Court File No. CV-24-00732200-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

BANK OF MONTREAL

Applicant

-and-

MARIO'S CATERING SERVICE LTD. o/a MICHELANGELO BANQUET CENTRE, 2150386 ONTARIO INC., 9440763 CANADA INC. o/a THE GRAND OLYMPIA HOSPITALITY & CONVENTION CENTRE, 13225585 CANADA INC., AFTAB ELAHI, EMILIA MANSOOR aka EMILIA ELAHI, KAMRAN ELAHI aka MANSOOR KAMRAN ELAHI aka MANSOOR ELAHI and RAFFET ELAHI

Respondents

APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S. C. 1985 c-B-3, s.101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43, and Rules 14.05(2), (3) (d), (g) and (h) of the *Rules of Civil Procedure*

ABBREVIATED BOOK OF AUTHORITIES OF THE APPLICANT, BANK OF MONTREAL

(Application Returnable January 14, 2025)

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TO: **THE SERVICE LIST**

INDEX

LIST OF AUTHORITIES

Tab

TAB 1

Canadian Commercial Bank v. Gemcraft Ltd.

Ontario Judgments

Supreme Court of Ontario - High Court of Justice

Toronto Weekly Court

Montgomery J.

Heard: July 11, 1985

Oral judgment: July 11, 1985

Judgment: July 16, 1985

Action No. 4066/85

[1985] O.J. No. 477 | 3 C.P.C. (2d) 13 | 32 A.C.W.S. (2d) 49

Between Canadian Commercial Bank, Plaintiff, and Gemcraft Limited, Defendant

(7 paras.)

B. Tait, Q.C., for the Plaintiff. W.D.R. Beamish, for the Defendant.

MONTGOMERY J. (Orally)

1 This application by Canadian Commercial Bank (the "bank") is for the appointment of a receiver and manager of the property, undertaking, and assets of Gemcraft Limited ("Gemcraft").

2 The bank contends default under some of its loan agreements; Because of deterioration in the financial condition of Gemcraft; the bank says its security is in jeopardy. The bank holds fixed and floating charges contained in a debenture dated the 30th day of September 1980, a general assignment of book debts dated August 29, 1978 and security given pursuant to s. 178 of the Bank Act.

3 In January and February 1984 the bank agreed to issue an income debenture to Gemcraft as part of the restructuring of credit arrangements. The effect of the $1.5 million dollar income debenture gave Gemcraft a lower interest rate with no interest payable unless a profit was made. Principle is not due under the instrument until December, 1988. The bank would receive the interest by way of dividends from a Canadian corporation pursuant to a provision of the Income Tax Act. Gemcraft was authorized to draw on the income debenture so long as it maintained sufficient current receivables as defined in the margin requirements of the instrument. Gemcraft has received all but $221,000 under the income debenture but it is $784,000 short of its required receivables under the instrument. This in my view constitutes a continuing default under the financing agreements. All of the security held by the bank stands as security for the re-payment of all present and future indebtedness.

4 Gemcraft's position is that the bank holds $81,000, erroneously received as interest under the income debenture. It is common ground that an error in the customer's financial statements in 1983 of some $1.3 million dollar over-statement of inventory made it appear that a profit existed when it did not. The bank concedes that $81,000 held by it is to be credited against loan accounts rather than being construed as interest under the income debenture. This, however, does not cure the default. Gemcraft says it is entitled to apply the remaining $221,000 under the income

debenture against the loan accounts. The bank quite properly in my view says that is our money it is not yours. The margin requirement is $784,000 short. Until that short fault is remedied no further draw will be allowed by the bank.

5 I am satisfied that this default triggers the acceleration clause in the 1980 agreement. It is not necessary that the income debenture contain an independent acceleration clause. The 1984 letter agreement provides that the security for the income debenture is the 1980 agreement and the $10 million dollar debenture.

6 A further default exists. The mis-statement of inventory in 1983 perpetrated in ensuing financial statements constitutes a continuing default under the 1980 agreement. For these reasons the bank is entitled to the appointment of a receiver and manager under the terms of the 1980 agreement. I am also persuaded that the appointment is just and convenient under s. 114 of the Courts of Justice Act. I conclude that the bank's security is in jeopardy.

7 An order will issue appointing Price Waterhouse Ltd. as receiver and manager of the property, assets, and undertaking of Gemcraft. Costs to the applicant.

MONTGOMERY J.

TAB 2

Royal Bank of Canada v. 605298 Ontario Inc.

Ontario Judgments

Ontario Court of Justice (General Division)

Commercial List

Greer J.

Heard: November 10 and 12, 1998.

Judgment: November 20, 1998.

Court File No. 98-CL-3070

[1998] O.J. No. 4859 | 1998 CarswellOnt 4436 | 84 A.C.W.S. (3d) 92

Between Royal Bank of Canada, plaintiff, and 605298 Ontario Inc., defendant

(5 pp.)

Case Summary

Creditors and debtors — Debtor's rights — Against Collateral security — Receivers — Appointment — By court.

Motion by the Bank for an order appointing a receiver of the property, assets and undertaking of the debtor corporation. The Bank provided various credit facilities to the debtor. As security for the money, the debtor issued two debentures which were registered against the debtor's property. The bank also held a general security agreement which gave it a security interest over all of the debtor's assets, property and undertaking. The debentures provided that upon default, the bank could appoint a receiver of the property. The debtor defaulted on the debenture payments. It was also in default of the interest payments due on the credit facilities.
HELD: Motion allowed.

The receiver was appointed. The bank had extended great latitude towards the debtor. The debtor failed to show any irreparable harm that was not compensable in damages. There was no other acceptable means to protect the interests of the parties other than the appointment of the receiver.

Counsel

A. Irvin Schein, for the plaintiff. Avrum D. Slodovnick, for the defendant and the Moks. M.J. Neirinck, for the Penta Group and the Ugovsek Group.

GREER J. (endorsement)

1 The Plaintiff, Royal Bank of Canada, ("the Plaintiff" or "the Bank") moves for an Order appointing Pricewaterhouse Coopers Inc. ("PwC") as Receiver and Manager of the property, assets and undertaking of the Defendant, 605298 Ontario Inc. ("the Defendant"). The Bank is a creditor of the Defendant, being the holder of two debentures in the amounts of $4,200,000 dated November 11, 1987 and $4,900,000 dated December 19, 1990, and the holder of a General Security Agreement dated November 11, 1987, granting a security interest to it over all of the Defendant's assets, property and undertaking, including the real property owned by the Defendant in the

Town of Markham ("the property") which houses a small shopping plaza, the largest tenant of which is a bowling alley.

2 Further, in 1995, the Bank provided various credit facilities to the Defendant consisting of a $75,000 demand operating loan, a $118,000 letter of credit, a $2,983,714 match funded base rate loan and a $1,537,137 term loan. As security for all of this money, the Defendant issued the two debentures which are registered against the property owned by the Defendant. Finally, the Bank holds a joint and several personal guarantee dated June 19, 1991 in the amount of $1,245,000 signed by Dr. Simon Mok and his wife, Grace Mok; a joint and several guarantee dated July 4, 1991 in the amount of $725,000 executed by Penta Drugs Limited, S.T.K. & W. Chemists Limited, Sydney Yiu, Keith Mak, Tak Man Lam and George Kam; a guarantee dated June 26, 1991 in the amount of $300,000 executed by Peter Mok; and a joint and several guarantee dated July 8, 1991 in the amount of $580,000 executed by Ugovsek Investments Limited and Stanislav Ugovsek.

3 Under the provisions of its debentures, the Bank, upon default, may appoint any person or persons to be a Receiver of the property. The Defendant has failed to make any payments on the first due debenture for over a year, and interest on the demand operating loan in the amount of $75,000 has been in arrears since March 23, 1997, interest on the $1,537,137 term loan has been unpaid since May 21, 1997 and interest on the $2,983,714 match funded base rate loan which came due on November 1, 1997, has been in arrears since June 4, 1997. Demand letters have been sent by the Bank to the Defendant for all of its security and demand letters have also been sent to all the guarantors by the Bank.

4 The parties agree that the Defendant has been attempting to restructure its loans and that the Defendant has been having on-going negotiations between the Moks, on the one hand, and the Penta Group and the Ugovsek Group on the other hand. There is documentation to this effect in the Motion Record. There is also evidence that the Moks have attempted to list the property and the bowling alley business for sale without consultation with others who have an interest in the Defendant.

5 Prior to the Motion being heard, the Bank filed a further short 7 paragraph supporting affidavit sworn to by Kenneth L. Kallish, a solicitor. The Defendant moved to adjourn the Motion to allow it to cross-examine Mr. Kallish on the affidavit. This Motion was refused by me and the main Motion was heard.

6 The Moks wish to have further time during which to negotiate a possible restructuring, and take the position that the Bank is owed less than the value of the property so that it has adequate security for its loans. Further, the Defendant maintains that it would be prejudiced if the Receiver is appointed as the value of the property would be diminished if sold by a Receiver as opposed to if it was sold by the Defendant itself. The Defendant believes that the appointment of the Receiver is the remedy of last resort.

7 The Penta Group and the Ugovsek Group are co-owners of the land with the company. They do not oppose the appointment of a Receiver. They wish finality brought to the proceedings which has have been long and protracted, and if no forbearance agreement is reached, they would not contest the Receivership.

8 The Bank says it has delayed long enough in exercising its rights under its security. It relies on the principles set down in Confederation Life Insurance Company v. Double Y Holdings Inc., *[1991] O.J. No. 2613* *DRS 94-01472*, Action No. 91-CQ-72 where the secured creditor had not received payments on account of interest since its security matured nor had the principal being repaid when it fell due. In that case, at p. 5, Farley J. notes:

> I must also note that there appears to be a major distinction between those cases where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute.

At p. 6, he notes that the plaintiffs have extended great latitude to the defendants, which is the case before me. I note, as Farley J. did, that the Defendant before me has not shown any irreparable harm that is not compensable in damages, although as Ground J. noted in Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. *(1995), 30 C.B.R. (3d) 49* at p. 58, the authorities seem to support the proposition that irreparable harm need not be demonstrated.

9 I am satisfied that there is no other acceptable means to protect the interests of the parties other than the appointment of PwC as the Receiver. The appointment of a Receiver is an equitable remedy, and given that the Court must determine if such an appointment is both just and convenient. While such an appointment may be intrusive and should not be granted simply as a matter of course (see: Royal Bank of Canada v. Chongsim Investments Ltd. *(1997), 32 O.R. (3d) 565*), in the case at bar, the Bank has not caused the default, which the lending institution did in Royal Bank, supra. Here there has been default on the debenture, a loan has matured, there is more than a significant amount owing with huge arrears of interest outstanding, and the Bank has exercised great patience to the present date. It does not have to rely on the appraisal which has been presented by the Defendant, which does not reflect the true financial picture of what the bowling alley revenue and expenses are. The three groups which have an interest in the Defendant company are at odds with one another.

10 The Bank has agreed to postpone the effective date of the Order to November 24, 1998, if the order is made, to allow the interest groups to try to work out their differences and put forward a proposal for restructuring. I have concluded that the appointment of a Receiver must be made. Order to go appointing PwC as Receiver and Manager of the property, assets and undertaking of the Defendant company as set out in paragraph 1 of its Notice of Motion, to take effect on November 24, 1998, and in the terms of the Draft Order which is attached as Schedule A to the Notice of Motion.

11 If the parties cannot otherwise agree on Costs, I may be spoken to.

GREER J.

End of Document

TAB 3

Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.

Ontario Judgments

Supreme Court of Ontario - Court of High Justice

Gray J.

Heard: October 15 and 16, 1985

Judgment: October 28, 1985

Action No. 5473/85

[1985] O.J. No. 566 | 57 C.B.R. (N.S.) 186 | 33 A.C.W.S. (2d) 243

Between Ontario Development Corporation and Roynat Inc., Plaintiffs, and Ralph Nicholas Enterprises, Defendant

(22 paras.)

Sheila Block and Michael Rotsztain, for the Plaintiffs. Melvyn L. Solmon, for the Defendant.

GRAY J.

1 Two motions are involved in this matter. The first is a motion by the Plaintiffs for an order appointing a Receiver and Manager of the Alpine Hotel in Thunder Bay. The second is a motion by the Defendant to set aside the interim possession order granted by Saunders J. on September 6, 1985. At the close of argument on October 16th, judgment was reserved by me on both motions and I further ordered that the orders of the Court then outstanding were to continue until the disposition of these motions.

2 The Alpine Hotel is owned by the Defendant and the Plaintiffs loaned the Defendant $1,150,000 which enabled the Defendant to purchase the hotel in July, 1982, at which time the Defendant gave the Plaintiffs a debenture for $1,150,000. The Defendant defaulted in its obligations under the debenture and by an agreement, the Defendant agreed to pay $700,000 by April 16, 1985. It failed to do so. Demand was subsequently made for the payment of $1,363,963. By an agreement dated June 28, 1985, the Defendant agreed to make payment of $700,000 by July 31, 1985. Again, there was default and the time for payment was extended to August 15th and then again to August 30th and the Defendant continued to default.

3 The closing portion of paragraph 9 of the June 28, 1985 agreement dealing with the Rights of Lenders to enforce security reads thus:

> ... then the Lenders shall be entitled, notwithstanding any of the provisions of this Agreement to immediately enforce their security or exercise such other remedies available to them without any further notice to the Company, and the acknowledgement and consent referred to in paragraph 5 hereof shall be effective. The Company agrees that in any such event, it shall not in any manner challenge the rights of Lenders to so proceed, defend the proceedings or cross-claim, or commence any proceedings to prevent the Lenders from so proceeding.

4 Schedule "A" to the Agreement is an acknowledgement and consent executed by the Defendant.

5 The financial condition of the Defendant was, and still is, desperate. Even without making the payments owing

under the debenture at September 26, 1985, arrears of approximately $150,000 were owing to government bodies and numerous trade creditors remained unpaid.

6 The Plaintiffs appointed one Stetsko, a Chartered Accountant and Licenced Trustee in Bankruptcy in Thunder Bay, as Receiver and Manager and instructed him to enter and take possession of the Defendant's premises. I quote now from paragraph 10 of the Plaintiffs' Factum:

> Because of attempts by the Defendant's representatives to regain possession of the hotel after the Plaintiffs' initial entry, the Plaintiffs applied to Mr. Justice Saunders on September 6, 1985 and obtained an order for interim possession and custody under Rules 44 and 45. The application was brought, ex parte, under Rule 44.01(2) and based on the consent of the Defendant in the June 28 agreement waiving further notice of steps by the Plaintiffs to enforce their security. Mr. Justice Saunders was advised that the Plaintiffs were proceeding to cease operations of the hotel.

7 I will deal with this later. On September 11, 1985 the Defendant brought a motion to set aside the order of Saunders J. and an adjournment was granted by Callaghan J. (as he then was) on terms which permitted the Defendant to re-enter the hotel and operate it. A further adjournment to October 15, 1985, to permit completion of the cross-examinations was granted by Steele J., hence this hearing before me on October 15, 1985.

8 The Plaintiffs' position is that an order should go in the form of the order appearing at page 3 of the Motion Record, Vol. 1, by reason of the provision of section 114 of the Courts of Justice Act.

9 The Defendant's position is that the Plaintiffs, who are seeking equitable relief, should be denied that relief because they do not come to the court with "clean hands". The Receiver and Manager should not be appointed but rather, John Hobbs & Co. should be appointed as a court monitor with the Defendant being permitted to operate the business in the interim and with the court appointed monitor to have the power to obtain an appraisal and report to the court as to what should be done in the interim with the assets and the property pending final disposition of the issues between the parties.

10 The complaints that the Defendant makes concern the happenings from August 30th, onwards, and I am urged to find that an appraisal should be made to decide whether the hotel should be sold empty or as a going business.

11 The conclusion I have reached is that the order should go for the appointment of the Receiver and Manager, substantially in the form of the draft order appearing at page 3 of Motion Record, Vol. 1. There is, in my view, no need to give the Defendant more time because it is obvious that this hotel enterprise cannot succeed at this time. Its 1985 revenues have been grossly overstated and the hotel has survived thus far by non-payment of many of its current trade debts. I will deal briefly in a moment with certain other financial aspects but I do not propose to exercise my discretion in favour of the Defendant because of inaccurate statements made on its behalf. The so-called Confederated Management Proposal and Commitment is not a viable proposal and I find difficulty with the evidence of the deponents Nicholas and Friesner.

12 The Plaintiffs financed the Alpine Hotel on two previous occasions and on both occasions the hotel failed.

13 Counsel for the Defendant, at some considerable length, reviewed the conduct of the Plaintiffs' representatives after August 30th, particularly with respect to the closure of the hotel and the allegation that Saunders J. was not told by the Plaintiffs that they had shut down the business.

14 With respect to this latter allegation, I was advised that Saunders J. was advised that the Plaintiffs were ceasing operations and all of this in the context of the manner in which the Plaintiffs were taken out of possession. counsel for the Plaintiffs clearly stated to me that Saunders J., on the ex parte application, was advised that the Plaintiffs were going to empty the hotel. I am not accepting the evidence of the affidavits in the Supplementary Record upon which I reserved judgment.

15 The important matter to decide on this motions is whether, at common law, or under the provisions of sections 19, 56, 57 or 59 of the Personal Property Security Act, there is an obligation on a secured party to preserve untangible property such as goodwill by not going into possession and by continuing to operate the business.

16 There may well be an obligation under the Personal Property Security Act requiring a secured party to use reasonable care in the custody and preservation of collateral property in his possession even when the debtor is in default but I fail to see that there is any obligation at common law or under the Personal Property Security Act requiring a secured party's representative to continue with the real property in such a way as to require continuation of a financially unsound business; the result of which continuation would simply add to the debt already owed to the secured creditor. It is not required. The authority for this proposition is Re B. Johnson & Co. (Builders) Ltd. [1955] ch. 634.

17 I was asked to conclude that the collateral property in this case consisted of certain goodwill. My reading of the material convinces me that at this point in time, this hotel business has virtually no existing goodwill. It would not be prudent or commercially reasonable to require the continued operation of this hotel business. The concept of the monitor merely is a request for further delay to permit possible payment of a portion of the indebtedness and the Receiver and Manager, if appointed, can decide in all the circumstances whether to operate or close the hotel.

18 I read the decision of Anderson J. in Bank of Montreal v. Appcon Ltd. 37 C.B.R. 281 with care and I have concluded that it does not stand for the proposition on its facts that a Receiver cannot sell. The Receiver, in that case, did not get the power to sell because of the unusual facts of the case.

19 As I said previously, the order shall go for the appointment of the Receiver and Manager, substantially in the form of the draft order appearing at page 3 of the Motion Record, Vol. 1. I make this order under section 114 of the Courts of Justice Act.

20 It is just and convenient to make the appointment where the principal owing under the debenture is in arrears and where the security is in jeopardy:

Kerr on the Law and Practice as to Receivers, 16th ed. p. 52 McMahon v. North Kent Ironworks Company [1891], 2 Ch. 148.

21 In the result, therefore, (1) the application to set aside the order of Saunders J. dated September 6, 1985 is dismissed; (2) the conditions set forth in paragraphs 2, 3, 4 and 5 of the order of Callaghan J. (as he then was) are at an end; (3) an order will go substantially in the form set forth in paragraph 3 of the draft order appearing at page 3 of Motion Record, Vol. 1.

22 The costs of the Plaintiffs' motions for the appointment shall be costs to the Plaintiffs on a solicitor and his own client basis in accordance with the provisions of Schedule "A" at page 38 of Motion Record Vol. 1.

GRAY J.

TAB 4

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.

Ontario Judgments

Ontario Court of Justice - General Division

Commercial List - Toronto, Ontario

Ground J.

Heard: December 7 and 15, 1994.

Judgment: January 31, 1995.

Court File No. 94-CU-80416 Commercial Court File No. B 280/94

[1995] O.J. No. 144 | 30 C.B.R. (3d) 49 | 53 A.C.W.S. (3d) 307

Between Swiss Bank Corporation (Canada), plaintiff, and Odyssey Industries Incorporated and Weston Road Cold Storage Company, defendants

(24 pp.)

Case Summary

Receivers — Appointment — By court — Circumstances when granted — Preconditions, default in compliance with obligations to creditor.

Motion for appointment of a receiver and manager of the property, undertaking and assets of the defendants. In December, 1988, the plaintiff applicant advanced approximately $47.5 million to a partnership, one of the partners of which was the first defendant. The loan, the proceeds of which were advanced by the partnership to that defendant, was repayable on demand. As security for the loan, the plaintiff received assignments of two mortgages from a numbered company to the first defendant as well as a fixed and floating charge debenture over all of the defendant's assets. Those mortgages were registered over seven cold-storage warehouse plants. In December, 1989, the plaintiff agreed to renew an existing facility in favour of the second defendant in the sum of approximately $10,179,000. The latter loan, secured by a collateral mortgage, a general security agreement over the defendant's assets, and guarantees provided by the defendants' principal and the first defendant, was repayable on December 31, 1994 or in the event of default, on demand. While the loan to the first defendant fell into arrears in the fall of 1994, the second defendant made none of the annual $150,000 payments called for under the terms of its loan. By letters dated July 22, 1994, the plaintiff demanded full payment of the loans from both defendants but received no payments in response thereto. In the spring of 1994, the corporate group of which the defendants were a part made an elaborate but unsuccessful attempt to put a restructuring plan in place.
HELD: Motion allowed.

Although the plaintiff failed to establish the existence of any default resulting from a transfer of assets pursuant to the restructuring plan, the existence of the other defaults with respect to interest payments, principal payments, arrears of realty taxes on the mortgaged assets, and failure to pay principal on demand justified the appointment of a receiver. None of the submissions made on the defendants' behalf was persuasive in making the point that it would be unjust or inequitable to grant such an appointment.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 101. Income Tax Act, s. 88.
Frank Newbould, Q.C., for the plaintiff. Alan J. Lenczner, Q.C. and Linda L. Fuerst, for the defendants.

GROUND J.

1 This is a motion brought by the plaintiff, Swiss Bank Corporation (Canada) ("Swiss Bank") for the appointment of a receiver and manager of the property, undertaking and assets of the defendants, Odyssey Industries Incorporated ("Odyssey") and Weston Road Cold Storage Company ("Weston").

Factual Background

2 Odyssey and Weston are part of a group of entities controlled by Joseph Robichaud ("Robichaud") which carry on business in Ontario, Quebec and the Maritime Provinces. The business is based upon the storage of frozen foods in large cold storage warehouse facilities. Other entities controlled by Robichaud either carry on, or carried on, similar business in Western Canada and in the United States.

3 Odyssey, a corporation controlled by Robichaud, was a holding company. It held 100% of the equity of Associated Freezers of Canada Inc. ("AFC"). AFC operated the freezer business under leases from limited partnerships controlled by Robichaud which held the beneficial ownership of the various cold-storage warehouse facilities. As a result of various transactions recently undertaken by one or more of the Robichaud entities, it is in issue as to which corporation or entity manages the business, or has beneficial ownership of the various warehouse properties at this time.

4 Seven cold-storage warehouse plants are registered in the name of 606327 Ontario Limited ("606327"). They are situated in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. Until recently, 606327 held the properties in trust for a limited partnership registered in Ontario as The Polar-Freez Limited Partnership ("Polar-Freez"). Ninety percent of the limited partnership units of Polar-Freez were owned by AFC.

5 Two cold-storage warehouse facilities are owned by the defendant Weston which is a limited partnership registered in Ontario.

6 On December 13, 1988, Swiss Bank advanced approximately $47.5 million (the "Odyssey Loan") to Associated Investors Partnership ("Associated Investors"), one of the partners of which was Odyssey. The loan was repayable on demand. Associated Investors advanced the funds to Odyssey.

7 The security Swiss Bank received for the Odyssey Loan included:

(a) assignments by Odyssey of $30 million and $39 million mortgages (the "Polar-Freez Mortgages") from 606327 to Odyssey, each mortgage being registered over the seven cold- storage warehouse plants beneficially owned by Polar-Freez. The mortgage terms included an obligation to pay all taxes when due; and

(b) a fixed and floating charge debenture (the "Odyssey Debenture") in the amount of $47.5 million given by Odyssey over all of its assets as a general and continuing collateral security. The Odyssey Debenture contained standard provisions dealing with events of default and remedies, including the right to apply to a court for the appointment of a receiver and manager.

8 The Odyssey Loan was payable on demand. By letters dated July 22, 1994, Swiss Bank demanded payment of outstanding arrears and principal to be made no later than September 6, 1994. Payment was not made. Principal outstanding as of November 20, 1994 was $48,959,148.48. As of November 20, 1994, there was $1,178,241.19 of arrears of interest owing.

9 Municipal property taxes on the seven Polar-Freez properties are in arrears of approximately $2.5 million. These arrears have existed over various periods of time within the past two years.

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to

exceed $10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

11 The security Swiss Bank received for the Weston Loan included:

(a) a collateral mortgage in the amount of $13 million over the two warehouses owned by Weston. The mortgage provided that Weston was to pay all municipal taxes when due;

(b) a general security agreement over the assets and undertaking of Weston containing standard terms describing the events of the default and remedies available, including the right of Swiss Bank to apply to court for the appointment of a receiver and manager; and

(c) guarantees by Odyssey and Robichaud of the indebtedness of Weston to the amounts of $13 million and $3.5 million respectively.

12 Principal payments on the Weston Loan of $150,000 were due on December 31 each year commencing in 1990. No payments of principal were made and therefore as of December 31, 1993, and thereafter, $600,000 in principal payments were in arrears. The Weston Loan agreement provided for a hedge account to be funded by Weston. The purpose of this account was to provide protection to Swiss Bank as a hedge against any adverse movements in foreign exchange rates in the event that Weston transferred its obligations into Swiss francs. An initial deposit of $1 million was made by Weston to the hedge account at the end of December 1989 as required. Further payments of $350,000 per annum commencing on December 31, 1990 were required; however, the only payment made was a further $15,000 payment on July 31, 1992. The hedge account is in arrears of $1,040,000.00. Municipal tax arrears against the Weston properties of approximately $1 million have been outstanding for approximately two years.

13 By letter dated July 22, 1994, Swiss Bank demanded payment in full of outstanding principal plus interest by September 6, 1994. Payment was not made. Principal outstanding as of November 29, 1994 was $11,334,907.93. Loan interest payments have been in default since March 31, 1994. The amount of interest outstanding to November 29, 1994 is $203,686.70.

14 In the Spring of 1994, the Robichaud Group presented a restructuring plan that included a reverse take-over of a new Robichaud corporation named Polar Corp. International ("Polar Corp.") by a V.S.E.-traded corporation.

15 The restructuring plan contemplated: (i) Polar Corp acquiring the seven warehouses from Polar-Freez; (ii) a transfer of AFC's ownership interest in Polar-Freez to a corporation named Pacific Eastern Equities Inc. ("Pacific Eastern"), a corporation controlled by Robichaud with no substantial assets; (iii) a winding-up of AFC under section 88 of the Income Tax Act, and conveyance of its assets to Odyssey; (iv) a sale of the leasehold interest of Odyssey (now the tenant) in the seven warehouses to Polar Corp.

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

If:

(a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;

(b) any payment required under Section 2.20 shall not be made when due;

(c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or

(d) by 5 p.m on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,

this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

17 It appears to be agreed that the conditions set out in section 2.21 of the Master Agreement were not fulfilled.

Submissions

18 It is the position of counsel for Swiss Bank that the transfers of assets contemplated by the Master Agreement did in fact take place and that the cancellation of the leases to AFC which were assigned to Odyssey on the wind-up of AFC constituted a breach of the covenant of Odyssey contained in the Odyssey Debenture not to dispose of any part of the charged premises except in the ordinary course of business. It is his further submission that, if I should find that the transactions contemplated by the restructuring plan did not in fact take place, there is still ample evidence before the court that the Odyssey Loan and the Weston Loan were in default and that Swiss Bank is entitled to the appointment of a receiver.

19 With respect to the restructuring plan, counsel for Swiss Bank points out that a number of the letters and memoranda and several statements contained in the affidavits of Robichaud, all submitted to the court, refer to the transactions as having taken place and the assets having been transferred in accordance with the restructuring plan. There is no reference anywhere to the transfer documents being held in escrow pending the approval by Swiss Bank to the restructuring plan. He submits that the Master Agreement is of no legal effect in that Swiss Bank gave notice that it was not satisfied as to the tax aspects of the restructuring plan and, accordingly, the situation remains as it was before the Master Agreement was entered into.

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of $1,100,000.00; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of $2,500,000.00; that there are principal payments of $600,000.00 in arrears on the Weston Loan, and that the annual payments of $350,000.00 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of $203,000.00; that there are municipal tax arrears on the Weston properties in amounts in excess of $1,000,000.00; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey Debenture has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the Bank Act, S.C. 1980-81-82-83, c. 40 (the "Bank Act") in that the loan could not be made by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the Bank Act and,

accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

22 Second, counsel alleges that Swiss Bank is in breach of certain provisions of the commitment letters for both the Odyssey Loan and the Weston Loan by refusing to agree to certain conversions of the loans from Swiss francs to Canadian dollars on several occasions at the request of the borrowers made pursuant to the terms of the commitment letters. In refusing to allow such conversions, counsel submit that Swiss Bank was not only in breach of the terms of the commitment letters, but was also in breach of its fiduciary duty to the borrowers in that Swiss Bank had undertaken to give advice to the borrowers as to the structure of the loans and as to currency conversions.

23 Third, counsel for Odyssey and Weston point out that Swiss Bank is not seeking the appointment of an interim receiver pending trial of this action, but is seeking the appointment of a court appointed receiver and manager to take over the business, undertaking and assets of Odyssey and Weston to enforce the security held by Swiss Bank and effect repayment of the Odyssey Loan and the Weston Loan. Counsel submit that under the provisions of section 101 of the C.J.A., a receiver and manager may be appointed where it appears to a judge of the court to be just or convenient to do so, and that, in seeking the appointment of a receiver and manager, Swiss Bank is seeking an equitable remedy. It is the position of counsel for Odyssey and Weston that to appoint a receiver in this case would be unjust and inequitable. They submit that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed pending the trial of the oppression action commenced by Swiss Bank. There are certificates of pending litigation registered against the properties and there is an outstanding order restricting the disposition of any assets of Odyssey and Weston. In addition, Robichaud and the Robichaud group are prepared to give an undertaking to the court that there will be no expenditures of cash outside the ordinary course of business pending the trial of the action. It is further submitted that, if it is determined at trial that the assets have been transferred in accordance with the restructuring plan, there is very little in Odyssey for a receiver to administer and that, if it is determined that the assets remain in Odyssey and Polar-Freez, a sale of such assets by the receiver would result in a substantial tax liability and Swiss Bank would not recover an amount which would substantially decrease the principal amount of the Odyssey Loan. In addition, counsel submits that to appoint a receiver would be inequitable in view of Swiss Bank's acquiescence in the asset transfer since the Spring of 1994. Further, it is submitted, the appointment would result in extreme hardship to the borrowers, that Swiss Bank does not come to court with clean hands in view of its refusal to permit conversions of the loans and that any receiver and manager appointed to run the business of Odyssey and Weston would not have the background and experience of Robichaud in the operation of the business.

24 With respect to the diversion of funds to affiliates in the United States, counsel for Odyssey and Weston submit that there is no evidence that the transfer of the deposit receipts was for any improper purpose or was not in the ordinary course of business in view of the history of relationships among the Robichaud group of companies and, in any event, does not constitute evidence that the security for the Swiss Bank loans was in jeopardy or materially affect the ability of the borrowers to repay such loans.

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to have taken place. Section 5.4 of the Master Agreement provides:

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its

> obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

26 One could become embroiled in a metaphysical debate as to whether the effect of such section is that the transactions having taken place have been reversed or that the transactions are deemed never to have taken place. Whichever is the case, there has either been a default under the Odyssey Debenture which has been rectified, or no default under the Odyssey Debenture has taken place. Accordingly, it is not, in my view, grounds for the appointment of a receiver and manager by Swiss Bank. I am also not satisfied that the rather confused transactions involving the term deposits in the United States constitute grounds for the appointment of a receiver. It appears that the transfers of the term deposits to the United States were for valid business reasons, i.e. to provide security for the performance of a lease or for the approval of a proposal under Chapter 11. There is no evidence to support the contention of counsel for Swiss Bank that the failure to reflect one of the transfers of such term deposits on the books of AFC was part of some nefarious plot to divert assets of the Robichaud Group companies. Accordingly, I am not persuaded that these transactions constitute a basis for determining that the security for the loans was in jeopardy, or that the ability of Odyssey and Weston to repay the loans was materially effected by these transactions so as to satisfy the court that it would be just and convenient on this ground to appoint a receiver and manager.

27 It appears, however, that the other defaults under both the Odyssey Loan and the Weston Loan referred to by counsel for Swiss Bank, would of themselves provide ample justification for the appointment of a receiver and manager. One must then consider the submissions made by counsel for Odyssey and Weston that, in this case, it would be unjust and inequitable to order such appointment.

28 The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see Bank of Montreal v. Appcon *(1981), 33 O.R. (2d) 97*).

29 The second submission of counsel for Odyssey and Weston is that there would be no substantial benefit to Swiss Bank resulting from the appointment in that, if it is determined that the assets have been transferred to Polar Corp., there is very little in Odyssey for a receiver to administer. Having found that the effect of the termination of the Master Agreement is that either the transfer of assets has been reversed or is deemed not to have taken place, substantial assets remain in Odyssey and its subsidiaries and a receiver would be in a position to administer such assets and business or to realize upon them to satisfy the indebtedness owing to Swiss Bank. Accordingly, I do not accept the submission that there is no substantial benefit to Swiss Bank from the appointment of a receiver.

30 Counsel for Odyssey and Weston submit that Swiss Bank acquiesced in the transfer of assets since the Spring of 1994, and that accordingly, it would be inequitable to appoint a receiver at this time. My reading of the material before this court is that, although Swiss Bank was aware of the intended restructuring plan and the motivation for such plan, it was concerned throughout about the effect that such plan would have on its security position and the tax ramifications of such plan, and at no time indicated its acquiesence in, or approval of, the plan.

31 With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from

seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

32 The first submission of counsel for Odyssey and Weston is that the Odyssey Loan was illegal and accordingly the security for such loan is void and unenforceable. The illegality is alleged to have arisen from the fact that Swiss Bank would not have been able to make the original loan to Odyssey itself without being in breach of certain regulations under the Bank Act. I am unable to accept this submission for two reasons. The initial loan made in 1985 has been repaid and it is security for the new loan made in 1989 which is now sought to be enforced. There is so far as I am aware no allegations that Swiss Bank was unable to make the new loan in 1989. In any event, Swiss Bank did not make the original 1985 loan; rather, it arranged for the loan to be made by its parent company in Switzerland and an European affiliate of its parent company, neither of whom would have been subject to the regulations under the Bank Act. Accordingly, I fail to see how the original loan could be said to be illegal when the loan was not made by an institution subject to the regulations under the Bank Act. Moreover, the decision of the Ontario Court of Appeal in Sidmay Ltd. et al. v. Wehttam Investments, *[1967] 1 O.R. 508*; aff'd *[1968] S.C.R. 828* would seem to stand for the proposition that, even if a loan is made in contravention of a statute or regulation governing the lending institution, such loan is still enforceable by the lending institution.

33 Counsel for Odyssey and Weston further submit that Swiss Bank did not come to court with clean hands in view of the fact that it was in breach of the provisions of the commitment letters governing the Odyssey Loan and the Weston Loan by virtue of its failure to allow certain currency conversions, and was also in breach of its fiduciary duty to the borrowers in that it had undertaken to give advice with respect to the structure of the loans and the provision for currency conversion. I can see that the language of the two commitment letters dealing with currency conversions is not abundantly clear and there is little evidence before this court as to whether the requests for currency conversions were properly made on the appropriate dates and with the appropriate notice.

34 There is also very little evidence before this court to establish that this a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in Hodgkinson v. Simms, *[1994] 3 S.C.R. 377*, September 30, 1994. At pp. 20-22 of his reasons, La Forest J. stated:

> In Lac Minerals, *[1989] 2 S.C.R. 574*, I elaborated further on the approach proposed by Wilson J. in Frame v. Smith. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in Lac Minerals, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", vis, situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party....

> In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a banker customer and banker are conducted on a creditor-debtor basis; see Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan, *[1980] 1 S.C.R. 433*; Thermo-King Corp. v. Provincial Bank of Canada *(1981), 34 O.R. (2d) 369*, leave to appeal refused, *[1982] 1 S.C.R. xi*. ...

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest... No doubt it will be a rare occasion where parties, in all other respects are justified in surrendering their self-interest such as to invoke the fiduciary principle.

36 The commercial transactions among the parties to this action do not appear to me to be those rare occasions where the fiduciary principle would be invoked.

37 In any event, in my view, such allegations of breach of contract and breach of fiduciary duty would have to be established by the borrowers in an action in damages against Swiss Bank and such damages may well be offset against the amounts owing under the Odyssey Loan and the Weston Loan. The fact that such allegations are being made at this time does not, however, constitute a reason for refusing to grant the appointment of a receiver at this time or convince me that it would be unjust or inequitable to do so. It has not been suggested that the damages which might be awarded to Odyssey and Weston, should they be successful in any such action, would be sufficient to pay off the Odyssey Loan and the Weston Loan. In fact, the limited evidence before the court as to the damages to which Odyssey and Weston would be entitled would seem to indicate that such damages would fall far short of the amount necessary to pay off the two loans.

38 In summary, although I am not satisfied that at this time there exists any default resulting from a transfer of assets pursuant to the restructuring plan or that the transfer of the deposit receipts to affiliates in the United States constitutes grounds for the appointment of a receiver, the existence of the other defaults with respect to interest payments, principal payments, arrears of taxes and failure to pay principal on demand, in my view, justifies the appointment of a receiver and none of the submissions put forward by counsel for Odyssey and Weston convinces me that it would be unjust or inequitable to grant such appointment.

39 Accordingly, an order will issue, substantially in the form of the order annexed as Schedule "A" to the notice of motion, appointing Coopers & Lybrand Limited as receiver and manager of the property, undertakings and assets of Odyssey and Weston. If counsel are unable to settle the terms of such order, they may attend upon me. Counsel may also make oral or written submissions to me as to the costs of this motion.

GROUND J.

BANK OF MONTREAL Applicant	-and-	MARIO'S CATERING SERVICE LTD. o/a MICHELANGELO BANQUET CENTRE et al. Respondents

Court File No. CV-24-00732200-00CL

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ABBREVIATED BOOK OF AUTHORITIES OF THE APPLICANT, BANK OF MONTREAL (Application Returnable January 14, 2025)

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