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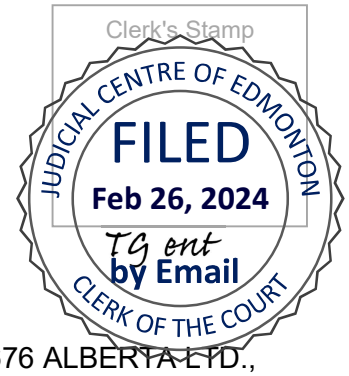
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYNAT INC.
DEFENDANTS	JANMAR INVESTMENTS (ALBERTA) LTD., 1406676 ALBERTA LTD., MARJORIE CARR and WARD FLEMING
DOCUMENT	**BENCH BRIEF OF ROYNAT INC. IN SUPPORT OF AN APPLICATION FOR A RECEIVERSHIP ORDER AND JUDGMENT**



BENCH BRIEF

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I. INTRODUCTION

1. This is the brief the Plaintiff, Roynat Inc. (the "**Plaintiff**" or "**Roynat**") in support of an application to appoint a Receiver over certain assets, undertakings and property of the Defendant, Janmar Investments (Alberta) Ltd. ("**Janmar**") and to have Consent Judgments granted against the Defendants, and each of them.

2. Pursuant to loans extended by Roynat, Janmar is indebted to Roynat in the amount of $5,516,385.13 as of February 23, 2024 plus accruing interest and legal costs on a solicitor and own client full indemnity basis ("**Indebtedness**"). The Indebtedness is secured by a debenture, which includes a mortgage of land over a commercial building owned by Janmar and located at 370 Falconer Crescent in Fort McMurray, Alberta (the "**Janmar Lands**") and a security interest in all of Janmar's present and after acquired personal and real property.

3. The Defendants, 1406676 Alberta Ltd. ("**140**"), Marjorie Carr ("**Marjorie**") and Ward Fleming ("**Fleming**") (collectively the "**Guarantors**") each have executed written guarantees in favour of Roynat ("**Guarantees**"), with respect to the Indebtedness owing by Janmar.

4. J.W. Carr Holdings Ltd. ("**Holdings**") and 272649 Alberta Ltd. ("**272**") also executed guarantees in favour of Roynat with respect to the Indebtedness owing by Janmar, however as all proceedings and enforcement processes against Holdings and 272 have been stayed by virtue of *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings in Court of King's Bench Action #2303 06543, Holdings and 272 have not currently been included as Defendants in the present action.

5. Janmar and the Guarantors are in default of their respective obligations to Roynat. On or about September 29, 2022 Roynat demanded payment of the Indebtedness from the Defendants and issued, to the corporate Defendants, a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***").

6. Subsequent to the demands being issued, Roynat and the Defendants entered into a Forbearance Agreement in November 2022 ("**Forbearance Agreement**") which was extended in June 2023. The forbearance period expired on October 31, 2023 and Janmar has failed to repay the Indebtedness or sell or refinance the Janmar Lands, and Roynat has lost confidence in the ability of Janmar to manage its financial affairs and retire the Indebtedness.

7. Roynat respectfully submits that having regard to the circumstances, it is just and convenient to appoint a Receiver of the Janmar Lands and any assets, undertakings and property of Janmar related to (including any leases), located on, attached to, or affixed on the Janmar Lands, including all proceeds thereof, and that MNP Ltd. ("**MNP**") ought to be appointed as Receiver.

II. FACTS

Loan Agreements and Janmar Security

8. By an Offer of Finance dated January 25, 2017, Roynat agreed to provide Janmar with financing in the total principal sum of $8,050,000.00 (the "**Loan Agreement #1**"), together with interest thereon and costs on a solicitor and own client full indemnity basis.

9. By an Offer of Finance dated August 31, 2017, Roynat agreed to provide Janmar with financing in the total principal sum of $1,000,000.00 (the "**Loan Agreement #2**", with Loan Agreement #1 and Loan Agreement #2 being the "**Loan Agreements**"), together with interest thereon and costs on a solicitor and own client full indemnity basis.[1]

10. By a Demand Debenture made by Janmar on February 7, 2017, and registered in the Land Titles Office for the Alberta Land Registration District on March 6, 2017 as instrument number 172 060 051, Janmar agreed to pay on demand to Roynat all amounts owing under the Loan Agreements up to the principal sum of $11,00,000.00 plus interest at the rate of 25% per annum payable monthly (the "**Janmar Debenture**"). Under the Janmar Debenture, as continuing security for the payment and performance of all present and future indebtedness by Janmar to Roynat, Janmar granted a mortgage and charge to and in favour of Roynat in, among other property, the following:

    (a) PLAN 1520043
    BLOCK 2
    LOT 4
    EXCEPTING THEREOUT ALL MINES AND MINERALS
    AREA: 0.596 HECTARES (1.47 ACRES) MORE OR LESS
    ("**Janmar Lands**");

    (b) All of its freehold and leasehold real and immovable property;

    (c) All of its present and after acquired personal property;

    (d) All accounts, instruments, debts which are then due, owing or accruing due or which may thereafter become due, owing or accruing due to Janmar together with all records (whether in writing or not) and all other documents of every kind in which in any way evidence or relate to any or all accounts, instruments and debts; and

    (e) All of its present and after acquired inventory.[2]

11. By the Janmar Debenture, Janmar agreed that upon default, Roynat could, among other remedies, appoint a person to be a Receiver of any or all of Janmar's present or after acquired personal or real property.[3]

12. By the Loan Agreements and Janmar Debenture, Janmar agreed to pay Roynat when due, all amounts (whether principal, interest calculated at the rate specified therein, or other sums) owing to Roynat and further agreed to pay, on demand, all legal and other

[1] Affidavit of Cian McDonnel sworn February 26, 2024 ("**Affidavit**") at para 4 and Exhibit "A".
[2] Affidavit at para 5 and Exhibit "B".
[3] Affidavit at Exhibit "B", s 8(g).

costs incurred by Roynat in respect of the credit facilities, including, without restriction, for the preparation, registration or realization on the security and collection of the Indebtedness, all with legal costs on a solicitor and his own client full indemnity basis.[4]

13. Through refinancing by Janmar, Roynat agreed to discharge its Demand Debenture only as against the lands legally described as Plan 98545666, Block 29, Lots 16 and 17 and expressly reserved all rights and remedies related to the Janmar Lands. To Roynat's knowledge, other than the lands mentioned in this paragraph, the main, material asset of Janmar is the Janmar Lands.

Guarantees

14. In consideration for the Loan Agreements and Roynat extending credit from time to time to Janmar the Guarantors, and each of them, delivered a written guarantee by which the Guarantors unconditionally promised to pay to Roynat all debts and liabilities of Janmar to Roynat, present or future, plus interest thereon and any and all costs, charges and expenses which may be incurred by Roynat in recovering any Indebtedness of Janmar thereby guaranteed or in enforcing the Guarantees, including, without limitation, lawyer fees on a solicitor and his own client full indemnity basis.[5]

Default, Forbearance and Amounts Owing

15. Janmar defaulted under the terms and conditions of the Loan Agreements and Janmar Debenture and on or about September 29, 2022, Roynat did demand payment of the Indebtedness from the Defendants (the "**Demand**") and further issued, to the corporate Defendants, a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*.[6]

16. By the Forbearance Agreement dated effective November 2022, the Defendants and Roynat acknowledged, among other things, that:

    (a) Janmar was in default of its obligations to Roynat;

    (b) The Indebtedness and loans made by Roynat to Janmar were due and owing;

    (c) The Guarantees were validly executed;

    (d) There was no defence or set-off available to either Janmar or 140, Marjorie or Fleming to the claims of Roynat for repayment of the loans or for payment under the Guarantees; and

    (e) All legal fees on a solicitor and own client full indemnity basis in connected with preparation and enforcement of the Forbearance Agreement or any of the Loan Agreements, Janmar Debenture or related security shall form part of the Indebtedness.[7]

17. By the Forbearance Agreement, the Defendants irrevocably executed and delivered to Roynat, among other items, a Consent Receivership Order over the assets, undertakings

[4] Affidavit at para 4-5, Exhibit "A" and "B".
[5] Affidavit at para 11 and Exhibit "G".
[6] Affidavit at para 12 and Exhibit "H".
[7] Affidavit at para 14 and Exhibit "I".

and property of Janmar and a Consent Judgment in favour of Roynat, as against all Defendants.[8]

18. By a Forbearance Amending and Extension Agreement dated June 8, 2023 between the Defendants and Roynat, the parties agreed, among other things, to extend the forbearance period, and the deadline for Janmar to pay the Indebtedness owing to Roynat, to October 31, 2023.[9]

19. The forbearance period under the Forbearance Agreement, as amended, has expired and the Indebtedness is fully due and owing to Roynat.[10]

20. As of February 23, 2024, there is due and owing to Roynat by Janmar the amount of $5,516,385.13, plus interest which continues to accrue pursuant to the terms of the Loan Agreements together with costs on a solicitor and his own client full indemnity basis.[11]

21. As of February 23, 2024, the Guarantors are indebted to Roynat in the following amounts, jointly and severally, plus costs on a solicitor and his own client full indemnity basis:

    (a) 140, in the amount of $5,516,385.13 plus interest pursuant to the terms of the Loan Agreements; and

    (b) Marjorie and Fleming, each in the amount of $1,000,000.00 plus interest thereon after the Demand at the rate pursuant to the Loan Agreements.[12]

22. Over 16 months have elapsed since Roynat first issued the Demand to Janmar and the other Defendants to permit the Defendants time to reorganize their business and financial affairs, including time to solicit a sale of the Janmar Lands, both informally and formally through the Forbearance Agreement. Despite those efforts, the Indebtedness has not been repaid, nor has a sale of Janmar Lands been completed.

23. As a result, and due to the passage of time without repayment in full of the Indebtedness and the expiry of any forbearance period and without any sale of the Janmar Lands, Roynat has lost confidence in the ability of Janmar and its management to manage its financial affairs.

24. Further, the Janmar Debenture permits Roynat to appoint a Receiver in the event of default and pursuant to the Forbearance Agreement, Janmar irrevocably consented to the appointment of a Receiver.[13]

25. MNP Ltd. has consented to act as Receiver of Janmar.[14]

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[8] Affidavit at Exhibit “I”.
[9] Affidavit at para 16 and Exhibit “J”.
[10] Affidavit at para 17.
[11] Affidavit at para 18 and Exhibit “K”.
[12] Affidavit at para 19.
[13] Affidavit at Exhibit “B”, section 8(g) and Exhibit “I”, section 3.4.
[14] Affidavit at para 23.

III. ISSUES

26. Roynat respectfully submits that the issues before this Honourable Court are:

a. Should a Receiver be appointed by this Honourable Court in the present circumstances?

b. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver?

c. Should the Consent Judgments against each of the Defendants be granted?

IV. ARGUMENT

A. Should a Receiver be appointed by this Honourable Court in the present circumstances?

27. Each of section 243 of the *BIA*, section 13(2) of the *Judicature Act*, section 65(7) of the *Personal Property Security Act*, and section 49 of the *Law of Property Act* vest in this Honourable Court, authority to appoint a Receiver where it is just or convenient to do so.[15]

28. In Roynat's respectful submission, this Honourable Court should exercise its discretion to appoint a Receiver, as it is just, convenient and generally appropriate that a Receiver be appointed at this time of the Janmar Lands and any assets, undertakings and property of Janmar related to (including any leases), located on, attached to, or affixed on the Janmar Lands, including all proceeds thereof.

29. The factors this Court may consider when 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;

[15] BIA, s 243 **[TAB A]**; *Judicature Act*, RSA 2000, c J-2, s 13(2) **[TAB B]**; *Personal Property Security Act*, RSA 2000, c P-7, s 65 **[TAB C]**; *Law of Property Act*, RSA 2000, c J-2, s 49 **[TAB D]**.

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.[16]

30. When a creditor has authority to appoint a Receiver under a security agreement, this Honourable Court has applied a less onerous test than the test for injunctive remedies:

> The Alberta Court of Appeal notes in *BG International Limited v Canadian Superior Energy Inc*, 2009 ABCA 127 at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.
>
> The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: Paragon Capital at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.[17]

31. The Janmar Debenture authorizes the appointment of a Receiver, and the Defendants have consented to the appointment of a Receiver pursuant to the Forbearance Agreement. While it is not essential for Roynat to establish irreparable harm if a Receiver is not appointed, the Indebtedness owing by Janmar is in excess of $5,516,385.13 and poses material risk to Roynat.

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[16] *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 at para 27 **[TAB E]**.
[17] *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63 at paras 20-21 **[TAB F]**.

32. Roynat has provided ample time and opportunity to Janmar to repay the Indebtedness prior to seeking this relief. Demand was first issued in September 2022 and subsequently, the Forbearance Agreement entered into, and thereafter extended to October 31, 2023.

33. While there is a cost of appointing a Receiver, Roynat's position is that the appointment of a Receiver will result in a timely and economical resolution, namely involving the management and ultimate marketing and sale of the Janmar Lands. Roynat further submits that the value of the Janmar Lands will be maximized and preserved by appointing a Receiver and facilitating a diligent sales process.

34. Roynat is seeking the appointment of a Receiver limited to the Janmar Lands and any assets, undertakings and property of Janmar Investments (Alberta) Ltd. ("**Janmar**") related to (including any leases), located on, attached to, or affixed on the Janmar Lands. Roynat, via the Demand Debenture, originally held a security interest against lands owned by Janmar legal descripted as Plan 98545666, Block 29, Lots 16 and 17. Through refinancing, Roynat agreed to discharge its Demand Debenture only as against said lands and expressly reserved all rights and remedies related to the Janmar Lands.

35. The Consent Receivership Order formed part of the Forbearance Agreement, which was finalized after much negotiation between Roynat, the Defendants and their respective counsel. The general judicial approach towards consent orders is set out in *Brooks v Brooks* where the Court held:

> The Consent Order was the result of settlement discussions between the parties and their respective counsel, as both were represented at the time. It is not the role of the judge to go behind any compromise reached by the parties and their counsel, where the judge considers the Order to be appropriate in the circumstances.[18]

36. In terms of any grounds to set aside, challenge or reject consent orders, the courts have consistently considered consent orders to effectively be agreements or contracts, or perhaps more appropriately evidence of contracts or agreements, between the parties as set out in the form of an order. As a result, it is widely considered that normal principles of contract law apply to setting aside a consent order, with the basis to set aside a consent order being narrow:

> An order is granted on the merits after the court has considered the strength of each side's case. A consent order has been described as a contract, although it has also been said that it is more accurate to describe it as evidence of a contract. A consent order sets out, in the form of an order, the agreement which the consenting parties have made: *155569 Can. Ltd*. *v. 248524 Alta.*, 1992 CanLII 14204 (AB KB), 126 A.R. 396, [1992] A.J. No. 135 (Q.B.).
>
> Since a consent order is a contract or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order, can generally only be varied on grounds of common mistake, misrepresentation or fraud: *155569 Can*. In *155569 Can.*, the court set aside a prior consent order appointing a receiver and providing for the collection and payment of rent to the plaintiff on the basis that the defendants would not have consented to the order if they had been aware of a prior agreement to do otherwise. The court found that the consent order could be vacated on grounds of unilateral mistake since the defendant consented to the order on

[18] *Brooks v Brooks*, 2012 NBCA 50 at para 11 **[TAB G]**.

> the basis of a mistaken understanding on a crucial point, and the plaintiff knew the defendant was mistaken.[19]

37. There is no basis for any suggestion of fraud or deceit in this case, nor any suggestion of mistake, misrepresentation or other grounds on which a contract may be set aside. As a result, Roynat respectfully submits that this Honourable Court ought to exercise its discretion to give effect to the agreement between the parties and appoint a Receiver.

B. If this Honourable Court exercises its discretion to appoint a Receiver, what firm out to be appointed as Receiver?

38. In an application for the appointment of a Receiver, the Court is tasked with deciding the appropriate person or firm to be appointed. Roynat respectfully submits that MNP ought to be appointed as Receiver in this case.

39. Consideration should be given to the applicant creditor's proposed Receiver:

> The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking the receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.[20]

40. MNP is a well-recognized and respected insolvency firm and is prepared to act as Receiver if appointed and as such, Roynat respectfully submits that it would be reasonable for this Honourable Court to appoint MNP as Receiver of Janmar.

C. Should the Consent Judgments be granted by this Honourable Court?

41. The Defendants have agreed that the Indebtedness is due and owing to Roynat and that each of the Guarantors have executed the Guarantees, for valid consideration.[21]

42. Janmar has defaulted in its obligation to repay the Indebtedness. The Guarantors have each respectively defaulted on their obligations to repay the Indebtedness (subject to any provisions in their respective Guarantees limiting the amount owing).[22] There is no defence to the claim for judgment by Roynat.

43. Further, the Defendants have each executed a Consent Judgment in favour of Roynat and agreed that upon default, Roynat is authorized to:

(a) apply to have signed and entered the Consent Judgment on a minimum of three (3) days' notice; and

(b) fill in the judgment amounts in the Consent Judgment.

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[19] *Simonelli v Ayron Developments Inc.*, 2010 ABQB 565 at paras 66-67 **[TAB H]**.
[20] *Confederation Trust Co. v Dentbram Developments Ltd.*, 9 CPC (3d) 399, 1992 CarswellOnt 474 (Ont Gen Div [Commercial List]) at para 2 **[TAB I]**.
[21] Affidavit at Exhibit "I", s H and 1.1.
[22] Affidavit at paras 13 and 17.

44. The Consent Judgment was, as with the Consent Receivership Order, finalized between the parties after much negotiation towards forbearance. The Defendants were represented by counsel at the time of execution and Roynat relies on its arguments in paragraphs 35 to 37 of this Brief as to why this Honourable Court should give effect to the Consent Judgment.

V. CONCLUSION AND RELIEF SOUGHT

45. Roynat submits that:

(a) having regard to the circumstances, it is just and convenient to appoint MNP as Receiver of the Janmar Lands and any assets, undertakings and property of Janmar related to (including any leases), located on, attached to, or affixed on the Janmar Lands, including all proceeds thereof; and

(b) the Consent Judgment, or alternatively judgment in substantially the same form, should be granted as against each of the Defendants, jointly and severally, as the Indebtedness is due and owing, the Guarantees were validly executed and the Defendants, and each of them, irrevocably executed the Consent Judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February, 2024

DUNCAN CRAIG LLP

Per: _____
DARREN R. BIEGANEK, KC/
ZACHARY SOPROVICH
Counsel for the Plaintiff, Roynat Inc.

LIST OF ATTACHMENTS

A. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243.

B. *Judicature Act*, RSA 2000, c J-2, s 13(2).

C. *Personal Property Security Act*, RSA 2000, c P-7, s 65.

D. *Law of Property Act*, RSA 2000, c J-2, s 49.

E. *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430.

F. *Kasten Energy Inc. v Shamrock Oil & Gas Ltd*., 2013 ABQB 63.

G. *Brooks v Brooks*, 2012 NBCA 50.

H. *Simonelli v Ayron Developments Inc.*, 2010 ABQB 565.

I. *Confederation Trust Co. v Dentbram Developments Ltd*., 9 CPC (3d) 399, 1992 CarswellOnt 474 (Ont Gen Div [Commercial List]).

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

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

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

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

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

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

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

243(3)Definition of "receiver" — subsection 248(2)

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

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

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

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

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

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

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.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.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Personal Property Security Act
Part 5 — Rights and Remedies on Default (ss. 55-65)

R.S.A. 2000, c. P-7, s. 65

s 65. Receiver

Currency

65.Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

65(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

65(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

65(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

65(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

65(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

65(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

65(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

65(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

Currency
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Concordance References
Personal Property Security Act Concordance 84, Receiver, receiver and manager
Personal Property Security Act Concordance CABYCONCORD1, Table of Concordance

End of Document

R.S.A. 2000, c. L-7, s. 49

s 49. Appointment of receiver

Currency

49.Appointment of receiver

49(1) Notwithstanding section 40, after the commencement of an action on

(a) a mortgage of land other than farm land, or

(b) an agreement for sale of land other than farm land,

to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:

(c) appoint, with or without security, a receiver to collect rents or profits arising from the land;

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

49(2) If

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

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

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

49(3) Notwithstanding subsections (1) and (2), an application to appoint a receiver may be made ex parte if

(a) in the case of a mortgage, the land is transferred or sold

(i) while the mortgage is in default, or

(ii) within 4 months before the mortgage goes into default,

or

(b) in the case of an agreement for sale, the purchaser's interest in the land is assigned or sold

(i) while the agreement for sale is in default, or

(ii) within 4 months before the agreement for sale goes into default.

49(4) The proceeds of rents or profits collected by the receiver, less any fee or disbursements, which may be allowed by the Court to the receiver by way of remuneration, shall be applied

(a) in payment of taxes accruing due or owing on the land in receivership, and

(b) in reduction of the claims of the mortgagee or vendor against the land in receivership.

49(5) A receiver appointed pursuant to this section may distrain for rent in arrears in the same manner and with the same right of recovery as a landlord.

49(6) On default of the mortgagor or purchaser of the land other than farm land that is in receivership to pay the rents or profits from it, the Court may order possession of the land to be delivered up to the receiver and leased by the receiver, on any terms and conditions that the Court considers fit.

49(7) The Court may, on application by the receiver, give the receiver further directions from time to time as the circumstances require.

49(8) An order appointing a receiver may be discharged by the Court at any time, but the order shall only be discharged on application after notice.

49(9) When and so often as the circumstances require, the Court may, without discharging the order appointing the receiver, substitute another person for the person originally appointed by the order appointing a receiver, and the substituted receiver shall perform all the duties and has all the powers given by the order or this section to the person originally appointed.

49(10) When an order appointing a receiver is made under this section, then, unless the Court otherwise directs in that order or in a subsequent order, proceedings in the action on the mortgage or on the agreement for sale shall be stayed until the time that the order appointing a receiver is discharged.

49(11) Subsection (10) does not apply when the mortgagor or purchaser is a corporation.

49(12) In this section, **"farm land"** means farm land as defined in section 47(4).

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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

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

Headnote

Receivers --- Appointment — General

Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that

doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,[8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*[9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,[10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*[11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."[12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne [*]

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***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.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

Natural resources --- Oil and gas — Oil and gas leases — Transfer of title

Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

APPLICATION seeking order for appointment of receiver and manager of company's assets and undertaking.

***Donald Lee J.*:**

Introduction

1 This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

Facts

2 Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

3 Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

4 The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of $567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

5 On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

6 By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

7 As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

8 On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

9 At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

10 On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58 which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

11 The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

12 The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

> 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.

Parties' Positions and Analysis

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, (2002), 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.

Kasten's Submissions

14 The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

15 Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

17 The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc.*, 1992 ABCA 93 (Alta. C.A.); at para 10, [1992] 4 W.W.R. 499 (Alta. C.A.). Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at 576, (1971), [1972] 2 W.W.R. 28 (S.C.C.). The contract is assignable and subject to seizure.

Shamrock's Submissions

18 The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

19 Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

22 Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

23 In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

24 In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

25 Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

26 After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

27 Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

28 Shamrock agrees that a Receiver could only be appointed over its personal property, which includes the oil when it is produced and removed from the ground. However, it contends that the authority of the Receiver does not extend to the lease or the sale of Sawn Lake Well since Kasten has no security over the PNG lease under the GSA and can only receive revenue from the Well. Shamrock takes the position that the oil and gas lease is a *profit à prendre*, which is an interest in land excluded under Alberta's *PPSA*, s 4(f).

29 I note that the Supreme Court of Canada in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58, [2008] 3 S.C.R. 166 (S.C.C.) [Saulnier] discussed the term "property" in the context of a commercial fishing licence under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 [*BIA*] and *Nova Scotia's Personal Property Security Act*, SNS 1995-96, c 13 [*PPSA*]. The provision of the relevant section of Nova Scotia's *PPSA* is identical to that of *Alberta's Personal Property Security Act*, RSA 2000, c P-7.

30 The Supreme Court in *Saulnier* held that the *BIA* and *PPSA* should be interpreted in a way best suited to enable them accomplish their respective commercial purposes. Binnie, J, writing for the Court, observed that:

> [28] ... [A] fishing licence ... bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds ...
>
> [29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) ... The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.
>
> [30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on The Law of Real Property (4th ed. 1975), at p. 779:
>
> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree.
>
> And at p. 822:
>
> A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.
>
> [31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in ***Harper v. Minister for Sea Fisheries*** (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:
>
> A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]
>
> . . .
>
> [33] In my view these observations are helpful ... there are important points of analogy between the fishing licences issued to the appellant ***Saulnier*** and the form of common law property called a *profit à prendre* ...
>
> [34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.
>
> (emphasis added)

31 In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in *Saulnier*. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: *Saulnier* at para 29. The right to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": *Saulnier* at para 34.

32 In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: *Saulnier* at para 34; *Stout & Co. LLP v. Chez Outdoors Ltd.*, 2009 ABQB 444 (Alta. Q.B.) at para 39, (2009), 9 Alta. L.R. (5th) 366 (Alta. Q.B.) [*Chez Outdoors*]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": *Chez Outdoors* at para 15. That right

is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

33 This Court has the authority to make an Order either "unconditionally or on any terms and conditions" it thinks just, including a restriction of the powers of a Receiver and Manager if necessary in the circumstances of the case before it: *Judicature Act*, s 13(2).

34 Kasten seeks a court-appointed Receiver who is a court officer owing a fiduciary duty to all parties, including the debtor: *Philip's Manufacturing Ltd., Re* (1992), 92 D.L.R. (4th) 161 (B.C. C.A.) at para 17, [1992] 5 W.W.R. 549 (B.C. C.A.) (WL). It argues that the court-appointed Receiver would take instructions from the Court and not from Kasten. The Receiver would be bound to act in the best interests of all parties. In a *volte-face*, Kasten seeks in its supplemental brief that this Court should appoint it as a Receiver. There was no reason specifically advanced by Kasten for its new position.

35 Shamrock submits that a Consent Receivership Order should be granted and the Receiver should not be conferred with a power of sale. It wants the Order held in abeyance until April 1, 2013 or when Shamrock/Stout fails to make a payment of interest as scheduled, whichever occurs first, in order to allow for the sale of Sawn Lake Well.

36 The Respondent notes that Kasten now seeks to be appointed as the Receiver and Manager instead of the earlier proposed independent body corporate, MNP Ltd. which had given its consent to act as Receiver and Manager of Shamrock, the debtor.

37 In the absence of any clear objection to the appointment of MNP Ltd., an independent and neutral entity in this matter, an Order will issue to name MNP Ltd. as the court-appointed Receiver and Manager of all the current and future assets, undertakings and properties of Shamrock Oil and Gas Ltd. until Kasten and other creditors (secured and unsecured) are paid in full. The Receiver and Manager will have no power of sale, except as approved by an Order of this Court. However its authority is suspended until April 1, 2013 in order to accommodate any potential sale of Sawn Lake Well by Shamrock. To be clear, if Sawn Lake Well is not sold on or before April 1, 2013, the power and authority of the Receiver and Manager is to become effective immediately on that day.

38 If parties are unable to agree on costs, they should arrange to speak to me within 30 days of the issue of this decision.

Application granted.

End of Document

2012 NBCA 50
New Brunswick Court of Appeal

Brooks v. Brooks

2012 CarswellNB 332, 2012 CarswellNB 333, 2012 NBCA 50, [2012] W.D.F.L. 3253, [2012] W.D.F.L. 3288, 1011 A.P.R. 94, 216 A.C.W.S. (3d) 171, 390 N.B.R. (2d) 94

Sarah Elizabeth Brooks, (Respondent) Appellant and Colin David Brooks, (Petitioner) Respondent

J.C. Marc Richard J.A., J.T. Robertson J.A., M.E.L. Larlee J.A.

Heard: April 12, 2012
Judgment: June 7, 2012
Docket: 1-12-CA

Counsel: Sarah Elizabeth Brooks, Appellant, for herself
Colin David Brooks, Respondent, for himself

Subject: Family; Contracts

Headnote

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Variation or termination — Appeals

Parties were divorced in August 2008 after almost 20 years of marriage — Consent orders providing for matters including custody of two children of marriage, child support and spousal support were incorporated in order for corollary relief — Since divorce, wife twice sought to have order for corollary relief varied to increase spousal support, and, each time, husband responded with his own request for variation to reduce amount to reflect fact that he was now primary caregiver of two children — On both occasions, trial judge refused to interfere with spousal support provision of consent order — Wife appealed — Appeal allowed in part — Motion judge's decision dismissing both motion and husband's response for variation of spousal support was set aside — New hearing was ordered, but one limited to issue of prospective changes to spousal support provisions of consent order in accordance with Clause 25 of that order — By rejecting wife's motion without fresh adjudication of spousal support issues, motion judge deprived not only wife of benefit of Clause 25 of original consent order, but also husband of same, since, in his response, he too was seeking review of spousal support provisions — It was error in law for motion judge not to have determined anew spousal support obligations of parties.

Family law --- Domestic contracts and settlements — Effect of contract — On spousal support — Under Divorce Act — Variation of support

Parties were divorced in August 2008 after almost 20 years of marriage — Consent orders providing for matters including custody of two children of marriage, child support and spousal support were incorporated in order for corollary relief — Since divorce, wife twice sought to have order for corollary relief varied to increase spousal support, and, each time, husband responded with his own request for variation to reduce amount to reflect fact that he was now primary caregiver of two children — On both occasions, trial judge refused to interfere with spousal support provision of consent order — Wife appealed — Appeal allowed in part — Motion judge's decision dismissing both motion and husband's response for variation of spousal support was set aside — New hearing was ordered, but one limited to issue of prospective changes to spousal support provisions of consent order in accordance with Clause 25 of that order — By rejecting wife's motion without fresh adjudication of spousal support issues, motion judge deprived not only wife of benefit of Clause 25 of original consent order, but also husband of same, since, in his response, he too was seeking review of spousal support provisions — It was error in law for motion judge not to have determined anew spousal support obligations of parties.

APPEAL by wife from dismissal of motion to vary spousal support.

Per curiam:

1 Sarah Elizabeth Brooks and Colin David Brooks were divorced in August 2008 after almost 20 years of marriage. Consent Orders providing for matters including custody of the two children of the marriage, child support and spousal support were incorporated in an Order for Corollary Relief. Since the divorce, Ms. Brooks has twice sought to have the Order for Corollary Relief varied to increase spousal support, and, each time, Mr. Brooks responded with his own request for a variation to reduce the amount to reflect the fact that he is now the primary caregiver of their two children. On both occasions, judges of the Court of Queen's Bench refused to interfere with the spousal support provision of the Consent Order. It is the last of these refusals that is the subject of Ms. Brooks' appeal.

2 The original Consent Order is dated June 5, 2008. It was later complemented by another one because the original Order failed to include a provision regarding prospective spousal support for Ms. Brooks. For the purposes of this decision, both of these orders together will be referred to as "the Consent Order". Clause 25 of the Consent Order provides that "[e]ither party may apply for a review of the spousal support provisions contained herein after 2 full years from the effective date of this order [and that] [t]here is no requirement for a material change in circumstances to occur before requesting a review pursuant to this order." On August 27, 2009, Ms. Brooks filed a motion to vary the Order for Corollary Relief. The motion was heard on June 3, 2010, but, for medical reasons, Ms. Brooks did not attend. Ultimately, her motion was dismissed in a decision that was not appealed. In any event, that motion could not have given effect to Clause 25 of the Consent Order, since it was filed and heard before two full years had expired.

3 On May 24, 2011, Ms. Brooks filed the motion that is the underlying subject of this appeal. In fact, she filed more than one notice of motion, but the motion judge treated them as one and we will do the same. Ms. Brooks essentially advanced two arguments in support of her request for an increase in spousal support. She maintained: (1) her post-divorce health deterioration should yield increased support payments; and (2) miscalculations in the spousal support provisions contained in both the June 1, 2007 Interim Consent Order and the June 5, 2008 Consent Order resulted in an undervaluation of spousal support and should now be rectified. In addition, Ms. Brooks alleged fraud and cover-up by her ex-husband, his lawyer and her own lawyer and sought various orders for contempt of court.

4 The motion judge dismissed Ms. Brooks' motion. With regard to spousal support, he dismissed it on the ground that she was effectively trying to re-litigate the issues that had been raised in the motion that was heard on June 3, 2010. In addition, the motion judge ruled that there was no merit to the allegations of fraud and that the Consent Order was a reflection of the will of the parties. The motion judge also dismissed the various requests for relief Ms. Brooks was seeking. He disposed of these as follows:

> 1. A request Mr. Brooks be held in contempt for refusing to send Ms. Brooks certain specific information. Dismissed, as there is no order of this Court directed to Mr. Brooks to provide such information;
>
> 2. A request that Mr. Brooks be required to accept correspondence from Ms. Brooks on the issues raised in these motions. Denied, as there is no requirement for anyone to receive correspondence in the normal course of litigation. Service of process is provided pursuant to the Rules of Court and so this request cannot be fulfilled;
>
> 3. A request that Mr. Brooks be found in contempt for refusing to accept registered mail on the issues before the Court. Dismissed, as there is no law that requires Mr. Brooks to accept correspondence. Correspondence that must be conveyed in a litigation file must either be served in accordance to the Rules or submitted under appropriate process and, receipt may be deemed under the Rules. Actually ordering Mr. Brooks to receive documents is not within the mandate of this Court in these circumstances;
>
> 4. A request that Mr. Brooks be ordered to provide certain documents to facilitate the claim against him. Denied, as being outside the scope of this process. There are certain, limited, cases in which the Court may order someone to produce specific documents. That is not what is being sought here. Ms. Brooks is seeking a blanket requirement to produce all documents she considers necessary. This is not the proper means to discover the case for the other side.

5. A request the Court create a compensation fund for Ms. Brooks' benefit to "facilitate a fair resolution to the on-going and unsatisfactory Divorce litigations ..." Denied. This is one of the specific claims for relief in the third motion and should not be inappropriately presented here. In addition, the claim for relief is not specifically supported by evidence sufficient to prove the claim;

6. A request the Court determine Mr. Brooks to be in contempt for failing to reveal all the evidence necessary for the defending party to meet the case against him. Denied. Ms. Brooks is the moving party and, as such has to define the parameters for the litigation. Mr. Brooks is under no compulsion to provide any, or any specific evidence in response. If he does not provide the appropriate evidence in the appropriate format, the consequence for him might be the loss of the motion;

7. A request the Court strike the whole of Mr. Brooks' responding document as malicious and demeaning and require Mr. Brooks to be required to give *viva voce* evidence in respect to the matters to be heard. Denied. Mr. Brooks has submitted a responding document with affidavit attached. Before I make any determination about the nature of that document, I must hear the argument. A determination the document is malicious and demeaning may well justify a remedy in costs or otherwise. It does not warrant striking the entirety of the document with no actual review of the contents;

8. A request the responding documents be struck and Mr. Brooks be held in contempt of this Court because his response does not respond to the matters set out to be heard. Dismissed. Again, the consequence of an inappropriately drafted response is not usually the removal of the document on grounds of relevance. Instead the poorly crafted response is detrimental to the responding party in determination of the matters at issue;

9. A request to order the appearance of two counsel in respect of their alleged contempt and further in respect of an interim motion of May 2007 and their alleged falsification of figures in the consent order disposing of collateral issues in the divorce. Denied. Counsel in proceedings from four years ago who are not parties to this matter cannot be summarily brought forward to reply to allegations that are not relevant to the matters immediately before this Court.

10. A second request to order the appearance of the two counsel for their alleged contempt in forcing Ms. Brooks to consent to orders she says resulted in her being trapped in an unconscionable situation. Denied. For the reasons set out above, I cannot order non-parties to appear and face allegations that are outside the Rules of Court. Further, other than Ms. Brook's [sic] calculations and her steadfast belief, there has been no proof presented to support the claims.

5 Ms. Brooks, who was self-represented at the hearing of her motion and again before us, brings a motion to introduce fresh evidence consisting of 10 documents. None of those documents has a direct bearing on the principal issue this Court must decide: whether the motion judge erred in refusing to increase the amount of spousal support presently being paid. Accordingly, the motion to adduce fresh evidence must be dismissed.

6 The appellant's Notice of Appeal and written submission outline 28 grounds of appeal. Some of the grounds challenge the motion judge's impartiality in deciding the matter and are simply frivolous. Many of the grounds challenge the dismissal of the various forms of relief Ms. Brooks was seeking, in addition to the increase in spousal support (that is those enumerated in paragraph 4 above). Those grounds effectively invite us to retry factual issues or substitute our discretion for that of the trial judge. However, as has been stated many times before, this is not the role of a court of appeal. As stated in *LeBlanc v. Doucet*, 2010 NBCA 13, 354 N.B.R. (2d) 117 (N.B. C.A.), at para. 1, and repeated in *Mills v. Mills*, 2010 NBCA 20 (N.B. C.A.), (2010), 356 N.B.R. (2d) 351 (N.B. C.A.), at para. 10: "[i]t is now an elementary statement of law that an 'appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities'."

7 The Supreme Court of Canada has been very clear in delineating the roles of the respective courts. This is expressed in the following recent decision of this Court in *MacDonald v. MacDonald*, 2011 NBCA 25, 372 N.B.R. (2d) 179 (N.B. C.A.):

> The standard of review that applies to family matters generally is that the judge's decision must be given considerable deference. An appellate court is empowered to set aside or vary a decision or order where it is the product of an error of law, an error in principle, a significant misapprehension of the evidence or if it is clearly wrong [para. 7]

8 Specifically with regard to findings of fact and discretionary relief, which formed the basis for many of the rulings enumerated above, the standard of review was again explained in *Yorke v. Yorke*, 2011 NBCA 79, 378 N.B.R. (2d) 141 (N.B. C.A.), leave to appeal dismissed (2012), [2011] S.C.C.A. No. 520 (S.C.C.):

> An appellate court must show considerable deference to a trial judge's decision on a family law matter (*T.M.A.H. v. J.J.G.*, 2010 NBCA 4, [2010] N.B.J. No. 21 (QL)). In *Milton v. Milton*, 2008 NBCA 87, 338 N.B.R. (2d) 300, at para. 14, this Court reiterated that with regard to the standard of review applicable to an appeal from a division of assets made pursuant to the Marital Property Act (legislation conferring discretion on a judge to divide property), we can intervene and review the facts only if the trial judge has misdirected herself or himself or if the decision is "so clearly wrong as to amount to an injustice" (see *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, [1989] S.C.J. No. 48 (QL), at 1375).
>
> In *N.L. v. R.L.*, File Number 127/07/CA, December 14, 2007 (N.B.C.A.), Richard J.A. summed up the standard of review in a family case:
>
> The law is equally clear that the Court of Appeal cannot re-try a case. The Court of Appeal may only overturn a trial judge's finding of fact can [sic] if it is the result of a palpable and overriding error, and may only interfere with a discretionary order if it is founded upon an error of law, an error in the application of the governing principles or a palpable and overriding error in the assessment of the evidence (see *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL), 2002 SCC 33 and *H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24 (QL), 2005 SCC 25 with regard to findings of fact, and *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76 (QL), 2003 SCC 71, at para. 43, with regard to discretionary orders). [para. 3]
>
> [paras. 8 and 9]

9 We simply do not see any error of the type that would allow appellate interference with any of the rulings that are enumerated in paragraph 4 above. Thus, there is no basis for intervention. The grounds of appeal relating to those rulings are therefore dismissed. We do, however, add an observation with respect to the first of those rulings, that is the one which addressed the relief sought that Mr. Brooks be held in contempt for refusing to send Ms. Brooks certain specific information. There was an obligation pursuant to the 2008 Consent Order for the parties to exchange income tax information each year by a specified date. Ms. Brooks deposed that Mr. Brooks had not complied with this but also admitted that she had not either, explaining that illness had prevented her from doing so. Although this was not addressed in his affidavit, Mr. Brooks explained to us that he had provided the tax information each year to his lawyer. In the circumstances, we make no determination of fact or credibility but we rather dispose of that issue by the exercise of our discretion not to find any contempt because both parties, for reasons of their own, might not have strictly complied with the wording of the Consent Order in regard to the exchange of tax information. This ruling does not, however, relieve either party of their future obligation to comply.

10 The balance of the grounds of appeal relate to the motion judge's ruling regarding spousal support. The principal reason for dismissing Ms. Brooks' motion is stated to be "because of the fact it is the second attempt to deal with the same issue." With respect, we see error in this statement. In the Consent Order, the parties specifically provided for a review of spousal support after the expiry of two full years after the effective date of the order without the need for a material change in circumstances. When Ms. Brooks filed her first motion for a variation of spousal support, on August 27, 2009, and when her motion was heard on June 3, 2010, two years had not expired. Thus, the ruling made pursuant to that motion could not be one as contemplated in Clause 25 of the Consent Order. When Ms. Brooks filed the motion, the decision of which is the subject of this appeal, she became entitled to a review of the spousal support provisions in the original Consent Order, without regard to the usual need for a material change in circumstances. This is what the parties had agreed to and that is what the judge had ordered in the Consent

Order. By rejecting her motion without a fresh adjudication of spousal support issues, the motion judge deprived not only Ms. Brooks of the benefit of Clause 25 of the original Consent Order, but also Mr. Brooks of the same, since, in his response, he too was seeking a review of the spousal support provisions. In our view, it was an error in law for the motion judge not to have determined anew the spousal support obligations of the parties. The appropriate relief to correct this error is to return the matter to the Court of Queen's Bench for adjudication of the issue of spousal support.

11 This said, the motion judge rejected Ms. Brooks' argument that she would be entitled to a retroactive variation of the spousal support provisions because of "fraud or unconscionable conduct by her ex-husband and a number of lawyers in submitting erroneous computerized calculations to the Courts." As the judge explained, the judge who signed the Consent Order "is not tied to the attached SupportMate calculations" that formed part of the Order. The Consent Order was the result of settlement discussions between the parties and their respective counsel, as both were represented at the time. It is not the role of the judge to go behind any compromise reached by the parties and their counsel, where the judge considers the Order to be appropriate in the circumstances. The fact remains that Ms. Brooks indicated her personal consent and signed the Consent Order. Neither the original Order, nor the subsequent one that made a correction to it, were ever appealed. Ms. Brooks cannot now renege on her consent and seek a retroactive variation of spousal support. In our view, the motion judge did not err in rejecting a claim for retroactive variation on the basis of fraud or unconscionable conduct.

12 In summary, the appeal should be allowed, but only as it relates to Ms. Brooks' claim for a prospective increase in spousal support to be adjudicated in accordance with Clause 25 of the Consent Order. Correspondingly, Mr. Brooks' response seeking a reduction in the amount also requires adjudication. In other respects, the rulings of the motion judge are upheld for the reasons given above. Paragraph 5 of the motion judge's Order, relating to existing pensions, was not raised as a matter on this appeal and remains unaltered.

13 It follows that the appeal is allowed in part. Pursuant to Rule 62.21(8) of the *Rules of Court*, the motion judge's decision dismissing both the motion and Mr. Brooks' response for variation of spousal support is set aside. A new hearing is ordered, but one limited to the issue of prospective changes to the spousal support provisions of the Consent Order in accordance with Clause 25 of that Order. No costs are allowed.

Appeal allowed in part.

End of Document

2010 ABQB 565
Alberta Court of Queen's Bench

Simonelli v. Ayron Developments Inc.

2010 CarswellAlta 1753, 2010 ABQB 565, [2010] A.W.L.D. 5053, [2010] A.W.L.D. 5054, [2010] A.W.L.D. 5058, [2010] A.J. No. 1000, [2011] 3 W.W.R. 140, 192 A.C.W.S. (3d) 1343, 34 Alta. L.R. (5th) 341, 506 A.R. 50

Giulio Simonelli and Elbow Lake RV Club Ltd. (Plaintiffs) and Ayron Developments Inc., Doug Chaluk, 934619 Alberta Ltd., Jim Ona, and Vantage Ranching Ltd. (Defendants)

A.G. Park J.

Heard: January 22, 2010
Judgment: September 3, 2010
Docket: Calgary 0401-12232

Counsel: Robert Simpson, Q.C. for Plaintiffs
Emi Bossio for Defendant, Ayron Developments Inc.
C. Michael Smith for Defendants, Doug Chaluk, 934619 Alberta Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Civil practice and procedure --- Judgments and orders — Final or interlocutory — Interlocutory judgment or order — Miscellaneous

Vacating order — Plaintiff and individual defendants entered into oral joint venture agreement to build airplane hangars as A Inc., and plaintiff's company actually constructed hangars — It was understood that one hangar would be transferred to defendant O upon completion — Plaintiff's company, other contractors and subcontractors filed builders' liens, and third parties held back payments on basis of alleged deficiencies — Plaintiff brought action for accounting as to business of A Inc., damages for loss resulting from defendants' conduct and preservation order — Statement of claim alleged causes of action based on breach of joint venture contract, but not against A Inc. — Plaintiff brought motion in chambers in 2004 for order which froze all of A Inc.'s assets, unless all three individual parties gave express written consent, or further order of court — Order to vary was granted from time to time to release money to pay legal bills and taxes, but A Inc.'s ordinary business operations were crippled — Defendants brought application to vacate or vary order — Application granted; order vacated — 2004 order was interim interlocutory order and jurisdiction existed to vacate or vary it — Parties intended that order be in effect for short period of time, until merits could be argued and determined — Plaintiff had not established strong prima facie case based on oppression under Alberta Business Corporations Act, nor that it would suffer irreparable harm if interlocutory quia timet injunction was not continued — Plaintiff met low threshold of showing that claim against defendants would be established — If order was attachment order under s. 17 of Civil Enforcement Act, it was interim order and could be vacated or varied — Rule 467 of Alberta Rules of Court did not apply such that order could be called preservation order — Delay was not inordinate and was not sufficient reason to vacate order.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Miscellaneous

Plaintiff and individual defendants entered into oral joint venture agreement to build airplane hangars as A Inc., and plaintiff's company actually constructed hangars — Plaintiff's company, other contractors and subcontractors filed builders' liens, and third parties held back payments on basis of alleged deficiencies — Plaintiff brought action for accounting as to business of A Inc., damages for loss resulting from defendants' conduct and preservation order — Plaintiff did not expressly allege oppression, nor did it apply for relief under Alberta Business Corporations Act — Statement of claim alleged causes of action based on breach of joint venture contract — Plaintiff brought motion in chambers in 2004 for order which froze all of A Inc.'s assets, unless all three individual parties gave express written consent — Order to vary was granted from time to time to release money

of Simonelli, Chaluk and Ona, or a further order of the Court, was obtained. They argue that this is simply a recognition of their prior agreement under their joint venture agreement.

59 They argue that this Court has very little jurisdiction to vary a final order and that, to the extent that this jurisdiction exists, an informed decision to vary the Order to release Ayron's funds for the payment of its expenses cannot be made unless the Defendants provide the Plaintiffs and this Court with an accounting of the funds that have been released to date, and an indication of the funds that will be required in the future and how those funds will be used.

60 They point to the specific wording in clause three of the Order, which states that the application is "otherwise adjourned", and argue that the word "otherwise" refers to the relief sought in the application, *other than* the parties' agreement under clause two. As a result, they argue that the only issues that were left open and that could be argued at a later time were whether the Plaintiffs were entitled to the relief applied for under clauses one, three, four and five of their August 6, 2004 Notice of Motion, which deal with matters other than the preservation order granted under clause two.

61 The Plaintiffs argue that clause two of the 2004 Order was a final interlocutory order, and that, as such, it was immediately effective and could not be varied other than according to its terms, which provided that it could only be varied by the express, written, unanimous agreement of Simonelli, Ona, and Chaluk or by "further Order of the Court".

62 The Defendants argue that the 2004 Order was an interim order having been granted until its merits could be heard on the adjourned date. They argue that the Order was in fact an interim, interim order as it specifically provided that the application was otherwise adjourned without prejudice to the right of the parties to bring any application before the court in the interim. They distinguish an interim order, which they say refers to an order for a period of time, from an interlocutory order, which they say is intended to be effective until the disposition of the underlying action, subject to any other provisions of the order. They argue that the purpose and express terms of the 2004 Order were that the merits of the Notice of Motion were to be argued at an adjourned date, and that, as such, the Order must be characterized as an interim order and not a final order.

63 This issue requires an examination of the distinction between interim relief and interlocutory relief; between a judgment and an order; and between an order granted on the merits and an order granted on the consent of the parties.

64 In *RJR-MacDonald*, the court explained the difference between interim and interlocutory relief, but noted that one may be a hybrid of the other, at para. 42:

> We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

65 It is the nature of the relief that is granted, not the manner in which it is granted, which distinguishes a judgment from an order. Both are final decisions. A judgment is a final decision regarding the underlying issues in a cause of action. An order is a final decision regarding a procedural question or an issue collateral to the issues in the underlying action: *Alberta Turkey Producers v. Leth*, 2006 ABQB 283, 399 A.R. 259 (Alta. Q.B.) at para. 22.

66 An order is granted on the merits after the court has considered the strength of each side's case. A consent order has been described as a contract, although it has also been said that it is more accurate to describe it as evidence of a contract. A consent order sets out, in the form of an order, the agreement which the consenting parties have made: *155569 Canada Ltd. v. 248524 Alberta Ltd.*, 126 A.R. 396, [1992] A.J. No. 135 (Alta. Q.B.).

67 Since a consent order is a contract or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order, can generally only be varied on grounds of common mistake, misrepresentation or fraud: *155569 Can.* In *155569 Can.*, the court set aside a prior consent order appointing a receiver and providing for the collection and payment of rent to the plaintiff on the basis that the defendants would not have consented to the order if they had been aware of a prior agreement to do otherwise. The court found that the consent order could be vacated on

grounds of unilateral mistake since the defendant consented to the order on the basis of a mistaken understanding on a crucial point, and the plaintiff knew the defendant was mistaken.

68 An order may also be terminated or varied under Rule 390, but only in very limited circumstances. Rule 390 states:

> 390(1) Any order may be set aside, varied or discharged on notice by the judge who granted it.
>
> (2) On consent of all parties interested the court may set aside, vary or discharge any order.

69 Rule 390 has been interpreted as giving a court the jurisdiction to vary an order that has not been entered, and only then if an error or new and significant facts have subsequently been discovered: *Alberta Turkey Producers* at para. 24. In the preceding case, the court stated at paras. 30 - 31:

> Rule 390 is not intended to function as a "try again" provision... and it does not allow the revisitation of an issue because an applicant is not satisfied with the original decision or has since devised better arguments..[citations omitted].
>
> Finality in litigation is of fundamental importance...

70 Rule 390(1) authorizes a judge to vary his or her own order, however, this may only be done if the order has not been settled, signed and entered. After that, the judge is *functus officio*, and a party who objects to the order must appeal. In *Riviera Developments Inc. v. Midd Financial Corp.*, 167 A.R. 69, [1995] A.J. No. 107 (Alta. Q.B.), the court interpreted Rule 390(1), noting the general rule that a judge's power to reconsider a finalized order was severely restricted, and referring to an article outlining eight exceptions to that rule, at paras. 15 - 17:

> McKinnon then goes on to outline eight exceptions to that standard: the slip rule, (in our province rule 339); the working out of an order made; rehearing where there was an abuse of process; where there has been a procedural irregularity; in some provinces, where there has been an inadvertent procedural mistake; in some provinces, to extend a time limit set by the order sought to be varied; fraud; and discovery of new evidence.

The court ruled that it was "...exceptional for even the same judge to hear re-argument of a motion".

71 In *Riviera*, the court also ruled that the word "court" in Rule 390(2) referred to a judge other than the one who had originally made the order sought to be varied. The court found that Rule 390(2) was to be interpreted as applying only if the parties affected by the order had consented to going before another judge, and to the terms of the varied order requested from that judge: at paras. 20 - 22.

72 I have no jurisdiction to vacate or vary the Order under Rule 390(1), as I did not grant the Order. I have no jurisdiction to vacate or vary the Order under Rule 390(2), as the parties have not consented to that. However, I find that the 2004 Order was an interim, but not a final, interlocutory order, and that, as such, this Court does have the jurisdiction to vacate or vary it on its merits.

73 The Order was a consent order and thus sets out the agreement between the consenting parties. The issue is whether they agreed that clause two of the Order was to have effect until the underlying issues had been determined or only for an interim period until the merits of the application could be argued and determined by this Court.

74 Since the Order is to be viewed as a contract, the rules of contract interpretation apply. These rules require that a contract be interpreted so as to discover and give effect to the intentions of the parties at the time that the contract was made. The Court looks for the reasonable objective intent of the parties, not their subjective intent. This intent is determined by considering both the express terms of the contract and the surrounding circumstances: *Chitty on Contracts*, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994), at paras. 12-039 - 12-040; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333, 223 A.R. 180 (Alta. C.A.), leave to appeal to S.C.C. refused, (1999), 243 N.R. 199 (note) (S.C.C.).

1992 CarswellOnt 474
Ontario Court of Justice (General Division), Commercial List

Confederation Trust Co. v. Dentbram Developments Ltd.

1992 CarswellOnt 474, [1992] O.J. No. 3870, 9 C.P.C. (3d) 399

CONFEDERATION TRUST COMPANY v. DENTBRAM DEVELOPMENTS LTD., AMNON ALTSCHULER GORDON COBB, OAKBRUM INVESTMENTS LIMITED and THE TORONTO-DOMINION BANK

Borins J.

Judgment: April 24, 1992
Docket: Doc. 92-CQ-8560CM

Counsel: *Michael McGowan* and *Kevin J. Zych*, for plaintiff.
Harvey M. Mandel, for defendants Dentbram Developments Ltd. and Amnon Altschuler.
Theodore Nemetz, for defendant Gordon Cobb.

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Receivers --- Appointment — Application for appointment — General
Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor
Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.
Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.
Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.

Held:

The motion was granted.
Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

***Borins J.*:**

1 I appreciate that the appointment of a receiver is a discretionary remedy and that the court ought not lightly to exercise it discretion to appoint a receiver. However, on the evidence before me, I am satisfied that it is just and equitable that a receiver be appointed. The plaintiff has demonstrated that its right under the mortgage to take steps to preserve the property and to obtain the benefits of the property in the realization of its debt have proved to be ineffective. As well, in consideration what is fair and equitable, I have taken into consideration that the mortgage contract contains an express covenant in which the mortgagee agrees to the appointment of a receiver in the event of default, and default has, of course, occurred. I my view, the appointment of a receiver is required, inter alia, for the reasons contained in para. 20 of the plaintiff's original factum.

2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all

interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

3 In he result, a order is to issue pursuant to the order as amended contained in Sched. "A" to the notice of motion which I have placed my fiat.

Motion granted.