatre premises which lease is registered against the title. Both the registered instruments of Newel Post and 571 have been postponed to the first mortgage held by Strategic Financial. There are also second and third mortgages held by companies related to Strategic Financial.

4 The first mortgage of Strategic Financial is in default and remains outstanding in the approximate amount of $14.340 million as at March 1, 2012 with interest accruing thereafter. Newel Post and 571 argued that the first mortgage may not be in default but the only evidence on this application is clear. 140 is in default in making the required interest payments as well as a $5 million dollar payment in principle due January 19, 2012. As a result of that default, Strategic Financial made demand for payment of the entire amount as it was permitted to do under the terms of the mortgage. No payment was forthcoming.

5 The uncontradicted evidence is that the theatre premises have health and safety issues including asbestos being present and an absence of an operating sprinkler system. 140 has no other assets to finance remedial work which it estimated to cost $2 million.

6 There is significant litigation between the parties which has created an effective deadlock. 571 and 140 are in litigation regarding the lease and their respective obligations under it. Newel Post and 140 are in litigation regarding the encumbrance

held by Newel Post against the title. Without an injection of capital, the building will remain vacant and deteriorate. Litigation costs will continue to mount.

Respondent's position

7 The essential position of Newel Post and 571 is that the applicant Strategic Financial can not meet the just and convenient test having regard to the principles stated in authorities such as *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.). Newel Post and 571 say that they will be damaged further by the appointment of a Receiver-Manager, though just how is not clear. The Receiver-Manager will be obliged to act in the best interests of all the interest holders so far as he is able.

8 The authorities do say that a lesser remedy should be searched for. The remedy suggested by Newel Post and 571 is that the shareholder of 140 should inject additional money into the company in order to remediate the building. However that is not an appropriate remedy, though it may be a solution. A non-party shareholder can not be compelled to inject money into a corporate litigant merely to avoid the appointment of a Receiver-Manager.

9 Newel Post and 571 then say that the land could be transferred to Strategic Financial which has the wherewithal to effect repairs. Once again, however, that's not an alternate remedy to the appointment of a Receiver-Manager.

10 A main complaint raised by 571 is that its litigation with 140, if it continues, would be funded by the Receiver-Manager who would then have a priority charge against the building. I have no evidence as to the appraised value of the land and building and so have no means of determining if such a charge would jeopardize anyone.

11 Lastly, Newel Post and 571 invite this court to pierce the corporate veil and regard the Plaintiff and the Defendant as one entity, personified by their controlling shareholder. There is in my view no basis for that approach here. There is no evidence of wrong-doing or deliberate conduct to injure the respondents, or of a shareholder treating the body corporate as though its property belongs to him personally. This is merely a case of one corporation in default in its debt to a related corporation, which is secured against the debtor's property and so is subject to enforcement.

Decision

12 The Court has jurisdiction to grant this relief pursuant to section 13(2) of the Judicature Act, RSA 2000, c J-2:

> An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

13 As well, the First Mortgage expressly provides for the appointment of a Receiver by article 26:

> It is declared and agreed that at any time and from time to time when there shall be default under the provisions of this mortgage, the Mortgagee may at such time and from time to time and with or without entry into possession of the Land or any part thereof, appoint a receiver or a manager or a receiver and a manager of the Land or any part thereof and of the rents and profits thereof and with or without security, and may from time to time remove any receiver and appoint another in his stead and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor. Such appointment may be made at any time either before or after the Mortgagee shall have entered into or taken possession of the Land or any part hereof.

14 The Alberta Court of Appeal addressed the issues in BG International at para. 17:

> In particular, the 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. C.J. G.D.) at para. 31:

> [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.

15 Some of the factors to consider in the appointment of a Receiver have been collected and repeated by this Court in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.).

16 On the evidence before me, the disrepaired state of the building and the ongoing litigation between the interest holders strongly supports the need for a Receiver-Manager to protect and preserve the building until further court order. All those issues must be resolved before the building's value can be enhanced so the interest holders can maximize their return. It is therefore just and convenient that a Receiver-Manager be appointed to protect and preserve the property in question until further court order. The Receiver-Manager will have security for its fees and disbursements and monies properly borrowed in the course of the receivership. The parties may apply within 15 days to address the specific terms of the order if need be. Costs may also be addressed.

Application granted.

2020 SKQB 19
Saskatchewan Court of Queen's Bench

Pillar Capital Corp. v. Harmon International Industries Inc.

2020 CarswellSask 34, 2020 SKQB 19, 314 A.C.W.S. (3d) 470

PILLAR CAPITAL CORP. (APPLICANT) and HARMON INTERNATIONAL INDUSTRIES INC. (RESPONDENT)

R.W. Elson J.

Judgment: January 22, 2020
Docket: Saskatoon QBG 1401/19

Counsel: Michael J. Russell, Kevin N. Hoy, for Applicant
Jared D. Epp, for Respondent

***R.W. Elson J.*:**

Introduction

1 In a brief fiat, dated January 16, 2020, I directed the issue of an order for the appointment of a receiver of all assets, undertakings and property of Harmon International Industries Inc. [Harmon]. In that fiat, I stated that reasons would follow in a published decision. This fiat contains those reasons.

2 Harmon is a Saskatoon company that has been engaged in the manufacture of various equipment, including light agricultural equipment. It stopped operating as a going concern on an undisclosed date, in late 2018 or early 2019. Before that, it had carried on business for almost 30 years.

3 Pillar Capital Corp. [Pillar] is a company specializing in providing short/medium-term loans for companies that require "non-traditional debt financing". Pillar advanced a secured loan of $3.3 million to Harmon in the summer of 2018. Harmon defaulted on its payment against the debt. It now finds itself owing in excess of $3.7 million to Pillar.

4 Pillar applies to this Court for the appointment of a receiver of all of the assets and properties of Harmon under s. 243 of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 [BIA].

5 For the reasons that follow, I am satisfied that: 1) Harmon is insolvent; and 2) it is both just and convenient for the Court to make the appointment requested.

Background Facts

6 The facts relating to this application are drawn from a considerable volume of affidavit evidence and exhibits to those affidavits. The affidavit material includes two affidavits from Steven Dizep, Pillar's president, and three affidavits from Calvin Moneo, one of Harmon's principal officers.

7 Harmon was incorporated in 1989. It carried on its manufacturing operations from the date of incorporation until its decision to cease operations, altogether. Its facilities and equipment have been idle since that time.

8 Prior to its financing arrangement with Pillar, Harmon appears to have been experiencing debt and cash flow issues. In the summer of 2018, it decided it would consolidate its existing debt. To that end, it approached Pillar through a brokerage to explore refinancing possibilities. According to Mr. Dizep, Harmon had existing mortgages on six parcels of real property,

in Saskatoon's north industrial district. The addresses of the land, consisting of almost seven acres, are at 2401 Millar Avenue and 821 - 47th Street East. Harmon told Pillar that the requested loan was to serve as bridge financing to pay out the existing mortgages. In turn, Harmon planned to sell all six parcels of land in order to extinguish any remaining debt then in place.

9 Pillar agreed to provide the financing. Under a loan agreement, dated July 10, 2018, Pillar made available to Harmon a 12-month term facility in the maximum principal amount of $3.3 million. As consideration for the loan, Harmon executed a promissory note in favour of Pillar for the principal amount under the loan agreement plus interest.

10 In further support of the loan agreement, Harmon granted security to Pillar under the following documents, all dated July 26, 2018:

a. a general security agreement, covering all present and after-acquired personal property of Harmon;

b. a collateral mortgage, over the six parcels of the land; and

c. a general assignment of rents in regard to the six parcels of land.

11 The general security agreement provides Pillar with the right to pursue specific remedies in the event of Harmon's default. One such remedy, set out in para. 13(a), is the right to appoint a receiver by way of an instrument in writing. Subject to the provisions of the appointing instrument, para. 13(a) recognizes that the extra-judicially appointed receiver possesses broad powers, including: 1) taking possession of the collateral; 2) preserving the collateral or its value; 3) carrying on or concur in carrying on all or any part of Harmon's business; and 4) selling, leasing, licensing or otherwise disposing of the collateral, or concurring in same.

12 Pillar also received security from Harmon's two principals, being Mr. Moneo and his brother, Victor. The Court was advised that no steps are being taken, in this particular application, against that security. Accordingly, it is not necessary to describe the particulars of that security in this decision.

13 The evidence shows that Pillar advanced to Harmon the full principal amount of the loan on August 10, 2018. Following the advance, Harmon made monthly payments, in accordance with the loan agreement, up to and including the month of April 2019. The monthly payment due on May 31, 2019 was not paid until June 14, 2019. Since then, Harmon has failed to make any payments to Pillar as they became due.

14 By letter, dated August 19, 2019, Pillar's counsel wrote to Harmon and the other entities from whom security and/or guarantees had been provided, giving notice of the default and demanding payment of the outstanding indebtedness. According to the letter, the indebtedness under the loan agreement amounted to $3,430,483.52 as at July 10, 2018. The letter further noted that, pursuant to the loan agreement, interest was accruing on the outstanding amount at $1,678.50 per day. The notices, provided under cover of counsel's letter, included the notice of intention to enforce security pursuant to s. 244(1) of the BIA.

15 Following the provision of the ten-day notice, Pillar endeavoured to facilitate the conclusion of an agreement between itself, Harmon, and a third-party auctioneer for the purpose of arranging for the voluntary liquidation of Harmon's personal property by way of auction. Notwithstanding Pillar's efforts to reach an agreement, no such contract was entered into and discussion concerning the voluntary liquidation of Harmon's assets have since broken down.

16 The Court received oral submissions on this application in two separate hearings, one on October 8, 2019 and the other on January 10, 2020. When the application was filed in advance of the first hearing, Pillar expressed serious concern for the protection of its security. Pillar grounded its concerns on two circumstances. First, it presented considerable evidence that Harmon had neglected the buildings, equipment and inventory. The evidence included photographs which showed considerable clutter as well as disrepair of Harmon's two buildings.

17 The second circumstance reflected, in Pillar's view, a much more urgent worry. In this regard, Pillar informed the Court that Harmon had accrued considerable arrears in its utility payments. This circumstance presented the real risk that the power and natural gas for its buildings would be shut off.

18 By the date of the first hearing, this second circumstance became less worrisome. The Court was advised that, since the affidavit evidence was filed, Harmon had covered the utility payments. While Pillar continued to seek the appointment of a receiver, the risk to its security was not as dire as it was at the time the application was filed.

19 Further, a few hours before the first hearing, the Court received an affidavit from Mr. Moneo. Aside from confirming the utility payments, Mr. Moneo deposed to the efforts he and his brother were taking to sell the parcels of land. He also exhibited an appraisal report, dated August 28, 2017, prepared by Brunsdon Lawrek & Associates [Brunsdon]. That report appraised the value of the five parcels of land, specifically located at 2401 Millar Avenue, at $5.5 million.

20 In addition to the Brunsdon report, Mr. Moneo also exhibited a valuation opinion by the commercial realtors with whom Harmon had listed the same five parcels. That valuation, dated September 4, 2018, was estimated at $5,125,000. The Court also learned that the land is for sale at a list price of $5,290,000.

21 Relying substantially on Mr. Moneo's evidence, Harmon vigorously argued that the court appointment of a receiver was premature. Aside from the absence of any immediate risk to Pillar's security, Harmon relied heavily on the prospect that it could pay out the debt in full if the land sold at a value approximating the valuations it had received.

22 After the October hearing, I wrote a short fiat in which I adjourned Pillar's application to January 10, 2020. In doing so, I concluded that it was "fair, just and convenient" to give the dispute between the parties more time to sort out. In particular, I felt that the additional time might allow Harmon and its officers the opportunity to show how serious they were in addressing all of Pillar's concerns and, in particular, paying down the indebtedness.

23 Unfortunately, when this application returned to court in the New Year, little had changed. The additional affidavit evidence, presented for the second hearing, disclosed that the indebtedness had increased to in excess of $3.7 million, as of January 6, 2020, with interest accruing at $1,835.55 per day. In the meantime, property taxes, which were in arrears at the time of the October hearing, remain unpaid and continue to accrue. The Court learned that the total tax arrears for both addresses now exceeds $100,000.

24 The Court also received more illuminating evidence on the value of the land that Harmon "purportedly" intends to sell. First, Pillar obtained an appraisal report from its own appraisers, Suncorp Valuations [Suncorp]. This appraisal, for the same five parcels of land described in the Brunsdon report, values the property within a range of $3.43 million to $3.65 million. Notably, Suncorp stipulates that its appraisal is based on "extraordinary assumptions". These assumptions are: 1) that the assessment of "deferred maintenance" issues presented to Suncorp are accurate; and 2) that the areas of the building unavailable to Suncorp during the site visit are of a similar condition to the remainder of the building. The author of the report took care in pointing out that the assumptions are "extraordinary" because they pertain to matters for which the appraiser did not have specialized knowledge or training, such as matters relating to the structural integrity of the building.

25 As a footnote to this report, it should be noted that Harmon's principals were less than cooperative in providing Suncorp access to the Millar Avenue property. Despite representations that the appraiser would be accommodated at an earlier time, access was not permitted until January 6, 2020, leaving little time before the matter returned to court.

26 As for efforts to sell the land, Harmon showed no interest or movement in this direction, at all. Specifically, the Court heard that Harmon maintained the list price of $5.295 million in place since the listing was issued. Secondly, and somewhat interestingly, the Court also received affidavit evidence from the commercial realtors with the listing of the land at 2401 Millar Avenue. One of the agents confirmed that he had provided Mr. Moneo with the market valuation he described in his earlier affidavit. The agent deposed that the valuation was based on an assumption that the interior of the industrial facility on the property was in a usable condition. Based on his personal inspection since that time, the realtor is of the view that the $5,125,000 list price is excessive. The realtor also deposed that, at Harmon's instruction, the listing agreement provided for a price of $5,290,000. He said that, in the course of the realtor's engagement with Harmon, he verbally advised Mr. Moneo that the list price was too high and should be reduced. Despite this advice, no such reduction was authorized.

27 In passing, I should also note that, in his most recent affidavit, Mr. Moneo expressed some umbrage at the fact that Harmon's realtors deposed affidavit evidence in support of Pillar. He also said that Harmon intends to change listing agents and reduce the list price to $4.5 million as soon as a new listing agent is retained.

Relevant Legislation

28 This application engages Part XI of the BIA, specifically s. 243, which reads as follows:

> **243(1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> **(1.1)** 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.
>
> **(2)** 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.
>
> **(3)** 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).
>
> **(4)** Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).
>
> **(5)** The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
>
> **(6)** 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.

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

29 This application also engages two specific definitions in s. 2 of the BIA. They are the definitions of the word "person" and the phrase "insolvent person", which read as follows:

2. In this Act

. . .

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

. . .

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Issues

30 There are two issues for the Court to determine in this application. They are:

a. Is Harmon an insolvent person within the meaning of the *BIA*?

b. If Harmon is insolvent, is it just or convenient for the Court to appoint a receiver over its property, assets, and undertakings of Harmon?

Law

Insolvent Person

31 The Court's authority to appoint a receiver under s. 243 first depends on a finding that the subject debtor is either a "bankrupt" or an "insolvent person" within the meaning of the respective definitions set out in s. 2. As Harmon is obviously not a bankrupt, the question is whether it is an insolvent person.

32 The definition of an "insolvent person" in s. 2 contains three discrete circumstances. As the list of these circumstances is worded disjunctively, the applicant need only establish that the debtor fits within one listed circumstance. Consequently, a debtor, who has ceased to meet its obligations as they generally became due, as described in subparagraph (a), is insolvent even if the aggregate value of the debtor's property is sufficient to pay out all the debtor's obligations.

33 In the present case, there has been an arguable dispute about the value of Harmon's property, and whether that value was sufficient for it to pay out all its obligations, and its obligation to Pillar, in particular. While the evidence in the most recent affidavits raises considerable doubt about the present state of the earlier property valuations, I am satisfied that there is more than enough evidence to establish insolvency through the circumstances listed in subparagraphs (a) and (b). Harmon's failure

to pay Pillar, or to meet its property tax obligations, is sufficient to establish insolvency. Accordingly, I find that Harmon is an insolvent person within the meaning of s. 2 of the BIA.

Just or Convenient

34 Having found insolvency, the Court's authority to make the requested appointment depends on whether it is "just or convenient" for the Court to do so. The burden in this regard lies with the party seeking the appointment.

35 The jurisprudence relative to the "just or convenient" test is considerable. In *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 SKQB 228, 50 C.B.R. (6th) 220 (Sask. Q.B.) [*Vortex*], Scherman J. repeated his earlier summary of that jurisprudence from an unreported decision, *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.* (February 25, 2016), Doc. Saskatoon QB 1639/15 (Sask. Q.B.). In the summary, two notable authorities were referenced, namely, *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, 74 C.B.R. (5th) 300 (Ont. S.C.J.) [*Carnival*], and *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 C.B.R. (5th) 178 (Alta. Q.B.) [*Kasten*]. The summary is recited at para. 19 of the *Vortex* decision:

> . . .
>
> 5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd*. 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*. 2013 ABQB 63.
>
> 6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:
>
> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*. (1995), 30 C.B.R. (3d) 49.
>
> 7. In *Kasten* the court said the following:
>
> > 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
> >
> > > 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.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

36 In the consideration of the non-exhaustive factors cited in *Kasten*, it is important to observe that, while the factors vary in their importance, no one factor is determinative. This includes the presence, or not, of irreparable harm to the applicant or the applicant's security. See Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.199530 C.B.R. (3d) 49(Ont. Gen. Div. [Commercial List]). By and large, courts have taken a contextual approach to the consideration of these factors. A court is expected to have consideration for all attendant circumstances, including the interests of all concerned, in the "just or convenient" analysis.

37 A question that often arises in the "just or convenient" analysis pertains to whether a court should appoint a receiver where the applicant's security provides for the private appointment of a receiver, as the security does in the present case. While the right to make such an appointment is a factor, the real inquiry is whether a court appointment is the "preferable" option — not the "essential" one. This point was also addressed in *Carnival*, where, at para. 27, Newbould J. recited the following passage from the decision of Blair J. in Bank of Nova Scotia v. Freure Village on Clair Creek199640 C.B.R. (3d) 274(Ont. Gen. Div. [Commercial List]):

27 ...

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

38 Turning to the application at bar, I am satisfied that it is both just and convenient that the requested application be granted. In my view, most of the factors identified in *Kasten* favour court appointment of a receiver. Given that Harmon has not carried on active business for some time, with no stated intention of doing so, the balance of convenience clearly favours the application.

39 More importantly, however, I am persuaded that the nature and condition of the property factors heavily in favour of a court appointed receiver — in preference to one appointed under the security agreement. It is now reasonably clear that the sanguine picture Mr. Moneo painted in his first affidavit does not bear up to the image now presented in the most recent evidence. In his most recent submission, Mr. Hoy described Harmon's property as a "catastrophe of an asset". As unfortunate as that description is, I am satisfied that it is apt.

Conclusion

40 In the result, the Court appoints Hardie & Kelly Inc. as receiver, without security, of all assets, undertakings and properties of Harmon. The order may issue in the form of the draft order filed by Pillar, subject to one modification. That modification, which counsel for Pillar agreed to in chambers, is the removal of the reference to the assets of Harmon's principals, Victor Moneo and Calvin Moneo, in para. 2 of the draft. In all other respects, the order may issue in the form of the draft.

41 In the event there are any matters related to the issuance of this order, or its terms, I shall consider myself seized with those matters.

Application granted.

2012 ONSC 3486
Ontario Superior Court of Justice [Commercial List]

Alexander v. 2025610 Ontario Ltd.

2012 CarswellOnt 17884, 2012 ONSC 3486, [2012] O.J. No. 2721

RE: Keith Alexander, Arthur Barkin, Marshall Barkin, Harvey Frisch, Eric Grossman, Robert Grossman, Stanley Grossman, Tom Koffler, Avi Ritter, Mark Simon, Judith Sporn, Stephen Stark, Michael Steinberg, John Uster, Steven Warsh and David Yarmus (Applicants) and 2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc. (Respondents)

D.M. Brown J.

Heard: June 8, 2012
Judgment: June 18, 2012
Docket: CV-12-9732-00CL

Counsel: J. Larry, for Applicants
A. O'Brien, for Respondents
W. Jaskiewicz, for Bibby International Trade Finance
R. English, for Toronto Dominion Bank
D. Stewart, for SF Partnership LLP

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

I. Application for the appointment of a receiver

1 Eric Inspektor and his family control and manage a group of companies called the "Kaptor Group". That Group included the respondents, 2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc. It used to include CarCap Inc. and Car Equity Loans Corp, but those companies were placed into receivership last December and their assets sold pursuant to court order this past March.

2 The applicants invested money in 2025610 Ontario Limited ("202") and Kaptor Financial Inc. ("KFI"). Neither is engaged in active business. [1] The respondent, Insignia Trading Inc., carries on business as the distributor of household merchandise, and it looked, in part, to 202 and KFI for funds to finance its operations.

3 The applicants seek the appointment of a receiver over all the respondents alleging, in the case of 202 and KFI, defaults under loan agreements, and in the case of all three respondents breaches of an April 17, 2012 Forbearance Agreement. The respondents opposed the appointment of a receiver.

4 For the reasons set out below, I grant the application.

II. Evidence

A. Overview

5 According to Robert Grossman, who filed the affidavit on behalf of the applicants, KFI financed the operations of the CarCap Companies, which are now in receivership. The applicants were amongst the persons who invested money in KFI. Mr. Grossman deposed that KFI owes the applicants about $8 million which now is in default.

6 202 owns 48% of KFI's equity with 60% of its voting rights. Individual investors, including some of the applicants, own the remaining 52% equity in KFI carrying 40% of the voting rights. Some of the applicants loaned 202 approximately $7 million which they contend is now in default.

7 Eric Inspektor controls 202 and has managed KFI.

8 KFI owns 60% of Insignia, with the remaining equity held by two children of Eric Inspektor, Russel and Darren Inspektor.

9 Mr. Grossman deposed that the applicants have not been able to ascertain what has happened to the approximately $15 million which they have invested in 202 and KFI.

B. Loans and security

Loans to KFI

10 Loans by the applicants to KFI were secured by short term and/or convertible debentures requiring monthly interest payments. KFI ceased paying interest at the end of August, 2011, putting it in default of the terms of the debentures. Mr. Grossman filed proof of the registration under the *PPSA* of his security interest given by the debentures. The debentures provided that in the event of default the creditor could apply to court for the appointment of a receiver. On December 28, 2011, Robert Grossman, and other applicants, served KFI with Notices of Intention to Enforce Security under section 244(1) of the *Bankruptcy and Insolvency Act*. Notwithstanding those demands, KFI has not repaid the debts owed.

Loans to 202

11 Loans by the applicants to 202 were by way of demand promissory notes with fixed repayment dates. Evidence was filed of demands on some of those notes for which principal had not been repaid by the stipulated date.

12 In August, 2011, some applicants loaned $1.45 million to 202 pursuant to a Co-Tenancy Agreement amongst the investors, 202, Mr. Inspektor and his wife, Lynette Inspektor. The Co-Tenancy Agreement stipulated that the funding to 202 was for the purpose of assisting "it in providing short term funding against a portfolio of car loans". On December 28, 2011 certain of the applicant investors demanded repayment of their investments because they had "learned that the monies they advanced were not, in fact, used for the purpose of funding car loans as required by the Co-Tenancy Agreement."

Insignia

13 The applicants did not loan money to Insignia. The evidence showed that Insignia owed KFI somewhere between $2 million and $8.2 million.

14 Mr. Grossman deposed that some investors had loaned money to 202 for the express purpose of financing inventory purchases by Insignia, but the evidence filed related to investors who were not named applicants.

15 Nevertheless, it is clear from an "Investor Package" dated January 18, 2012 prepared by Mr. Inspektor for "The Kaptor Group" that he treated the respondents as a closely linked and integrated group of companies for the purpose of presenting a work-out plan to those who had invested in all three respondents. Mr. Inspektor admitted the fact of the inter-company indebtedness in his May 31, 2012 affidavit.

C. The Monitoring and Forbearance Agreement

16 In early April, 2012 the applicants informed the respondents that they intended to seek the appointment of a receiver and provided the respondents with a draft Notice of Application and the affidavit of Mr. Grossman sworn April 2, 2012.

17 Negotiations ensued resulting in an April 17, 2012 monitoring and forbearance letter agreement amongst the applicants, 202, KFI and Insignia (the "Forbearance Agreement"). The Forbearance Agreement also was signed by Eric Inspektor, Lynette

Inspektor, Darren Inspektor and Russel Inspektor in their personal capacities. Under the Forbearance Agreement 202, KFI and Insignia consented to the appointment of Soberman Inc. as Monitor over each of them. The respondents agreed to fund the Monitor. The Monitor's mandate included conducting a forensic audit of the respondents and securing "complete and unfettered access" to the respondents' business premises, securing "complete, unfettered access" to "all books and records" of the respondents. The respondents agreed to disclose all their bank accounts to the Monitor, and 202 and KFI agreed to add the Monitor as one of the two signatories required on all cheques. As well, Insignia agreed to provide the Monitor with a weekly operating budget which "shall be approved by the Investor Group, acting reasonably". Limits were placed on the respondents' ability to incur debt or dispose of assets.

18 Concurrent with entering into the Forbearance Agreement the respondents, through their counsel, signed a Side Letter which stated, in part:

> The parties understand and agree that in the event that there is a breach of any term of the Letter Agreement that is not cured within 3 days of receiving notice thereof, the Investor Group may commence proceedings in the Ontario Superior Court of Justice under the *Bankruptcy and Insolvency Act* and/or the *Courts of Justice Act* to appoint a receiver over the assets, undertakings and property of any one or more of 202, Kaptor Financial and Insignia.
>
> It is further agreed that each of 202, Kaptor Financial and Insignia will sign a consent to the appointment of a receiver, in the form attached as Schedule "A", which consent shall be held in escrow by the Investor Group's counsel and may be released from escrow and relied upon in the event of a default as contemplated above.

19 In his initial responding affidavit of May 22, 2012, Eric Inspektor questioned the inclusion of certain terms in the Forbearance Agreement and Side Letter, hinting that he had only recently learned of their existence. I give no credence to Mr. Inspektor's efforts to distance himself and Insignia from those agreements. Mr. Inspektor is an experienced businessman and he signed the Letter Agreement. He was represented by very experienced counsel — Mr. Mel Solmon — who signed the Side Letter on behalf of the respondents.

III. Review of the respondents' position on their indebtedness and default

20 In his initial responding affidavit of May 22, 2012 Eric Inspektor did not respond in any fashion to the applicants' evidence establishing their loans, the security they had received, the defaults by 202 and KFI, and the demands for repayment made to those companies by the applicants.

21 In his second affidavit dated May 31, 2012 Eric Inspektor deposed:

> There has been no independent or objective vetting of the security or levels of investment claimed by the Applicants. The alleged indebtedness has been exaggerated and misrepresented to the Court.

22 Although Mr. Inspektor deposed that "the Kaptor Group has from time to time provided an accounting to the Investor Group of the outstanding indebtedness due and owing to them", he did not provide any statement of accounts in his affidavit. He simply asserted that "the amounts owing to the Investor Group are in dispute" and "until the forensic audit is conducted and security is vetted, the Investor Group status standing and amount at issue is in doubt".

23 In sum, when faced with evidence by the applicants that they had loaned $15 million to 202 and KFI, Mr. Inspektor did not dispute the fact of some indebtedness - his January, 2012 work-out proposal closed that avenue to him - offered no evidence on the amount of the indebtedness, notwithstanding the receipt of funds by 202 and KFI, and did not dispute the allegations of default or entitlement to repayment. His evidence on the issues of indebtedness and default was vague and evasive.

24 I find, on the evidence filed, that 202 and KFI are indebted to the applicants for significant sums of money and are in default of their obligations to repay. Mr. Inspektor did not respond in any meaningful way to the applicants' evidence about the amount of the debt or the default, and the respondents' entry into the Forbearance Agreement and Side Letter confirms the fact

of the indebtedness and default — companies which are not in default of their obligations do not enter into such agreements, especially when they have the assistance of highly experienced insolvency counsel.

25 I also find that the Kaptor Group, as described by Mr. Inspektor in his January, 2012 Investor Package, has an excess of liabilities over assets of approximately $13 million. In addition, from the weekly budget submitted by Insignia for the week ended May 18, 2012, it is clear that Insignia is operating at a loss.

IV. Review of the allegations of default under the Side Letter

A. The allegations of default

26 The Forbearance Agreement was entered into on April 17, 2012. According to the Monitor's First Report dated May 25, 2012, on its first attendance at the respondents' premises on April 27 the Monitor requested:

(i) access to certain books and records of the businesses;

(ii) access to the online bank statements of 202 and KFI; and,

(iii) its addition as co-signatory on the bank accounts of 202 and KFI.

27 By May 9 the respondents had provided much of the documentation requested by the Monitor; however, 202 and KFI had not facilitated the addition of the Monitor as co-signatory on their accounts nor provided online access to their accounts. Nor had Insignia provided a weekly operating budget for approval by the applicants. The Monitor also informed the respondents of material deficiencies in their financial statements and records which were preventing the preparation of the forensic audit.

28 In its First Report the Monitor stated that instead of receiving complete and unfettered access to the respondents' books and records as required by the Forbearance Agreement, records were not released until first reviewed and authorized by Eric Inspektor.

29 The Monitor reported that by May 10 the respondents had committed several defaults of the Forbearance Agreement, including (i) their failure to provide online access to bank statements, (ii) their failure to add the Monitor as co-signatory for the accounts of 202 and KFI, and (iii) Insignia's failure to provide weekly operating budgets.

30 On May 10 the Monitor wrote Eric Inspektor requiring the rectification of those failures by May 11, failing which the Monitor would inform the applicants that the respondents were in default of the Forbearance Agreement.

31 On May 11 the respondents provided online access to bank records and presented a first budget. However, arrangements were not made to add the Monitor as the second signature on 202 or KFI accounts. A further letter of May 17 was sent to the respondents advising them of their continuing default on that matter. The default was not remedied by the respondents until May 18, under further pressure from the Monitor. The evidence shows that the reason for the delay was the unwillingness of Eric Inspektor to make himself available to change the account signing cards or to send an appropriate direction to the bank to add the Monitor to the accounts.

32 Upon obtaining online access to bank statements for 202 and KFI on May 11, the Monitor discovered that between April 17 and May 11, 2012, funds had been paid from those accounts to Eric Inspektor and his wife in respect of "shareholder loans", "consulting fees", and a "guarantee fee". Payments to Eric Inspektor and his wife totaled about $60,000 and payments to their related company, 1360403 Ontario Limited, totaled $52,000. Funds also had been transferred to Insignia. In respect of those transactions the Monitor reported:

> It appears from the Monitors' initial review that the excessive delay by Eric Inspektor to add the Monitor as a 2nd signature on the bank accounts during this time a number of payments to Eric and Lynette Inspektor were made without the authorization or approval of the Monitor during the Monitoring Period (April 17, 2012 onwards). The Monitor sees this as a default of the Monitor Agreement (par. 9).

Although the Monitor has not fully reviewed the circumstances of these payments from 2025610 Ontario Ltd. and Kaptor Financial Inc. to the Inspektors, the Monitor notes the quantum and frequency of the payments to be unusual for corporations which do not carry on active business.

33 The first budget presented by Insignia was for the week ending May 18 showed an operating deficit of $32,900. The second largest operating expense was payroll of $11,500, most of which would be payable to members of the Inspektor family working for the respondents.

34 On May 17 the applicants informed the respondents that a payment of $10,000 was due the next day to the Monitor as required by paragraph 2 of the Forbearance Agreement. The respondents did not make that payment; their default remains outstanding.

B. The position of Eric Inspektor

35 In his two affidavits Eric Inspektor offered several explanations for the events which transpired between the appointment of the Monitor and the First Report of the Monitor of May 25, 2012, including the following:

(i) "the information requests had nothing to do with doing a forensic review of the historic operations and transactions of the companies";

(ii) The Monitor "began to make demands and requests for information in a peremptory and dictatorial manner";

(iii) The Bank would only add the Monitor as a signatory if a personal attendance was made with the presentation of photo ID. That turned out to be inaccurate; Mr. Inspektor ultimately ended up sending a May 18 letter of authorization;

(iv) The Monitor attempted to create "circumstances of default simply for the purposes of trying to use the Forbearance letter that was entered into and that they have done so in bad faith";

(v) The respondents "saw absolutely no reason to make the $10,000" payment to the Monitor since the applicants had taken the position that the respondents were in default of the Forbearance Agreement and would be seeking the appointment of a receiver;

(vi) The payments to Lynette and himself out of the accounts of 202 and KFI were to repay Lynette, as a creditor, for funds she had advanced to the respondents and to pay them both amounts due under their employment contracts for the first 3.5 months of 2012.

C. Findings of fact

36 When read as a whole, the Forbearance Agreement and Side Letter were designed to provide the applicants, through the appointment of the Monitor, with complete and unfettered access to the respondents' books and records so that they could attempt to find out what had happened to the significant amount of money they had loaned to 202 and KFI. The inclusion of Insignia in those agreements reflected the business reality of the high degree of inter-relatedness amongst the Kaptor Group of companies. In order to ensure that the operations of the respondents, pending completion by the Monitor of a forensic audit, were limited to ordinary course transactions, the Forbearance Agreement imposed restrictions on the respondents' operations and provided the Monitor with access to all material financial and operational information about the companies. That the applicants were affording the respondents a "last chance forbearance" from enforcement by such an arrangement was signaled by the tight default provisions contained in the Side Letter and the applicants' securing of the respondents' consents to the appointment of a receiver in the event of an uncured default.

37 Against that background, I have reviewed carefully Mr. Inspektor's affidavits of May 22 and 31, 2012. In them he developed the theme that he really did not know what he was getting into when he agreed to the appointment of a Monitor, he has had second thoughts, and he is not prepared to have his companies fund the Monitor anymore.[2] As I noted above, I give no

credence to Mr. Inspektor's efforts to distance himself and Insignia from the contents of the Forbearance and Side Agreements. Mr. Inspektor and the respondents entered into those agreements freely and with independent legal advice.

38 The evidence filed by the applicants and Eric Inspektor reveals, and I find, that following the appointment of the Monitor Mr. Inspektor, as the person in control of the respondents, did not provide the Monitor with "complete and unfettered access" to the respondents' records. He insisted on reviewing and authorizing the release of information, thereby impeding and delaying access by the Monitor.

39 The respondents did not provide the Monitor with online access to their banking records for over three weeks after the execution of the Forbearance Agreement and for two weeks after the Monitor had made formal demand. There was no reasonable excuse offered by the respondents for such a failure. While the respondents ultimately "cured" the defect by giving access and arranging for the co-signature, I conclude from the evidence that the respondents delayed providing such access in order to arrange payments to members of the Inspektor family, and their related companies, in preference to payments to other creditors, including the applicants. That is clear from the information the Monitor obtained about withdrawals from the 202 and KFI accounts once it had secured online access.

40 In his second affidavit Mr. Inspektor deposed that "the only purpose for the appointment of the Monitor was to give the Applicants comfort while the forensic audit was performed." That is an ironic statement given the payments which Mr. Inspektor made to his wife and himself from the bank accounts of 202 and KFI during the period of April 17 to May 18 when he delayed placing the Monitor on those accounts as a signing authority.

41 While the respondents cured their default in respect of providing online access to bank records and adding the Monitor to as signatory for the 202 and KFI accounts, the "cure", for all practical purposes, was too late and therefore meaningless. By the time the Monitor had secured access and signing authority, the damage had been done, to the prejudice of the applicants and other arm's-length creditors of 202 and KFI.

42 There is no dispute that the respondents failed to make the $10,000 payment due to the Monitor on May 18, 2012. I do not accept Mr. Inspektor's explanation that he was justified in so doing because the applicants were intending to apply before the court for the appointment of a receiver. Mr. Inspektor's position would stand the Forbearance Agreement and Side Letter on their heads. The respondents were granted forbearance on very strict terms, understandably strict in light of the respondents' failure to account for the significant sums loaned by the applicants. As I have found, after the execution of the Forbearance Agreement the respondents failed to provide timely and meaningful access to information about the accounts of 202 and KFI and, by the time they had, the preferential withdrawals in favour of the Inspektor family had been made and the damage done. Under those circumstances the applicants' intention to apply to court for a receiver was understandable. However, it did not relieve the respondents of their obligation to continue to fund the Monitor. The respondents' refusal to make the May 18 payment of $10,000 to the Monitor in my view simply re-inforced the message their conduct had been conveying that they were not prepared to comply with the terms, or the spirit, of the Forbearance Agreement.

V. Consideration of the applicants' request to appoint a receiver

43 The general principles guiding a court's consideration about whether to appoint a receiver were set out in *Bank of Nova Scotia v. Freure Village on Clair Creek*:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed... [3]

44 The applicants gave notice of this proceeding to the secured creditors of 202, KFI and Insignia. Some secured creditors were parties related to the Inspektor family; they opposed the application. Their interests are identical to those of the respondents. As to the arm's-length secured creditors, two appeared on the return of the application - Bibby Financial Services (Canada) Inc. and Toronto-Dominion Bank - and neither opposed the appointment of a receiver.

45 In the present case the applicants loaned monies to KFI, obtained security for their loans, KFI defaulted on the loans, demand was made, and the applicants enjoyed the right under their security to apply for the appointment of a receiver. So, too, the applicants loaned money to 202, default occurred and demand was made, although the applicants do not hold security which entitles them to the appointment of a receiver.

46 However, as Mr. Inspektor's January, 2012 proposal to the applicants and other investors demonstrated, the "Kaptor Group", including KFI, 202 and Insignia, were highly inter-related companies run as a group. The April Forbearance Agreement signified that the respondents realized that if they were to secure the forbearance of significant creditors, they would have to provide transparency to the creditor/applicants about the affairs of the remaining operating company, Insignia, to which both 202 and KFI had provided funds, and provide the creditors with sufficient comfort to justify their forbearance by exposing the business of Insignia to a possible receivership if the respondents did not live up to their promises of transparency. I reiterate: those were heavy terms, but reasonable in the circumstances and ones freely entered into by the respondents with the benefit of independent legal advice.

47 The respondents did not live up to their promises. They failed to make the May 18 payment of $10,000 to the Monitor. That was a breach of section 2 of the Forbearance Agreement. That breach triggered the rights of the applicants under the Side Letter, including the right to rely on the respondents' consents to the appointment of a receiver.

48 In addition, the respondents' unjustifiable delays in providing the Monitor with online access to their bank accounts and adding the Monitor as a signatory to the 202 and KFI accounts, when coupled with the self-dealing withdrawals the Inspektors undertook during the period of delay, constituted material breaches of sections 6 and 9 of the Forbearance Agreement. The late technical cures of those breaches made by the respondents did not cure the actual damage caused by the breaches. As a result, I regard those breaches as entitling the applicants to invoke the terms of the Side Letter for the appointment of a receiver over all three respondents.

49 Moreover, I regard that conduct, against the backdrop of all three respondents agreeing to the obligations contained in the Forbearance Agreement, as making it just and convenient to appoint a receiver over the three respondents under section 101 of the *Courts of Justice Act*. The respondents, by their conduct, turned their backs on their obligations under the Forbearance Agreement, thereby disentitling themselves to the benefit of the forbearance afforded by the applicants. The applicants understandably have lost confidence in the respondents' willingness to comply with the terms of the Forbearance Agreement and want the benefit of a court-appointed receiver to obtain timely directions and approvals in the realization process for the benefit of all creditors.[4]

50 With the benefit of independent legal advice the respondents provided consents in escrow for the appointment of a receiver. I regard it just and convenient to appoint a receiver to make good the consents given by the respondents.

51 Although the applicants did not loan monies to Insignia, that company owes KFI somewhere between $2 million and $8 million. Although Insignia owes a secured creditor, Bibby, about $270,000, as confirmed by Bibby's counsel at the hearing, a very significant receivable remains due and owing to KFI. A receivership of KFI inevitably will result in calls on Insignia to repay those loans. No doubt that degree of inter-connectedness between the two companies underlay the inclusion of Insignia in the Forbearance Agreement and Side Letter. Insignia appears to be insolvent on a balance sheet and operating basis. Its inclusion in the receivership therefore is justified not only by the terms of the Forbearance Agreement and Side Letter, but also by commercial practicality.

52 Accordingly, I grant the application to appoint Soberman Inc. as Receiver of 202, KFI and Insignia.

53 I have reviewed the terms of the proposed Receivership Order. The auditors of KFI, SF Partnership LP, proposed some changes to the language of the Model Order regarding the production of books and records. The applicants and SF Partnership have agreed on that language. Bibby Financial also proposed changes to take into account its factoring arrangement with Insignia; the applicants have agreed to those changes. The changes sought are reasonable in the circumstances. Consequently, I have signed the amended order submitted by the applicants.

54 I would encourage the parties to try to settle the costs of this application. If they cannot, the applicants may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, June 29, 2012. The respondents may serve and file with my office responding written cost submissions by July 13, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Application granted.

Footnotes

1 Respondents' Factum, para. 69.

2 Strikingly, in the January, 2012 Investor Package for The Kaptor Group, Eric Inspektor also complained about the unfairness of the forbearance agreement entered into with Callidus in October, 2011: see Application Record, Vol. 1, pp. 125-6.

3 (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), para. 11, citations omitted.

4 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (Ont. S.C.J.), paras. 21 and 22.

2018 ONSC 4326
Ontario Superior Court of Justice [Commercial List]

Ontario Securities Commission v. Paramount Equity Financial Corporation et al.

2018 CarswellOnt 12179, 2018 ONSC 4326, 294 A.C.W.S. (3d) 696, 62 C.B.R. (6th) 47

ONTARIO SECURITIES COMMISSION (Applicant) and PARAMOUNT EQUITY FINANCIAL CORPORATION, SILVERFERN SECURED MORTGAGE FUND, SILVERFERN SECURED MORTGAGE LIMITED PARTNERSHIP, GTA PRIVATE CAPITAL INCOME FUND, GTA PRIVATE CAPITAL INCOME LIMITED PARTNERSHJIP, SILVERFERN GP INC., PARAMOUNT EQUITY INVESTMENTS INC., PARAMOUNT ALTERNATIVE CAPITAL CORPORATION, PACC AINSLIE CORPORATION, PACC CRYSTALLINA CORPORATION, PACC DACEY CORPORATION, PACC GOULAIS CORPORATION, PACC HARRIET CORPORATION, PACC MAJOR MAC CORPORATION, PACC MAPLE CORPORATION, PACC MULCASTER CORPORATION, PACC SCUGOG CORPORATION, PACC SHAVER CORPORATION, PACC SIMCOE CORPORATION, PACC WILSON CORPORATION, NIAGARA FALLS FACILITY INC. AND PARAMOUNT EQUITY SOLUTIONS INC. (Respondents)

Hainey J.

Heard: July 11, 2018
Judgment: July 23, 2018
Docket: CV-17-11818-00CL

Counsel: Maya Poliak, Harvey Chaiton, for Receiver, Grant Thornton Limited
Michael Simaan, for Respondent, Virk Hospitality Corp.
Paul Le Vay, for Applicant, Ontario Securities Commission
Justin Fogarty, Pavle Masic, for Respondent, Silverfern Investors

***Hainey J.*:**

Overview

1 On an application by the Ontario Securities Commission ("OSC"), Grant Thornton Limited ("GTL") was appointed as Receiver over the Paramount Group on August 2, 2017. ("Paramount's Receiver")

2 Paramount's Receiver moves for an order appointing GTL as receiver over the property, assets and undertakings of Virk Hospitality Corp. ("Virk") including the property at 1677 Wilson Avenue, Toronto ("Virk Property"). The Virk Property includes a hotel/transitional accommodation facility ("Virk Hotel").

3 The motion is supported by the OSC and by the respondents, Silverfern Investors.

4 Virk is owned or controlled by Enzo Mizzi ("Enzo"). Companies related to Enzo have provided development, construction and property management services to Virk.

5 The Paramount Group made three loan facilities available to Virk in the total amount of approximately $21 million to fund the acquisition and development of the Virk Property ("Virk Loan"). The Virk Loan is secured by mortgages in favour of certain direct mortgage investors ("DMI Investors") and Silverfern LP ("Virk Mortgages").

6 To assist Virk with obtaining financing from the Paramount Group, 2490793 Ontario Inc. ("249") and 2180366 Ontario Inc. ("218") each signed a Postponement and Subordination of Shareholder's Financing Agreement dated February 25, 2016, pursuant to which 249 and 218 both agreed to postpone and subordinate to Silverfern LP and the DMI Investors all sums payable to them by Virk (the "Postponement Agreement").

7 Pursuant to the Postponement Agreement, Virk acknowledged and agreed that, as long as the Virk Loan remains outstanding, it will not make any payments to 218 or 249 on account of any monies owing to them by Virk.

Positions of the Parties

8 Paramount's Receiver takes the position on this motion that Virk is in default of its obligations under the Virk Loan for the following reasons:

a) Failure to repay the Virk Loan on its maturity date;

b) Breach of the Postponement Agreement;

c) Failure to pay property taxes on the Virk Property; and

d) Failure to comply with Virk's reporting requirements.

9 On March 7, 2018, Paramount's Receiver demanded payment of the Virk Loan and served Virk with a Notice of Intention to Enforce Security pursuant to s. 248(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"). Virk did not respond to the demand. As a result, Paramount's Receiver brought this motion to appoint a receiver over Virk's property.

10 Virk opposes the motion and submits that the Virk Loan is not in default because it has a three-year term and therefore does not mature for another 7 months. Virk also denies that it has breached the Postponement Agreement and that there are tax arrears outstanding with respect to the Virk Property. It also denies that it is in breach of any reporting obligations.

Facts

11 The Virk Hotel was to be redeveloped into condominiums. Since Virk acquired the Virk Property it no longer operates as a hotel and has been converted to a transitional housing facility for refugees which is supported by the City of Toronto.

12 Pursuant to a Letter of Commitment dated November 2, 2015, ("Commitment Letter") the Paramount Group agreed to make the Virk Loan in the amount of $19,772,350.

13 The Commitment Letter provided for the following three loan facilities related to the Virk Property:

a) A facility in the amount of $10,000,000 to fund the purchase and renovation of the Virk Property. ("First Facility");

b) A second facility in the amount of $2,616,175 to fund the renovation of existing buildings. ("Second Facility"); and

c) A third facility in the amount of $7,156,175 to fund the soft costs of development, including zoning, planning and architecture. ("Third Facility").

14 The Commitment Letter provides that the loan is for a term of 2 years from the date of the initial drawdown for each facility.

15 The Commitment Letter was amended on July 13, 2016. ("July Amendment"). Pursuant to the July Amendment the Second Facility was increased to $3,344,500. The July Amendment contains a handwritten notation that purports to change the 2-year term of the Second Facility to 3 years.

16 The Virk Mortgages that secure the Virk Loan are registered against the Virk Property as follows:

a) A second mortgage in the amount of $12,605,000 in favour of the DMI Investors; and

b) A third mortgage in the amount of $14,895,000 in favour of Silverfern LP.

17 Each of the Virk Mortgages provides for a term of 3 years.

18 The DMI Investors and Silverthorn LP are each a party to a Non-Merger Acknowledgment with Virk that provides as follows:

> In the event of any conflict or discrepancy between the Letter of Commitment, the Charge or the Loan Documents, the Lender may, in its sole discretion determine which shall prevail.

19 Schedule A to each of the Virk Mortgages sets out what constitutes an event of default under the Virk Loan as follows:

> 33.1 Failure by the Borrower to pay any instalment of principal, interest and/or Taxes under the Charge or under any charge or other encumbrance of the Property, on the date upon which any of the payments for same become due;
>
> 33.2 Failure by the Borrower or any Covenanter to strictly and fully observe or perform any condition, agreement, covenant or term set out in the application or Commitment for the loan secured by the Charge, the provisions of the Charge, or any other document creating a contractual relationship as between them or any of them or if it is found at any time that any representation to the Lender with respect to the loan secured by the Charge or in any way related thereto is incorrect or misleading;
>
> 33.3 Default by the Borrower in the observance or performance of any of the covenants, provisos, agreements or conditions contained in any charge or other encumbrance affecting the Property, whether or not it has priority over the Charge;

20 Paramount's Receiver alleges that Virk paid $2,050,000 to 218 and $900,000 to 249 out of the Virk Loan funds in contravention of the Postponement Agreement. Paramount's Receiver maintains that this constitutes an event of default under the Virk Mortgages. The express purpose of the Virk Loan was to finance the acquisition, renovation and development of the Virk Property. The Commitment Letter set out how the funds advanced were to be used by Virk. According to Paramount's Receiver, Virk has breached this term of the Commitment Letter by misdirecting the funds and not using them for their stated purpose.

21 Paramount's Receiver also alleges that there is approximately $145,000 in property tax arrears outstanding in respect of the Virk Property. This also constitutes an event of default under the Virk Mortgages

22 According to Paramount's Receiver, under the terms of the Commitment Letter, Virk was required to provide monthly project reports confirming the work in progress. Virk has only produced one status report to Paramount's Receiver dated April 30, 2018. No other project reports have been provided.

Issue

23 The issue that I must decide is whether I should appoint GTL as a receiver under the *BIA* over Virk's property, assets and undertakings.

Analysis

24 Under s. 243 of the *BIA* the court has the power to appoint a receiver where it is "just or convenient to do so". In making this determination the court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties in relation thereto. Where a party has the right to appoint a receiver under its security the court should consider whether a court appointment will enable the receiver to carry out its duties more efficiently. In the circumstances of this case I must determine whether it is more in the interest of all concerned to appoint a receiver.

25 I have considered the test I must apply under s. 243 of the *BIA* in the light of the evidentiary record before me. I have concluded that it is just and convenient to appointment GTL as receiver of Virk for the following reasons.

Term of Virk Loan

26 In my view the Commitment Letter is the operational document that establishes the term of the Virk Loan as two years from the date of the initial drawdown for each of the three loan facilities provided for in the letter. Mr. Simaan, on behalf of Virk, submits that the term of the Virk Loan is three years because the Second Facility for the renovation of the Virk Property has a handwritten notation changing the two-year term to three years. He argues that the two-year term for the two other facilities provided for in the Commitment Letter must have also been amended to provide for a three-year term. Despite Mr. Simaan's able argument, I do not accept his submission. There is no evidence to support this assertion which amounts to mere speculation. The Commitment Letter is clear that the term of the Virk Loan is two years.

27 Mr. Simaan also relies upon the fact that the Virk Mortgages registered against title to the Virk Property provide for three-year terms in support of his position that the Virk Loan has a three-year term. I do not accept this submission either because the Virk Mortgages contain a Non-Merger Acknowledgment clause that provides that the Paramount Group is entitled to determine that the 2-year term set out in the Commitment Letter prevails if there is a conflict between it and the terms of the Virk Mortgages. In my view the Commitment Letter clearly prevails and is the operative document that establishes that the Virk Loan has a two-year term.

28 Since Virk did not repay the Virk Loan when it matured following two years it is in default of the Virk Loan under Schedule A to the Virk Mortgages. The Paramount Group therefore has the right to enforce its security including the right to appoint a receiver over Virk's property, assets and undertakings.

Breach of the Postponement Agreement

29 I accept the evidence relied upon by Paramount's Receiver that Virk re-directed approximately $3 million of the funds advanced to it pursuant to the Virk Loan to 218 and 249 in contravention of the terms of the Postponement Agreement. I do not accept Mr. Simaan's argument that there was no breach of the Postponement Agreement because the payments made to 249 and 218 were not in respect of monies owing to them by Virk but were for other purposes. This does not make commercial sense in the context of the Virk Loan that is very specific as to how the funds advanced are to be used. In my view, these payments to 218 and 249 constitute an event of default under Schedule A to the Virk Mortgages. As a result, Paramount's Receiver has the right to enforce its security, including the right to appoint a receiver over Virk's property.

Tax Arrears

30 The evidentiary record contains a City of Toronto Tax Certificate that indicates that as of July 9, 2018 the outstanding taxes on the Virk Property were $191,252.02. I accept the evidence of Darren Marr who attended at the City of Toronto's Revenue Services on July 10, 2018 and confirmed that these tax arrears remained unpaid and outstanding as of that date. I do not accept the evidence of Gwendolyn Adrian, an associate with Mr. Simaan's law firm, who testified as follows:

> Finally, I am advised by Enzo that the property taxes have been paid for the Wilson Property and are current. Enzo advised me that while the tax payment was slightly late, this was due to the City being late with its own payments in respect of the residence and boarding provided at the Wilson Property.

31 I do not doubt that this is what Enzo said but it cannot be true in light of the Tax Certificate that confirms the outstanding tax arrears. These tax arrears also constitute an event of default under Schedule A to the Virk Mortgages. This also entitles Paramount's Receiver to appoint a receiver over Virk's property.

Monthly Project Reports

32 I am unable to make a finding as to whether Virk is in breach of an obligation to provide monthly project reports to Paramount's Receiver on the evidentiary record before me. However, in view of my other findings and conclusions it is not necessary for me to decide this issue.

Conclusion

33 For the reasons outlined above I have concluded that it is just and convenient in the circumstances to appoint GTL as receiver over the property, assets and undertakings of Virk. I am of the view that GTL is particularly well-suited to perform this role because it has become familiar with the Virk Property as the receiver of the Paramount Group.

34 I am also satisfied that the first mortgagee on the Virk Property will not be prejudiced by the appointment of a receiver since, based upon Paramount's Receiver's estimate of the value of the Virk Property, the first mortgagee appears to be fully secured.

Costs

35 I urge the parties to settle the issue of costs of the motion. If they cannot they may schedule a 9:30 a.m. attendance with me to settle costs.

36 I thank counsel for their helpful submissions.

Application granted.