COURT FILE NUMBER	2203-12557
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANT	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD, also known as FETOUN AHMED
DOCUMENT	**WRITTEN SUBMISSIONS OF THE DEFENDANTS 52 WELLNESS CENTRE INC., MICHAEL DAVE MANAGEMENT LTD. and 985842 ALBERTA LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	WARREN SINCLAIR LLP 600, 4911 – 51 STREET RED DEER, AB T4N 6V4 **ATTENTION: MATTHEW R. PARK** PHONE: (403) 343-3320 FAX: (403) 343-6069 FILE NUMBER: 127984/MP

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A. INTRODUCTION

1. On August 17, 2022, Royal Bank of Canada ("**RBC**") filed a Statement of Claim in this action. The defendants named in that pleading include Michael Dave Management Ltd. ("**Michael Dave Ltd.**"), 52 Wellness Centre Inc. ("**52 Wellness**") and 985842 Alberta Ltd. ("**985**").

2. By way of Application submitted for filing on August 19, 2022, RBC sought the appointment of a Receiver or Receiver-Manager in respect of the defendants Faissal Mouhamad Professional Corporation ("**FMPC**"), Delta Dental Corp. ("**Delta Corp.**") and 52 Dental Corporation ("**52 Dental**").

3. On August 23, 2022, an Interim Receivership Order was granted in respect of FMPC, Delta Corp. and 52 Dental. RBC's application for the appointment of a Receiver or Receiver-Manager was adjourned to September 14, 2022.

4. On Friday, September 9, 2022, RBC filed an amended Application, in which it seeks the appointment of a Receiver or Receiver-Manager in respect of 985, Michael Dave Ltd. and 52 Wellness (the "**Amended Application**"). In the alternative, RBC seeks the appointment of an Interim Receiver in respect of those corporations. The Amended Application was served on Michael Dave Ltd, 52 Wellness and 985, through counsel, at approximately 3:30 pm on September 9, 2022.

5. These written submissions are made on behalf of Michael Dave Ltd., 52 Wellness and 985 (collectively "**these Defendants**").

6. Unless otherwise indicated, capitalized terms employed herein shall have the meaning given to them in RBC's written brief filed in support of its application (the "**RBC Brief**") and in the written brief filed on behalf of FMPC in response to RBC's application (the "**FMPC Brief**").

B. FACTS

I. Admissions:

7. These Defendants agree with the facts set out at paragraphs 2,4-6, 13-39, 41-43, 45-50, 53, 56-57, 59, 60, 62, 70, 75, 80, 83, 85-87, 89, 93-95, 96 (a), and 97- 99 of the RBC Brief and further agree with all of the facts set out in the FMPC Brief.

II. Additional Facts:

8. 52 Wellness' only tangible asset is the 52 Wellness Building.[1]

9. The tax-assessed value of the 52 Wellness Building is $2,350,000.00.[2]

10. 52 Wellness does not carry on any sort of business beyond the lease of space within the 52 Wellness Building to various tenants, including 52 Dental. It's only source of revenue is the lease payments made to it by those tenants.[3]

11. The registrations against title to the 52 Wellness Building include the following:[4]

    a) Mortgage in favor of Bank of Nova Scotia (the "**BNS Mortgage**");

    b) Caveat re Assignment of Rents and Leases in favor of Bank of Nova Scotia;

    c) Caveat re Agreement Charging Land in favor of Dr. Hadi (the "**Hadi Charge**"); and

    d) Caveat re Assignment of Rents and Leases in favor of Dr. Hadi.

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[1] Affidavit sworn by Faissal Mouhamad on September 13, 2022 ("**Third Faissal Affidavit**") at para. 5.
[2] Third Faissal Affidavit at para. 6.
[3] Third Faissal Affidavit at para 7.
[4] Third Faissal Affidavit at para. 8.

e) Caveat re Agreement Charging Land in favour of the defendant Dr. Faissal Mouhamad (the "**Mouhamad Charge**").

12. The amount owing under the BNS Mortgage was $1,646,593.42 as of September 13, 2022.[5]

13. 52 Wellness is current in terms of its payment obligations owed under the BNS Mortgage.

14. The Hadi Charge relates to a promissory note given by 52 Wellness to Dr. Hadi in the amount of $385,000.00.[6]

15. The current amount due and owing under the Hadi Charge is $385,000.00 (the "**Hadi Indebtedness**").[7]

16. The Mouhamad Charge relates to a promissory note given by 52 Wellness to Dr. Mouhamad in the amount of $700,000.00.[8]

17. The current amount due and owing under the Mouhamad Charge is $700,000.00.

18. 52 Wellness uses the lease revenue it receives to pay the BNS Mortgage and other expenses associated with the 52 Wellness Building. The leases do not generate excess revenue for 52 Wellness.[9]

19. 52 Wellness has no immediate plans to sell the 52 Wellness Building.[10]

20. 52 Wellness has never had any employees.

21. Michael Dave Ltd.'s tangible assets consist of the MDM Real Property, the Tenant Improvements and the Red Deer Dental Clinic Equipment.[11]

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[5] Third Faissal Affidavit at para. 10.
[6] Third Faissal Affidavit at para. 11.
[7] Third Faissal Affidavit at para. 13.
[8] Third Faissal Affidavit at para. 14.
[9] Third Faissal Affidavit at para. 16.
[10] Third Faissal Affidavit at para. 17.
[11] Third Faissal Affidavit at para. 19.

22. Michael Dave Ltd. does not carry on any sort of business beyond the lease of the MDM Real Property to the Red Deer Dental Clinic. It's only source of revenue is the lease payments made to it on behalf of that clinic.[12]

23. The registrations against title to the MDM Real Property include the following:[13]

    a) A mortgage in favor of 1245233 Alberta Inc. ("**124**") and Solar Star Holdings Inc. ("**Solar Star**"), which will be referred to herein as the "**Solar Star Mortgage**";

    b) Caveat re Assignment of Rents and Leases in favor of 124 and Solar Star;

    c) A mortgage in favor of Dr. Hadi (the "**Hadi Red Deer Mortgage**"); and

    d) Caveat re Assignment of Rents and Leases in favor of Dr. Hadi.

24. The tax assessed value of the MDM Real Property is $875,000.00.[14]

25. The principal amount owing under the Solar Star Mortgage is at least $2,266,662.20.[15]

26. Michael Dave Ltd. is current in terms of its payments owed under the Solar Star Mortgage.[16]

27. Michael Dave Ltd. has guaranteed repayment of Hadi Indebtedness (the "**MDM Guarantee**").[17]

28. The Hadi Red Deer Mortgage is meant to secure repayment of any amounts outstanding under the MDM Guarantee.[18]

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[12] Third Faissal Affidavit at para. 21.
[13] Third Faissal Affidavit at para. 22.
[14] Third Faissal Affidavit at para. 20.
[15] Third Faissal Affidavit at para. 25.
[16] Third Faissal Affidavit at para. 30.
[17] Third Faissal Affidavit at para. 26.
[18] Third Faissal Affidavit at para. 27.

29. Any amounts owing under the MDM Guarantee are payable on demand. As of the date of this affidavit, no demand for payment has been made.[19]

30. Michael Dave Ltd. uses the lease revenue it receives to pay the Solar Star Mortgage and other expenses associated with the MDM Real Property. The lease does not generate excess revenue for Michael Dave Ltd.[20]

31. Michael Dave Ltd. has never had any employees.

32. Except, possibly, to Dr. Hadi, Michael Dave Ltd. does not intend to sell the MDM Real Property in the foreseeable future.[21]

33. RBC is not a creditor, secured or otherwise, of Michael Dave Ltd. or 52 Wellness.

34. 985's only tangible asset is the Drayton Valley Building.[22]

35. The tax-assessed value of the Drayton Valley Building is $671,660.00.[23]

36. 985 does not carry on any sort of business beyond leasing the Drayton Valley Building to a dental clinic. It's only source of revenue is the lease payments made to it by that tenant.[24]

37. The registrations against title to the Drayton Building include the following:[25]

    a) Mortgage in favor of 1193770 Alberta Ltd. (the "**119 Mortgage**");

    b) Caveat re Assignment of Rents and Leases in favor of 1193770 Alberta Ltd.;

    c) Mortgage in favor of Dr. Hadi (the "**Hadi Drayton Valley Mortgage**"); and

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[19] Third Faissal Affidavit at para. 28.
[20] Third Faissal Affidavit at para. 29.
[21] Third Faissal Affidavit at para. 32.
[22] Third Faissal Affidavit at para. 34.
[23] Third Faissal Affidavit at para. 35.
[24] Third Faissal Affidavit at para. 36.
[25] Third Faissal Affidavit at para. 39.

d) Caveat re Assignment of Rents and Leases in favor of Dr. Hadi.

38. The principal amount owing under the 119 Mortgage is at least $808,000.00.[26]

39. 985 is current in terms of its payment obligations owed under the 119 Mortgage.[27]

40. 985 has guaranteed repayment of Hadi Indebtedness (the "**985 Guarantee**").[28]

41. The Hadi Drayton Valley Mortgage is meant to secure repayment of any amounts outstanding under the 985 Guarantee.[29]

42. Any amounts owing under the 985 Guarantee are payable on demand. As of the date of this affidavit, no demand for payment has been made.[30]

43. 985 uses the lease revenue it receives to partially pay the 119 Mortgage. The lease does not generate excess revenue for 985.[31]

44. 985 has never had any employees.

45. 985 does not intend to sell the Drayton Valley Building in the foreseeable future.[32]

46. 985 has guaranteed repayment of the Indebtedness (the "**985 Guarantee**"). Collateral to that guarantee, 985 has given RBC a security interest in its present and after-acquired personal property. Particulars of the 985 Guarantee and the security given in relation to that guarantee are set out in the Beriault Affidavit.

47. RBC has made a demand for payment of the amounts owing under the 985 Guarantee. 985 has not complied with that demand.

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[26] Third Faissal Affidavit at para. 42.
[27] Third Faissal Affidavit at para. 43.
[28] Third Faissal Affidavit at para. 44.
[29] Third Faissal Affidavit at para. 45.
[30] Third Faissal Affidavit at para. 46.
[31] Third Faissal Affidavit at para. 47.
[32] Third Faissal Affidavit at para. 48.

C. ISSUES

48. The issues to be resolved on this application as it pertains to these Defendants are as follows:

    a) Should a Receiver or Receiver-Manager be appointed in respect of these Defendants, or any of them?

    b) Should an Interim Receiver be appointed in respect of these Defendants, or any of them?

D. LAW AND ARGUMENT

I. Appointment of a Receiver or Receiver-Manager

i. The Relevant Law:

49. The appointment of a Receiver is a discretionary remedy. In *Paragon*, Madam Justice Romaine noted that the factors a court may consider in determining whether it is appropriate to appoint a Receiver include the following[33]:

    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;

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[33] *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, [2002] CarswellAlta 1531, 2002 ABQB 30 (**"Paragon"**) at para. 27. **RBC Book of Authorities, Tab 9**

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; and

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

50. In *Murphy v. Cahill*, [2013] CarswellAlta 1490, 2013 ABQB 335 ("**Murphy**"), Madam Justice Veit updated this list of factors, noting that[34]:

> . . . 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."

51. Although the majority of receiverships arise in the context of a secured creditor-debtor relationship, the existence of that relationship is not a pre-requisite to the granting of a Receivership Order.

52. However, where the party applying for the appointment of a Receiver is not a security holder relying on an instrument, the court will be more cautious in reviewing the *Paragon* factors, as they may not readily apply.

53. A receivership application brought by a person other than a security holder relying on an instrument is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favors the granting of the relief.[35]

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[34] Murphy at para. 71. **RBC Book of Authorities at Tab 10**

[35] *Murphy* at para. 7.

ii. Application of the Law as it Pertains to 52 Wellness:

a. RBC seeks pre-judgment relief:

54. As noted above, RBC is not a creditor, secured or otherwise, of 52 Wellness. At best, RBC is a potential judgment creditor of that corporation.

55. Essentially, RBC seeks pre-judgment relief as against 52 Wellness. As noted by the Ontario Superior Court of Justice in *Anderson v. Hunking*:[36]

> 16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, above, at para. 6:
>
> > [T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

56. There is no evidence before the Court on this application that RBC's ability to recover any judgment obtained against 52 Wellness is in any sort of jeopardy.

b. There are no serious issues to be tried:

57. The evidence before the Court on this application does not establish that there is a serious issue to be tried in respect of 52 Wellness.

58. The allegation made by RBC in this action as against 52 Wellness is that 52 Wellness was the recipient of a fraudulent transfer or preference made by FMPC, in the form of the transfer of funds from FMPC to 52 Wellness (the "**52 Wellness Transfers**").

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[36] *Anderson v. Hunking.*, [2010] CarswellOnt519 at para. 16. **Tab 1**

59. RBC has offered no evidence that FMPC was insolvent or on the brink of insolvency at the time the 52 Wellness Transfers were made. The evidence in fact suggests the contrary.

60. Further, beyond providing some particulars of a contested lawsuit in which FMPC is named as a defendant, RBC has offered no evidence that that the 52 Wellness Transfers were made the intent of delaying, hindering or defrauding creditors or others of their just and lawful actions and debts within the meaning of the *Statute of Elizabeth.*

c. No irreparable harm will arise:

61. There is no evidence that RBC would suffer irreparable harm in the event the Court declined to appoint a Receiver or Receiver-Manager in respect of 52 Wellness.

62. As previously noted, 52 Wellness' sole tangible asset is the 52 Wellness Building.

63. The evidence on this application is that the total indebtedness secured by way of encumbrances registered against title the 52 Wellness Building exceeds or comes close to exceeding the value of that property, making any disposition of the same by 52 Wellness in the foreseeable future improbable.

64. In any event, 52 Wellness has no interest in divesting itself of the 52 Wellness Building.

65. Further, 52 Wellness has no revenue streams beyond the rental income it receives from the 52 Wellness Building tenants, all of which is necessary to service the BNS Mortgage and to pay for other expenses associated with the 52 Wellness Building.

66. In 52 Wellness' submission, the allegations made against it in the Statement of Claim, if true, could give rise to an argument that RBC is entitled to a constructive trust in respect of the 52 Wellness Building. If RBC wishes to ensure that the 52 Wellness Building is not disposed of to its detriment, it need only register a Certificate of *Lis Pendens* against title to that property.

d. The balance of convenience favors 52 Wellness:

67. The evidence does not establish that RBC will suffer any harm if its application in respect of 52 Wellness is dismissed.

68. Conversely, significant harm will be occasioned to 52 Wellness if a Receiver or Receiver-Manager is appointed, in that it will suffer the loss of its only revenue stream, namely the rental income generated by the 52 Wellness Building.

iii. Application of the Relevant Law to Michael Dave Ltd.:

a. RBC seeks pre-judgment relief:

69. RBC is not a creditor, secured or otherwise, of Michael Dave Ltd. At best, RBC is a potential judgment creditor of that corporation.

70. RBC has offered no evidence that its ability to recover any judgment against Michael Dave Ltd. is in any sort of jeopardy.

b. Serious issued to be tried:

71. The allegation made against Michael Dave Ltd. in this action is that it was effectively the recipient of a fraudulent transfer or preference made by FMPC, in that FMPC appears to have made payments directly to some of Michael Dave Ltd.'s creditors (the "**MDM Transfers**").

72. An explanation for the MDM transfers is given in the affidavit sworn by the defendant Faissal Mouhamad in this action on September 8, 2022. The MDM Transfers were effectively inter-company/related company loans made by FMPC to Michael Dave Ltd.

73. In any event, RBC has offered no evidence that FMPC was insolvent or on the brink of insolvency at the time the MDM Transfers were made. The evidence in fact suggests the contrary.

74. Further, beyond providing some particulars of a contested lawsuit in which FMPC is named as a defendant, RBC has offered no evidence that that the MDM Transfers were made the intent of delaying, hindering or defrauding creditors or others of their just and lawful actions and debts within the meaning of the *Statute of Elizabeth*.

75. RBC's application materials appear to suggest that FMPC transferred the Tenant Improvements and the Red Deer Dental Equipment to Michael Dave Ltd. without RBC's knowledge or consent. However, RBC's pleadings do not contain any allegations related to this purported transfer. If pled, these Defendants concede that there would potentially be a triable issue concerning the alleged transfer.

c. No irreparable harm will arise:

76. There is no evidence that RBC will suffer irreparable harm if the Court declines to appoint a Receiver or Receiver-Manager in respect of Michael Dave Ltd.

77. As previously stated, Michael Dave Ltd.'s only tangible assets are the Tenant Improvements, the Red Deer Dental Clinic Equipment and the MDM Real Property.

78. The Tenant Improvements and the Red Deer Dental Clinic Equipment are currently under seizure initiated by RBC and have been left with Dr. Mouhamad pursuant to the terms of a bailee's undertaking. Moreover, these assets are located at the Red Deer Dental Clinic and, from a practical perspective, are under the supervision of the Interim Receiver. No other action is required to preserve the Tenant Improvements or the Red Deer Dental Clinic Equipment.

79. The evidence on this application is that the total indebtedness secured by way of encumbrances registered against title the MDM Real Property exceeds that value of that

property by a significant margin, making any disposition of the same by Michael Dave Ltd. in the foreseeable future improbable.

80. Further, Michael Dave Ltd. has no revenue streams beyond the rental income it receives on behalf of the Red Deer Dental Clinic, all of which is necessary to service the Solar Star Mortgage and to pay for other expenses associated with the 52 Wellness Building.

d. The balance of convenience favors Michael Dave Ltd.:

81. No harm will come to RBC if the Court declines to appoint a Receiver or Receiver-Manager in respect of Michael Dave Ltd.

82. There are sufficient measures in place to preserve any interest RBC may hold in the Tenant Improvements and the Red Deer Dental Clinic Equipment and there is no reasonable likelihood that the MDM Real Property will be sold, transferred or otherwise disposed of to RBC's detriment.

83. RBC suggests that the appointment of a Receiver is necessary to determine the priorities to the Tenant Improvements and the Red Deer Dental Clinic Equipment. Michael Dave Ltd. disputes that a Receiver is necessary to achieve that objective. Priorities can be ordered by the Court by way of an application under section 69 of the *Personal Property Security Act*, R.S.A. 2000, c. P-7.[37]

84. Conversely, Michael Dave Ltd. will suffer significant harm upon the appointment of a Receiver or Receiver-Manager, in that it will be deprived of its only revenue stream, namely the rental income it receives from the Red Deer Dental Clinic.

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[37] *Personal Property Security Act*, R.S.A. 2000, c. P-7, section 69. **Tab 2**

iv. Application of the Relevant Law to 985:

85. Owing to the timing of the service of the Amended Application, 985 has not been afforded an adequate opportunity to prepare a response to RBC's receivership application. An adjournment of that application will be sought as it pertains to 985.

II. Appointment of an Interim Receiver

i. The Relevant Law:

86. These Defendants agree that the law related to the appointment of an Interim Receiver is accurately stated in the RBC Brief.

ii. Application of the Relevant Law to 52 Wellness and Michael Dave Ltd.

87. It is submitted that if the Court declines to appoint a Receiver/Receiver-Manager in respect of 52 Wellness and/or Michael Dave Ltd., it should follow that the Court should also decline to appoint an Interim Receiver in respect of those corporations.

88. With that said, for the reasons stated above, 52 Wellness and Michael Dave Ltd. submit that RBC has failed to establish the first 2 elements of the tripartite test.

89. With respect to the final element of the relevant test, namely the balance of convenience, 52 Wellness and Michael Dave Ltd. adopt the submissions made below on behalf of 985.

iii. Application of the Relevant Law to 985:

a. Serious issued to be tried:

90. 985 concedes that this element of the tripartite test is met.

b. ***No irreparable harm will arise:***

91. No harm will arise to RBC if an Interim Receiver is not appointed in respect of 985.

92. RBC is a secured creditor of 985, in the sense that it holds a security interest in all of 985's present and after-acquired personal property (the "**985 Security Interest**").

93. However, 985 has no personal property to speak of. Its only tangible asset is the Drayton Valley Building. RBC does not have any sort of interest in that property.

94. It is true that the 985 Security Interest attaches 985's accounts receivable.

95. 985's only receivable is the rental revenue it receives from the lease of the Drayton Valley Building. All of that revenue is applied toward payment of the 119 Mortgage.

96. Even if RBC had some sort of interest in the Drayton Valley Building, the evidence on this application is that the total indebtedness secured by way of encumbrances registered against title to that property significantly exceeds the value of the property, making any disposition of the same by 985 in the foreseeable future improbable.

c. The balance of convenience favors 985:

97. Only a brief adjournment of RBC's application is sought insofar as that application pertains to 985. Given the nature of 985's business operations and of RBC's security, there is next to no likelihood that RBC would be prejudiced if the Court declined to appoint an Interim Receiver.

98. Conversely, 985 would be significantly prejudiced by the appointment of an Interim Receiver, given that it would be expected to bear the costs associated with the interim receivership. It is anticipated that those costs would be significant, even for a brief appointment, and would certainly be disproportionate to the actual risk faced by RBC.

F. RELIEF SOUGHT

99. The remedy sought by RBC is one which the Court has regularly described as drastic and extraordinary and one which should be granted sparingly, especially in circumstances in which the applicant is not a security holder whose instrument specifically allows for the appointment of a Receiver.

100. It is submitted that RBC has not met the requirements necessary to establish entitlement to the appointment of an Interim Receiver or a Receiver/Receiver-Manager in respect of either 52 Wellness or Michael Dave Ltd. Those corporations seek the dismissal of RBC's application as it pertains to them and further seek costs of this application.

101. It is further submitted that RBC has not met the requirements necessary to establish entitlement to the appointment of an Interim Receiver in respect of 985 and 985 seeks the dismissal of that portion of RBC's application.

102. A brief adjournment of RBC's application to appointment a Receiver/Receiver-Manager in respect of 985 is sought.

ALL OF WHICH is respectfully submitted this 13th day of September, 2022.

WARREN SINCLAIR LLP

Per: _____

Matthew Park
Legal counsel to 985, Michael Dave Ltd. and 52 Wellness

LIST OF AUTHORITIES

Tab 1. *Anderson v. Hunking.*, [2010] CarswellOnt519 (Ont. S.C.).

Tab 2. *Personal Property Security Act*, R.S.A. 2000, c. P-7.

TAB 1

2010 ONSC 4008, 2010 CarswellOnt 5191, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

2010 ONSC 4008
Ontario Superior Court of Justice

Anderson v. Hunking

2010 CarswellOnt 5191, 2010 ONSC 4008, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

Garth Anderson, et al. (Plaintiffs / Moving Parties and Bryan Hunking, et al. (Defendants / Respondents)

G.R. Strathy J.

Heard: June 17, 2010
Judgment: July 16, 2010
Docket: CV-10-8597-00CL

Proceedings: additional reasons at *Anderson v. Hunking* (2010), 2010 ONSC 4920, 2010 CarswellOnt 6724 (Ont. S.C.J.)

Counsel: Lincoln Caylor, Jonathan Bell for Plaintiffs / Moving Parties
Heath Whitely, Gwendolyn L. Adrian for Hunking, et al., Defendants / Respondents
David Preger for Romspen Mortgage Investment Fund
A. Kauffman for Ernst and Young Inc., proposed receiver
No one for Chowdhry, et al.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

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

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Defendant conducted educational seminars, which were investment advertisements — Defendants allegedly promised defendants that they would receive two-thirds return on investment, which was also tax deductible — Plaintiffs claimed that money was improperly transfered to building interest of defendant which was retirement home — Plaintiffs brought proceedings against defendant for fraud, misrepresentation and unjust enrichment — Plaintiffs claimed that defendants improperly took their investments and used them to invest in property — Plaintiffs brought application to appoint receiver of retirement home — Application dismissed — Plaintiffs did not make strong case that defendant made specifically prohibited use of money — Unjust enrichment not made out as advance of funds was met with corresponding liability — Loan was juristic reason for enrichment — No evidence of irreparable harm — Business interests of defendant appeared solvent — No evidence to support allegation that retirement residence was plan to deplete funds stolen from plaintiff — Balance of

convenience did not favour appointment — Appointing receiver is intrusive.

Table of Authorities

Cases considered by *D.G. Redman Prov. J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Fisher Investments Ltd. v. Nusbaum (1988), 71 C.B.R. (N.S.) 185, 31 C.P.C. (2d) 158, 1988 CarswellOnt 180 (Ont. H.C.) — followed

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — followed

Richardson Estate v. Mew (2009), 64 R.F.L. (6th) 126, 73 C.C.L.I. (4th) 257, 2009 ONCA 403, 2009 CarswellOnt 2576, (sub nom. *Richardson (Estate Trustee of) v. Mew)* 96 O.R. (3d) 65, 310 D.L.R. (4th) 21 (Ont. C.A.) — followed

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — followed

Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — followed

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — followed

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — pursuant to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 41.02 — pursuant to

APPLICATION by plaintiffs to appoint receiver.

***D.G. Redman Prov. J.*:**

1 This is a motion by the plaintiffs for an order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 41.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appointing a receiver over the assets and business of a commercial retirement project owned or controlled by the defendant Bryan Hunking ("Hunking") and referred to as the "Retirement Residence".

2 The 79 individual plaintiffs claim that they are victims of a fraudulent investment scheme orchestrated by Hunking, in

concert with the defendants Rajesh Chowdhry ("Chowdhry"), Inderpal Bajaj ("Bajaj") and Ajinderpal Singh ("Singh") (collectively, including Hunking, the "Partners"). They claim that, contrary to assurances made to them that their money would be put in low risk/high return investments, some $5 million, or more than half of their investments, ended up in the Retirement Residence.

3 At the hearing of the motion, the plaintiffs asked that the receiver be given power to sell the Retirement Residence, which they say is either insolvent or at risk of imminent insolvency.

4 I will begin by describing the circumstances that give rise to this motion. I will then set out the court's jurisdiction to appoint a receiver and the principles that govern the exercise of that jurisdiction. I will then apply those principles to the facts of this case.

Background

5 The plaintiff, Dr. Robert Gibb ("Gibb"), who has sworn an affidavit in support of the motion, claims that, at some time in 2000, he and the other plaintiffs (who appear to be unrelated individual investors) began attending investment seminars conducted by the Partners. These seminars, although ostensibly for educational purposes, served as a platform to promote the Partners' investment vehicle, which has been referred to as the "Netbusmodel Group".[1] Gibb alleges that the Partners represented that 80% of investors' money contributed to Netbusmodel would be placed in "secure" investments, which would yield returns of 18-30% per annum and the balance would be placed in more speculative, high tech start-up companies. Some of the investors were induced to participate in a charitable donation plan, referred to as "Help for Humanity - Canada" on the basis that their "investment" would be fully tax deductible but that they would eventually receive a return of two-thirds of their investment.

6 This is an individual action in which 79 investors are joined as plaintiffs. It is not advanced as a class action. Gibb is the only plaintiff who has sworn an affidavit in support of this motion. Singularly lacking from his evidence, and presumably from the records of the other plaintiffs is any documentary evidence of the allegedly fraudulent misrepresentations made by the Partners. While different investors were allegedly induced to participate in different investments within the Netbusmodel Group, and to make their investments in different ways, it is acknowledged that none of the plaintiffs were told that their money would be used to finance the Retirement Residence.

7 In approximately October, 2001, the Partners purchased a corporation called Emmanuel Village Homes (Kitchener) Inc. ("EV Homes") for a price of one dollar. In return, they took over that corporation's outstanding liabilities of about $2.4 million. The assets of EV Homes consisted of 42 town homes, all of which were subject to life leases, and a tract of land.

8 In December of 2001, the Partners began to construct the Retirement Residence on the tract of land owned by EV Homes. The money to finance the construction came from a company called Commonwealth Capital Corporation ("Commonwealth"), which was also owned by the Partners.

9 As construction of the Retirement Residence progressed, the Partners acquired additional funding by way of a $7.5 million first mortgage from Romspen Investment Corporation ("Romspen") and they severed the lands on which the Retirement Residence was being built from the balance of the lands containing the town homes. They created Emmanuel Village Residence Inc. ("EV Residence"), which took title to the lands on which the Retirement Residence was being built. EV Homes retained the town homes lands and held an unsecured debt from EV Residence, representing the money put into the Retirement Residence by EV Homes.

10 Plaintiffs' counsel claim to have established that in excess of $5 million of the $8.63 million invested by the plaintiffs found its way into the Retirement Residence. Some of that ($1.4 million) came from Help for Humanity - Canada, and some came from Commonwealth (approximately $3.7 million). The funds provided by Commonwealth are alleged to have been provided by six sources:

(a) Alcorp ($520,000);

(b) VM Press ($45,000);

(c) S & P Trading ($180,000);

(d) Harsajan Singh ($2.086 million);

(e) Birchwood ($530,000);

(f) Baby Alcorp ($370,224).

11 In March, 2003, through a series of transactions, three of the Partners, Chowdhry, Bajaj and Singh, transferred their interests in EV Homes, EV Residence and Commonwealth to a holding company owned by Hunking. In the result, Hunking now owns the Retirement Residence. The validity of these transactions is challenged in litigation between Hunking and the other three Partners.[2]

12 The plaintiffs claim that at least $3.166 million of their investments in the Netbusmodel Group was fraudulently transferred to Commonwealth and was used to construct the Retirement Residence.

13 A fundamental factual issue raised by this motion is whether Hunking, who now owns the Retirement Residence, participated in the alleged diversion of the plaintiffs' investments to the Retirement Residence.

14 The plaintiffs have provided no direct evidence on this critical question. Gibb has no direct evidence on the issue and much of his affidavit is either argumentative or the statement of information that has been provided to him as a result of investigations carried out by his counsel. The plaintiffs also rely on evidence of the Partners other than Hunking, but this evidence is disputed by Hunking and the plaintiffs concede that some of that evidence is unreliable. The other Partners are in litigation with Hunking and may well have their own reasons to embarrass him financially. While plaintiffs' counsel appear to have done an admirable job of forensic investigation, the evidence falls short of establishing that Hunking was a knowing participant in the diversion of the plaintiffs' funds into the Retirement Residence.

Jurisdiction to appoint a receiver

15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
>
> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (Ont. H.C.);
>
> (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090 (Ont. S.C.J.), 2008 CanLII 66137, referring to *Royal Bank v. Chongsim Investments Ltd.*, 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Ont. Gen. Div.);
>
> (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), 1996 CanLII 8258;
>
> (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.);
>
> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue

to be tried;

(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude -evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.*(2008), 49 C.B.R. (5th) 214 at paras. 7 and 11. [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton*, 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (Ont. S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, above, at para. 6:

> [T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

Analysis

17 In this section, I will apply the test for the appointment of an interlocutory receiver, having regard to the principles expressed above.

(a) Preliminary assessment of the merits of the case

18 The plaintiffs' case is based on (i) fraud; (ii) conspiracy; and (iii) unjust enrichment. The plaintiffs also claim the remedy of constructive trust over the Retirement Residence which they say was constructed using their funds.

19 The plaintiffs say that they have established a strong *prima facie* case of fraudulent misrepresentation. They claim that their investment, which was made based on the representation that it would be "secure", was in fact "funneled" into the Retirement Residence".

20 A fundamental problem with the fraudulent misrepresentation aspect of this case is that Gibb, (who is the only affiant on behalf of the plaintiffs) gives only general evidence as to what the Partners told him would be done with his money. Although he claims that 80% of his money was to be put in "secure" investments and the balance in "risky start-up high tech companies", there is no evidence that there were specific limits on the use that could be made of his funds. There were certainly no limits reduced to writing that have been put in evidence and there are no limits identified by Gibb. His evidence, and the other evidence adduced by the plaintiffs, is really to the effect that, "[n]o one ever told the investors their money would ever go into the Retirement Residence".

21 Moreover, there is no evidence of specific representations that were made to any one of the other 78 investor plaintiffs, other than the foregoing general representations.

22 A second problem is that the plaintiffs' case in fraud and conspiracy against Hunking will fall to be determined on questions of credibility as between Hunking and the other Partners.

23 Hunking's evidence is that he understood that the construction of the Retirement Residence was being funded by Commonwealth through loans advanced by the other Partners, and their families, as well as by private loan agreements with other lenders. Hunking swears that he did not participate in a fraud, that the representations made to investors concerning their investments in Netbusmodel reflected his understanding of the facts, and that he was not aware of any wrongdoings in relation to the plaintiffs' investments.

24 For the purposes of this motion, it is not disputed that the plaintiffs invested over $8 million in the Netbusmodel Group and that much of that money has not been returned to them. Nor is it disputed that some of this money found its way through Commonwealth and into EV Homes and EV Residence. What is altogether unclear is what happened in the "messy middle" to use the expression of counsel for the plaintiffs. The plaintiffs have not established anything more than that Hunking *might* have been responsible for the misappropriation of investors' funds and the use of those funds for the Retirement Residence.

25 While the plaintiffs' counsel points to a number of circumstances that cast doubt on Hunking's explanation that the money was provided by the other Partners, there are - equally -circumstances that suggest that the other Partners controlled the flow of funds from Netbusgroup through Commonwealth and to EV Homes and/or EV Residence. On the evidence before me, I cannot say that a strong case of fraud (or, for that matter, a *prima facie* case of fraud) has been made out against Hunking. For the same reason, I cannot say that there is strong evidence that Hunking was a party to a conspiracy to defraud the plaintiffs.

26 The plaintiffs' alternative claim is in unjust enrichment. The well-settled elements of this cause of action are: (a) enrichment of the defendant; (b) corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.); *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.) at para. 36. While there is a basis for concluding that there has been a deprivation of the plaintiffs because they have lost their investments, it does not follow that there has been an enrichment of the defendant because the advance of funds by Commonwealth is reflected by a liability of EV Residence to Commonwealth. As well, there is a juristic reason for the "enrichment" - namely, the funds were advanced as a loan.

(b) Irreparable Harm

27 The plaintiffs rely on the following observation of Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, above, at para. 59:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. CrainInc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

28 The plaintiffs say that the liabilities of the "EV Group" are increasing daily and that, because of Hunking's actions, there is a strong likelihood that by the time of trial the amount of equity in the EV Group, and in the Retirement Residence in particular, will be insufficient to satisfy the plaintiffs' claim. They say that there is no evidence that Hunking has any asset other than the Retirement Residence to satisfy their claims.

29 The plaintiffs rely on unaudited financial statements of EV Residence for the year ended February 28, 2009, which show assets of approximately $11.75 million (with lands and buildings reflected at book value) as against liabilities of over $18 million and a negative cash flow. The notes to the financial statements indicate that:

> The company has incurred significant losses from operations, has a working capital deficiency and a deficit of $6,640,465 as at February 28, 2009. The continuation of the company as a going concern is dependent on its ability to generate sufficient cash to meet its obligations as they come due and achieving a profitable level of operations.

30 In spite of this, it was acknowledged by counsel for Romspen, which does not oppose the appointment of a receiver provided it does not have to fund the cost, that his client's mortgage and the realty taxes are current and in good standing.

31 Hunking has tendered the affidavit of Theresa Landry, Executive Director of the Retirement Residence, to the effect that the facility has, since late 2005, maintained occupancy levels at approximately 96% and has a number of long-term employees. Contrary to the plaintiffs' assertions, through Gibb, that Hunking is living an "extravagant" and "luxurious lifestyle" from the profits of the Retirement Residence. Ms. Landry deposes that from approximately 2004 to February 2009, Hunking and his wife received no salary from the Retirement residence and were only reimbursed for their expenses in the amount of about $24,000. Commencing in February, 2009, Hunking was paid a salary of about $95,000 per annum before taxes and his wife (who has worked at the Retirement Residence on a full-time basis since 2008) was paid about $60,000 per annum before taxes.

32 There is no evidence to support the plaintiffs' inflammatory allegations (which appear to be fueled by hearsay information supplied by the other Partners who are in litigation with Hunking) that Hunking is using the Retirement Residence as his personal bank account to deplete funds "stolen" from them. Nor is there any current, independent, reliable evidence to show that the Retirement Residence is being operated as anything other than a going concern or that it is a wasting asset or being dissipated in any way.

33 The Retirement Residence is subject to a substantial mortgage in favour of Romspen, an apparent arms-length commercial lender, which presumably has a keen interest in ensuring that the asset is not dissipated. It is also subject to two certificates of pending litigation, obtained by the plaintiffs, which will effectively prevent the sale or further encumbrance of the Retirement Residence.

34 The plaintiffs' submission on irreparable harm overlooks the fact that, apart from Hunking, his wife and his companies, there are other defendants, including the other three Partners, who may well be either wholly or partly liable to the plaintiffs and there is no independent evidence to show that these parties lack the means to satisfy a judgment. I conclude that it would be pure speculation to say that the plaintiffs will suffer irreparable harm if a receiver is not appointed.

(c) Balance of convenience

35 I have noted above that the appointment of a receiver is intrusive and that the effect on the parties must be considered in the exercise of the court's discretion. In this case, the plaintiffs are neither judgment creditors nor secured parties. They simply have a potential claim against Hunking. The plaintiffs seek, at a minimum, the appointment of a receiver to take possession of and manage the Retirement Residence and, at the more extreme end, to sell it. It is quite obvious that the appointment of a receiver could have drastic consequences in terms of the business itself, and the confidence of staff, suppliers and residents in the viability of the business. It would take out of the hands of Hunking an enterprise in which he appears to have invested some seven years of work and could well see the enterprise sold from under him. I note, in that regard, that the plaintiffs have not given any undertaking as to damages, should it be determined that this relief ought not properly to have been granted. I also note that there has been no guarantee by the plaintiffs that Hunking and his wife would remain employed by the receiver.

36 In a nutshell, the appointment of a receiver would likely have disastrous consequences for Hunking, someone who may, at the end of the day, be found innocent of wrongdoing.

37 Balanced against this is the existing security that the defendants have by way of a certificate of pending litigation against the Retirement Residence as well as the potential for recovery against the other defendants, and Hunking, in the event that they prove liability and damages at trial. There is no evidence of dissipation of the Retirement Residence and it appears to be operating as a going concern. While there is a risk that the plaintiffs will not be able to enforce a judgment against Hunking, should they obtain one, I am not satisfied that the appointment of a receiver will attenuate that risk.

Conclusion

38 For these reasons, the plaintiffs' motion for the appointment of a receiver is dismissed, with costs. If costs are not agreed upon, written submissions may be made to me care of Judges' Administration.

39 Counsel for the defendants indicated that he is prepared to cooperate with counsel for the plaintiffs to finalize a schedule in order to bring this matter on to trial within a reasonable time. If the parties are unable to agree on a timetable an appointment can be made through my assistant in order to set a timetable.

40 I encourage counsel to discuss the removal of one of the two certificates of pending litigation and the temporary lifting of the certificate to enable the Retirement Residence to refinance the Romspen mortgage, which is at 11%, a rate which is a burden on the defendant. I will remain seized of the matter should a motion be necessary.

Application dismissed.

Footnotes

1 The "Netbusmodel Group" consisted of three companies, which have been referred to as "Netbusmodel", "Alcorp" and "Baby Alcorp".

2 Superior Court of Justice File 04-CV-271509CM3.

TAB 2

Order of the Court

69 On application of an interested person, the Court may

(a) make an order determining questions of priority or entitlement to

(b) direct an action to be brought or an issue to be tried.