Court File No. CV-25-00100786-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MERIDIAN CREDIT UNION LIMITED

Applicant

– and –

MUSHIMPEX INVESTMENTS INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF THE APPLICANT

DATE: October 2, 2025

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TO: **THIS HONOURABLE COURT**

AND TO: **SERVICE LIST**

SERVICE LIST

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PART I – OVERVIEW

1. The applicant, Meridian Credit Union Limited (the "**Meridian**"), brings this application for an order appointing msi Spergel Inc. as receiver and manager over the real property municipally described as 336 Tweedsmuir Avenue, Ottawa, Ontario (the "**Tweedsmuir Property**") registered in the name of the respondent Mushimpex Investments Inc. (hereafter the "**Debtor**"), including all proceeds thereof, substantially in the form of the Commercial List model order.

PART II – FACTS

Background

2. The Debtor is a federal business corporation that has its registered head office located in Ottawa, Ontario.[1] The Debtor operates primarily as a real estate investment entity.[2]

3. The Debtor is the registered owner of Tweedsmuir Property, which is legally described as Lot 33, Plan 263, Ottawa/Nepean [PIN 04020-0051].[3]

4. The Tweedsmuir Property is a residential investment property, and the Debtor has leased various units located therein to tenants.[4]

5. The Debtor's sole director is Eddy Mushibuka ("**Mushibuka**").[5]

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[1] Affidavit of Jessica Cloughton sworn September 30, 2025, Application Record, Tab 2, at para. 4, Exhibit "A".
[2] *Ibid*, para. 5.
[3] *Ibid*, para. 6, Exhibit "B".
[4] *Ibid*, para. 7.
[5] *Ibid*, para. 8 and Exhibit "A".

The Loan

6. Pursuant to a Small Business Credit Agreement (the "**Credit Agreement**") dated December 3, 2019 and executed December 4, 2019 by Mushibuka on behalf of the Debtor, Meridian agreed to provide the Debtor with a non-revolving term loan (the "**Loan**") for the purpose of pulling equity from the Tweedsmuir Property to be used to support the development of another real property.[6]

7. The Loan was in the principal amount of $1,850,000.00 with interest to accrue at the fixed rate of 2.84 per cent per annum.[7]

8. The Loan was fully advanced to the Debtor on or about December 20, 2019.[8]

9. Pursuant to the Credit Agreement, the Loan had a term of 60 months.[9]

Security for the Loan

10. The Debtor's indebtedness to Meridian with respect to the Loan pursuant to the Credit Agreement is secured by, among other things, the following:[10]

(a) a General Security Agreement granted by the Debtor in favour of Meridian dated December 3, 2019 (the "**Meridian GSA**");

(b) a personal guarantee and postponement of claim from Mushibuka of the Debtor's indebtedness to Meridian executed on December 4, 2019;

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[6] *Ibid*, para. 9, Exhibit "C."
[7] *Ibid*, para. 10, Exhibit "C".
[8] *Ibid*, para. 11.
[9] *Ibid*, para. 12, Exhibit "C".
[10] *Ibid*, para. 13, Exhibits "D" to "G".

(c) a first-ranking collateral mortgage granted by the Debtor in favour of Meridian for the sum of $3,100,000.00 registered against title to the Tweedsmuir Property on December 20, 2019, as Instrument No. OC2178444 (the "**Meridian Mortgage**"); and

(d) a General Assignment of Leases and Rents in favour of Meridian dated December 18, 2019, notice of which was registered on title to the Tweedsmuir Property on December 20, 2019, as Instrument No. OC2178447.

11. Meridian perfected its security interest contained in the Meridian GSA through registration of a financing statement pursuant to the provisions of the *Personal Property Security Act* ("**PPSA**").[11]

12. Among other rights and remedies, both the Meridian Mortgage and Meridian GSA provide for the appointment of a receiver in the event of default of the Debtor's obligations to Meridian:[12]

(a) Schedule "B" to the Meridian Mortgage states that "when there shall be default under the provisions of these presents the chargee [Meridian] may at such time and from time to time and with or without entry into possession of the charged premises [the Tweedsmuir Property] or any part thereof by writing under its corporate seal appoint a receiver of the charged premises or any part thereof and of the rents and profits thereof and with or without security"; and

(b) Paragraph 11(a) of the Meridian GSA states that "upon any default under this General Security Agreement, the Lender [Meridian] may … enforce its rights … by the appointment …of a receiver or receivers of all or any part of the Collateral".

Other Creditors

13. Other than Meridian, no other creditors have filed a financing statement in the Personal Property Security Registry.[13]

14. Based on the property abstract for the Tweedsmuir Property, the only encumbrances registered on title are the Meridian Mortgage and the Notice of the General Assignment of Leases and Rents to Meridian, as described above.[14]

15. Based on an Execution Certificate for the Debtor in the Regional Municipality of Ottawa - Carleton, being the jurisdiction in which the Tweedsmuir Property is located, there are three executions filed with the Sheriff against the Debtor as follows:[15]

(a) Execution 23-0001039 filed by Oakwood Designers & Builders Inc. in the amount of $1,005,667.81;

(b) Execution 24-0000776 filed by Oakwood Designers & Builders Inc. in the amount of $789,158.57; and

(c) Execution 24-0001024 filed by Caisse Desjardins Ontario Credit Union Inc. in the amounts of $1,712,505.19, $3,353.47 and $1,591.49.

16. Meridian is unaware of what amounts might be owing to other creditors of the Debtor, including government priority claims.[16]

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[11] *Ibid*, para. 14, Exhibit "H".
[12] *Ibid*, para. 15.
[13] *Ibid*, para. 16, Exhibit "H".
[14] *Ibid*, para. 17, Exhibit "B".
[15] *Ibid*, para. 18, Exhibits "I" to "L".

The Defaults and Demands

17. In or around December of 2024, Meridian conducted a review of the Loan and made the decision to exit the relationship with the Debtor. The decision was based on a sustained deterioration in financial performance over the preceding five years, as well as significant outstanding government obligations aggregating approximately $330,000. These obligations included, but were not limited to, income tax, HST, and property tax arrears:[17]

(a) on May of 2024, Meridian received a Notice of Registration of Tax Arrears Certificate for the Tweedsmuir Property in the amount of $124,795.35. The Debtor subsequently satisfied the lien, which was discharged on September 6, 2024;

(b) the Debtor holds additional real estate assets. Meridian received notice of significant property tax arrears associated with those additional properties;

(c) in October of 2024, Meridian received notice that the Debtor owed HST to the Canada Revenue Agency in the amount of $34,715.38; and

(d) Meridian received Mushibuka's 2023 Notice of Assessment issued November 21, 2024, which indicated that Mushibuka owed income tax arrears to the Canada Revenue Agency.

18. Meridian issued a non-renewal notice to the Debtor on December 18, 2024, with a deadline of March 21, 2025, for the repayment of the outstanding indebtedness. On December 19, 2024,

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[16] *Ibid*, para. 19.
[17] *Ibid*, para. 20, Exhibits "M" and "N".

Mushibuka signed back the non-renewal notice on behalf of the Debtor and personally as guarantor.[18] The Loan matured on December 20, 2024, and was not repaid by the Debtor.[19]

19. Since maturity, effective December 21, 2024, the Loan accrues interest at Meridian's Prime Rate of interest plus 1.75% per.[20]

20. Subsequent attempts by Meridian to contact Mushibuka by telephone and email have failed.[21]

21. As at June 12, 2025, the Debtor was indebted to Meridian with respect to the Loan in the amount of $1,578,648.32, exclusive of costs, with interest continuing to accrue at the applicable rate (the "**Indebtedness**").[22]

22. By letters dated June 12, 2025, Meridian, through its lawyers, made demand upon the Debtor and Mushibuka pursuant to their respective obligations under the Credit Agreement and the Guarantee (the "**Demands**"). Meridian declared the entire amount of the Indebtedness of the Debtor with respect to the Loan to be immediately due and payable, and enclosed a Notice of Intention to Enforce Security against the Debtor pursuant to section 244(1) of the *Bankruptcy and Insolvency Act*.[23]

23. Notwithstanding, the Demands having expired on June 27, 2025, the Debtor and Mushibuka have failed or refused to pay out the Indebtedness owed to Meridian.[24]

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[18] *Ibid*, para. 21, Exhibit "O".
[19] *Ibid*, para. 22.
[20] *Ibid*, para. 23.
[21] *Ibid*, para. 24.
[22] *Ibid*, para. 25.
[23] *Ibid*, para. 26, Exhibit "P".
[24] *Ibid*, para. 27.

24. Deposits aggregating $29,000.00 have been made into the Debtor's operating account held with Meridian on three separate occasions since May 2025 (On May 22, June 24 and August 7). These deposits were insufficient to bring the Loan into good standing.[25]

Outstanding Indebtedness

25. As at July 25, 2025, the Indebtedness has increased to $1,590,919.62, which does not include Meridian's expenses incurred to date.[26]

Current Status of The Relationship Between Meridian and the Debtor

26. Meridian no longer wishes to finance the Debtor. Since Meridian delivered the non-renewal notice to the Debtor in December of 2024, the Debtor is either unable or unwilling to obtain alternate financing. The Loan matured in December of 2024 and was not paid out. Meridian has shown considerable patience with the Debtor in permitting it sufficient and significant time in which to find alternative financing or to sell the Tweedsmuir Property.[27]

27. The Debtor appears unable to obtain alternative financing as three Writs of Seizure and Sale are being held in the hands of the Ottawa Sheriff's Office. These include Writs for a $1.7 million Judgment in favour of Caisse Desjardins Ontario Credit Union Inc. from July 2024 and two Judgments for approximately $1,006,000 and $784,000 in favour of Oakwood Designers & Builders Inc. from, respectively, September 2023 and May 2024. Any refinancing obtained by the Debtor would need to pay out or settle these Judgments.[28]

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[25] *Ibid*, para. 28.
[26] *Ibid*, para. 29, Exhibit "Q".
[27] *Ibid*, paras 30 and 32.
[28] *Ibid*, para. 33.

28. Meridian has no visibility regarding how these Judgments arose or whether the Debtor has any plan to deal with them moving forward.[29]

29. Meridian has lost confidence in the ability of the Debtor to repay its commitments, given the sizeable judgments which have been registered in the form of Writs against it.[30]

30. Meridian also has no visibility as to how the Debtor is operating the Tweedsmuir Property such as whether rents are being collected. While sporadic deposits have been made into the operating account held with Meridian, given the current circumstances, Meridian has determined that the Debtor does not demonstrate sufficient reliability regarding the repayment of the Loan.[31]

31. Meridian proposes that msi Spergel Inc. be appointed as the receiver and manager of the Tweedsmuir Property. Msi Spergel Inc. has agreed to accept the appointment.[32]

PART III – ISSUES

32. The sole issue to be determined on this application is whether it just and convenient to appoint msi Spergel Inc. as receiver and manager over the Tweedsmuir Property?

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[29] *Ibid*, para. 34.
[30] *Ibid*, para. 35.
[31] *Ibid*, para. 36.
[32] *Ibid*, para. 38, Exhibit "R".

PART IV – LAW AND SUBMISSIONS

It Is Just and Convenient to Appoint a Receiver

33. Pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**") and s. 101 of the *Courts of Justice Act* (the "**CJA**"), the court may appoint a receiver where it is "just or convenient" to do so.

34. Where a security instrument governing the relationship between the debtor and secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant. In such circumstances, the courts do not regard the appointment of a receiver as extraordinary or equitable, because the applicant is merely seeking to enforce a term of its bargain with the debtor.[33]

35. As Justice Koehnen recently recognized in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, the "relief becomes even less extraordinary when dealing with a default under a mortgage."[34] It is essentially a *prima facie* right of a mortgagee and should be granted "as a matter of course", in circumstances where the principal is immediately payable or interest is in arrears.[35]

36. In determining whether it is just or convenient to appoint a receiver, the court must have regard to all the circumstances of the case; particularly, the nature of the property and the rights and interests of all parties in relation to the property.[36]

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33 *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, para. 42; See also *Meridian* v. *Okje Cho & Family Enterprise Ltd*., 2021 ONSC 3755, para. 21
34 *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, para. 44
35 *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, para. 20.
36 *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, para. 41

37. Additional factors that the court may consider in determining whether it is just and convenient to appoint a receiver include: (i) whether the lender's security is at risk of deteriorating, (ii) whether there is a need to stabilize and preserve the debtor's business, (iii) a loss of confidence in the debtor's management, and (iv) positions and interests of other creditors.[37]

38. Other factors the court will holistically consider in determining whether it is just and convenient to appoint a receiver include, without limitation, the following:[38]

(a) the fact the creditor has a right to appoint a receiver pursuant to a security instrument;

(b) the balance of convenience to the parties;

(c) whether the secured party encounters or expects to encounter difficulty in enforcement with the debtor and others;

(d) whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(e) the conduct of the parties;

(f) the goal of facilitating the duties of the receiver; and

(g) whether irreparable harm might result if no order were made, although it is not essential for a creditor to establish irreparable harm or that the situation is urgent if a receiver is not appointed.[39]

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37 *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, para. 45; See also

39. In this case, it is just and convenient to appoint a receiver having regard to the following:

(a) the Loan matured in December of 2024 and has not been repaid, despite the Debtor acknowledging that Meridian would not renew the Loan;

(b) the Debtor's principal and the guarantor of the Loan, Mushibuka, refuses to communicate with Meridian;

(c) Meridian has made formal demand for repayment of the Loan, which has not been acknowledged by the Debtor or Mushibuka;

(d) pursuant to the terms of the Meridian GSA and the Meridian Mortgage, upon default under the Loan, Meridian may seek the appointment of a receiver over the Debtor's properties, assets, and undertakings;

(e) Meridian's security is in jeopardy, and at risk of deteriorating, given that the Debtor appears to have unpaid HST arrears which would enjoy a super-priority even over Meridian's security;

(f) there now exists judgments and executions which bind the Tweedsmuir Property, which could result in a Sheriff's sale which would liquidate Meridian's prime security for the Loan;

(g) Meridian has, justifiably, lost confidence in the management of the Debtor's business;

Meridian v. *Okje Cho & Family Enterprise Ltd*., 2021 ONSC 3755, para. 20
38 *Canadian Western Bank* v. *2563773 Ontario Inc*., 2023 ONSC 4766, paras. 5 to 11

(h) Meridian has no visibility into how the Debtor is managing the Tweedsmuir Property and whether it is collecting rents and what it is doing with any income collected;

(i) Meridian has shown considerable patience with the Debtor in permitting it significant time to either sell the Tweedsmuir Property or arrange alternative financng; and

(j) appointing a receiver and manager, as a court officer, will provide transparency and fairness to all the stakeholders, and will ensure a fair and orderly liquidation process, to maximize realization.

PART V – RELIEF REQUESTED

40. Meridian therefore seeks the order in the form as contained in its Application Record.

Dated: October 2, 2025

ALL OF WHICH IS RESPECTFULLY SUBMITTED

SPETTER ZEITZ KLAIMAN PC
James Quigley
Lawyers for the Applicant

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39 *Textron Financial Canada Ltd.* v. *Chetwynd Motels Ltd*., 2010 BCSC 477, at para. 50; *Swiss Bank Corp. (Canada)* v. *Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, at para. 28

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023
2. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953
3. *Canadian Western Bank v. 2563773 Ontario Inc.*, 2023 ONSC 4766
4. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613
5. *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755
6. *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49
7. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.,* 2010 BCSC 477

SCHEDULE "B" – STATUTORY PROVISIONS

***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101(1):**

101(1) Injunctions and receivers
In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 47, 95, 96, 243 & 244:**

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

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

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

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

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

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

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

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

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

(g) 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.

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

(h) the inventory,

(i) the accounts receivable, or

(j) the other property

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

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

No advance consent
(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

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

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

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

Idem
(4) This section does not apply where there is a receiver in respect of the insolvent person.

Confederation Life Insurance Co. v. Double Y Holdings Inc.

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Farley J.

September 3, 1991

Action No. 91-CQ-72

[1991] O.J. No. 2613

Between Confederation Life Insurance Company, Plaintiff, and Double Y Holdings Inc. et al., Defendants

(13 pp.)

Case Summary

Receivers — Appointment of receiver — On application of a plaintiff — Realty — Completion of building.

Application by the plaintiff for a court appointed receiver. The applicant was one of many financiers of a real estate project that had met with hard times as a result of the recession. The mortgages on the project matured with the project still incomplete. The respondents could not afford to complete the project or pay off the indebtedness and had been unsuccessful in finding purchasers. They had earlier agreed not to oppose the present application although the mortgages also made provision for the appointment of a private receiver. The lien claimants, trade creditors and other parties financially interested in the project were not opposed to this application.
HELD: Application granted.

While the defendants did not show any irreparable harm resulting from the granting of the order sought, there would be prejudice to the plaintiffs if the project remained in limbo. A creditor in the position of the applicant was not under an obligation to continue to advance funds to the project whether he was willing or not.

STATUTES, REGULATIONS AND RULES CITED:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 114.
No counsel mentioned.

FARLEY J. (endorsement)

Transferred to Commercial List.

This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

Confederation Life Insurance Co. v. Double Y Holdings Inc.

Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 309 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. nonexistent statutory declarations.

The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s. 9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s. 10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s. 11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s. 16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see London & Western Trusts Co. Ltd. v. Lucas, [1937] O.W.N. 613 (H.C.J.) and Receiverships, Bennett (1985), at p. 154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. Schwartzman v. Great West Life (1955), 17 W.W.R. 37 (B.C.S.C.) and Adriatic Development v. Canada Trustco, (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was forced into a $20 million mortgage in November 1990 which provided only limited funding for construction. (Emphasis added). This is unsupportable in my view.

Is it "just or convenient" pursuant to s. 114 Courts of Justice Act to appoint a receiver? Bank of Montreal v. Appcorn Ltd. (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p. 101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. Goldtex Mines Ltd. v. Nevill (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See Receiverships, Bennet (1985), at p. 91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court -

appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also Kerr on Receiverships (1983), 16th ed. at p. 5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> Appointment to Enforce Rights
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear.... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

Canadian Commercial Bank v. Gemcraft Ltd. (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to Complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in Ontario Development Corp. and Roynat v. Ralph Nicholas (1985), 57 C.B.R. (M.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see Citibank Can. v. Calgary Auto Centre (1989), 75 C.B.R (M.S.) 74 (Alta. Q.B.) at pp. 85-6.

I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

The defendants suggested that a receivership here was akin to that situation cautioned against in Fisher Investments v. Nusbaum (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p. 188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

As to the question of sufficient time to pay after demand (see Mister Broadloom v. Bank of Montreal (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (Whitley v. Challis, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see Bennett pp. 99).

Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.

FARLEY J.

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.

IN THE MATTER OF SECTION 243 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C.1985, c.B-3 AS AMENDED;
IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c.C-43, AS AMENDED

MERIDIAN CREDIT UNION LIMITED
Applicant

-and-

MUSHIMPEX INVESTMENTS INC.
Respondent

Court File No.: CV-25-00100786-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

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