Court File No. CV-23-00705869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ROYAL BANK OF CANADA

Applicant

- and -

TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.

Respondents

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 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

SUPPLEMENTARY BOOK OF AUTHORITIES

Date: October 10, 2023

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I N D E X

TAB	Document
1.	*Royal Bank of Canada v. CFNDRS Inc*., 2017 ONSC 7661.
2.	*Business Development Bank of Canada v 2197333 Ontario Inc*., 2012 ONSC 965.
3.	*Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2018 ONSC 3437.
4.	*Potentia Renewables Inc. v Deltro Electric Ltd*., 2019 ONCA 779.
5.	*Tool-Plas Systems Inc. (Re),* 2008 CanLII 54791 (ON SC).

Tab 1

2017 ONSC 7661
Ontario Superior Court of Justice

Royal Bank of Canada v. CFNDRS Inc.

2017 CarswellOnt 20429, 2017 ONSC 7661, 22 C.P.C. (8th) 300, 288 A.C.W.S. (3d) 272

ROYAL BANK OF CANADA (Applicant) and CFNDRS INC., formerly known as DESIGN COFOUNDERS INC., formerly known as TAILORED UX INC. (Respondent)

F.L. Myers J.

Heard: December 20, 2017
Judgment: December 20, 2017
Docket: CV-17-587341-00CL

Counsel: James Satin, for Royal Bank of Canada
Mustafa Redha, for himself

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient
Applicant bank maintained it held security under general security agreement and lease, terms of security documents provided for appointment of receiver on default, respondent company was indebted to bank, it defaulted, and bank made demand — Bank brought summary application seeking appointment of receiver over property, assets, and undertaking of company — Application dismissed — Section 101 of Courts of Justice Act did not apply because that section involved only interlocutory orders, and appointment here was sought on final basis — Section 243 of Bankruptcy and Insolvency Act (BIA) allowed for such appointment, but nothing described what happened after receiver was appointed by way of application — Section 243(7) of BIA prohibited court from providing super-priority charge to receiver to indemnify it for disbursements it incurred in operation of business of insolvent person — There was no evidence before court as to why court-appointed receiver was just or convenient — Total debt of $45,000 was very small for court-ordered receivership process — There was no indication as to how court-based process could be expected to be value-maximizing or why it was more desirable than private appointment — In light of procedural issues, complete lack of evidence, and inapt order sought, receiver was not appointed at this time.
Table of Authorities
Cases considered by *F.L. Myers J.*:
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — followed
Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243 — considered

s. 243(7) — considered
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered
Personal Property Security Act, R.S.O. 1990, c. P.10
s. 63(4) — considered
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 14.05(2) — considered

R. 60.02(1)(d) — considered

APPLICATION by bank seeking appointment of receiver over property, assets, and undertaking of company.

***F.L. Myers J.*:**

1 On November 28, 2017, the bank commenced a summary application seeking the appointment of a receiver over the property, assets, and undertaking of the respondent. The relief claimed in the notice of application does not include the appointment of a manager of the business. Neither does it include a claim for judgment on the respondent's indebtedness. The appointment of a receiver alone is the sole substantive relief sought in this application.

2 The grounds relied upon in the application and the bank's evidence are that: the bank holds security under a general security agreement and a lease; the terms of the security documents provide for the appointment of a receiver on default; the respondent is indebted to the bank; it defaulted; and the bank has made demand.

3 The bank relies upon s. 101 of the *Courts of Justice Act*, RSO 1990, c. C-43 and s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B.3.

4 Section 101 of the *Courts of Justice Act* does not apply in this application. The section involves only interlocutory orders. Here, the appointment is sought on a final basis. This is allowed under s. 243 of the *BIA* and therefore under Rule 14.05 (2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194. However, nothing in that statute describes what happens after the receiver is appointed by way of application. An application is made and the court issues a final order appointing the receiver — presumably defining the goals of the process in that final order.

5 By contrast, when an action is commenced to enforce a debt and the plaintiff seeks the interim appointment of a receiver and manager under s. 101 of the CJA and Rule 41, the appointment is interlocutory. The receiver preserves and protects the assets pending proof of the debt. If the plaintiff obtains judgment on its debt, the receiver and manager then will enforce the plaintiff's judgment by way of equitable execution akin to an appointment under Rule 60.02 (1)(d). The receiver and manager will liquidate assets or engage in other processes to realize cash to pay to the plaintiff who is then a judgment creditor. Before the receiver and manager can pay a judgment creditor however, the receiver and manager, of necessity, will have to consider whether there are other claims that must, by law, be paid in priority to the claim of the judgment creditor. In that process an orderly liquidation and payment scheme is mandated and carried out.

6 While there is much similarity between the provincial and federal regimes, it should be borne in mind that s. 243 (7) of the BIA prohibits the court from providing a super-priority charge to the receiver to indemnify it for disbursements it incurs in the operation of a business of the insolvent person. I am unaware of any case law that provides for the appointment of a receiver under s. 243 of the BIA by way of originating application in which the receiver has been ruled to be entitled to a super-priority charge to protect its right to indemnity for business disbursements.

7 Although the notice of application in this case sought only the appointment of a receiver, the draft order submitted by the bank followed the Commercial List model form of order. It provided for the appointment of a receiver and manager under both s. 101 of the *CJA* and s. 243 of the *BIA*. It provided a super-priority charge for all fees and disbursement of the receiver and manager and its counsel on all disbursements although that is available only under the former statute and not under the latter. Where both statutes apply, that is permissible. But here, since s. 101 is not engaged in an interlocutory appointment process, the receiver would not be entitled to indemnity for business disbursements in a s. 243 receivership.

8 The test for the appointment of an interlocutory receiver is well understood. In para. 10 of *Bank of Nova Scotia v. Freure Village on Clair Creek* [1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List])], 1996 CanLII 8258 Blair J. (as he then was) set out several propositions that remain applicable today:

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

9 Justice Blair also noted that while the appointment of a receiver may be seen to be extraordinary, it is much less extraordinary when the plaintiff has a contractual right to appoint a receiver on its own. The question of whether a court appointment then is just and convenient when there is a contractual power of appointment will turn on an assessment of, "the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." *Freure Village* at para. [12].

10 In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties' dispute puts the business assets at risk or where realization options may be impaired by leaving the business in the debtor's hands or requiring the secured creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.

11 In this case, there is absolutely no evidence before the court as to why a court appointed receiver is just or convenient. All that follows was told to me on an unsworn basis by counsel and Mr. Redha personally.

12 As best as I can tell, the respondent runs a high tech startup that is in an early development stage. It is creating software that will help lead a business through the steps of a problem solving exercise. Like many startups, the business operates through its principal, Mr. Redha, and a number of independent contractor/consultants. There are no other employees. There is no bricks and mortar. There is Mr. Redha, his computer, and perhaps some IP. I did not ask if the business has an office or if the bank proposed to take possession of Mr. Redha's residence under the order as drafted.

13 The bank says that it is interested in collecting the respondent's accounts receivable and its entitlement to Scientific Research and Experimental Development Tax Incentive payments. Mr. Redha estimates conservatively that the business has approximately $75,000 in outstanding receivables. It may have entitlement to SR&ED payments for 2016 and 2017 that may be significant. The applications for these payments are complex and require Mr. Redha's involvement with a professional consultant who charges a 7% fee. Mr. Redha is bullish on his prospects to obtain new receivables, i.e. new revenue, in the New Year. I

doubt he would have been so bullish had he understood that a receivership would have seen him working for a salary to be negotiated with the receiver while the receiver obtains the receivables generated by his efforts.

14 Mr. Redha submits that the IP of the business has value that exceeds the amount of his debt. I have no way to assess the correctness of this statement. Moreover, the bank is not required to keep funding the respondent through a sales process of its own making. However, this much is clear to me (based on experience and common sense absent any evidence one way or the other) — if a receiver is appointed, it has no wherewithal to run the business without Mr. Redha's voluntary and ongoing commitment. Trying to sell partially developed software disembodied from an operating business and without Mr. Redha's ongoing support seems unlikely to be value-maximizing and probably is impossible. In fact, there really is no business for a third party to manage. There is just Mr. Redha and his computer and incomplete software.

15 Mr. Satin submits that the bank is entitled to a receiver under its loan and security documents. The proposed receiver, he says, is not willing to undertake the appointment without the protection of the court. There is no indication of why that may be so.

16 The total debt of about $450,000 is very small for a court ordered receivership process. There is no indication as to how a court-based process can be expected to be value-maximizing or why it is more desirable than a private appointment in this case. There is nothing inherent in the relationship between these parties that makes the mere existence of a default on a debt require a neutral third party to assume stewardship of the business such as it may be. The bank has delivered a notice under s. 63 (4) of the PPSA that it intends to realize on collateral of the respondent. Collecting $75,000 in outstanding receivables is not made more convenient by a court appointed receiver. Putting in place a trust or lockbox process for receipt of SR&ED payments may require some negotiation or, perhaps, appointment of a very limited true receiver empowered simply to receive this specific property of the debtor and perhaps to oversee completion of SR&ED applications. With some negotiation, a sale process for the respondent's IP might be agreed upon. It will take evidence however to establish that a professional accountant/trustee can come in and sell the IP in a value-maximizing process without Mr. Redha's voluntary, active engagement.

17 The respondent should not take from this that it is at all freed from its legal obligations to pay its debt. The bank has many paths open to it to seize and sell the respondent's assets, take its loss, and bring a swift end to the business. That strikes me as a lose-lose proposition, but that is not my decision to make. As usual, if there is to be a win-win, there will need to be a discussion in which each party tries to accommodate the other's interests to some degree at least.

18 In view of the procedural issues, the complete lack of evidence, and the inapt order sought, I am not prepared to appoint a receiver as sought in this case at this time. If the bank wishes, it may arrange a case conference before me, on notice to the respondent, at which I can assist the parties work towards a consensual outcome or restructured court proceedings. Alternatively, the applicant may file a draft order dismissing this application for signing. Mr. Redha's approval of the form and content of the draft order is not required. Nothing in this outcome precludes the applicant from commencing an action against the respondent to sue on its debt.

Application dismissed.

End of Document

Tab 2

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

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

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

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

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.2 Jurisdiction of court to appoint

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors --- Receivers — Jurisdiction of court to appoint

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — followed

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

s. 243(1) — pursuant to

s. 244(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — pursuant to

APPLICATION for appointment of receiver.

***Morawetz J.*:**

1 Business Development Bank of Canada ("BDC") brings this application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

2 Counsel to the Respondent submits that a receiver can be appointed by an interlocutory order where it appears to the court to be just or convenient to do so. Counsel referenced *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (Ont. H.C.) for this proposition. Counsel questioned as to whether it was proper to proceed by way of application as this would result in the granting of a final order, which, he submits, is inconsistent with the view expressed by Callaghan J. (as he then was) in *National Trustco*.

3 Counsel to BDC responded by referencing *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267 (Ont. C.A. [In Chambers]), a decision of MacPherson J.A. (In Chambers). In this case, the Ministry commenced its application, including the relief to appoint a receiver and manager pursuant to s. 101 of the *CJA*. The order appointing the receiver was granted and the moving party on appeal, Shehrazad, sought a stay pending appeal. The request for the stay was opposed by the Ministry on two bases: (1) the Court of Appeal had no jurisdiction to hear the motion because the order being appealed was an interlocutory order and, therefore, the appeal would have to be taken to Divisional Court; and (2) on the merits, the moving party could not meet the test for obtaining a stay.

4 With respect to the jurisdictional point, MacPherson J.A. disagreed with the position put forth by the Ministry noting that the Ministry did not bring a motion to appoint a receiver; rather, it made an application.

5 Justice MacPherson stated the following:

> 16. It follows that the decision of this court in *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.), governs the question of which court has jurisdiction to hear the appeal in these proceedings. In *Illidge*, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.
>
> 17. The court rejected this argument. Armstrong J.A. stated at paragraph 4:
>
> > At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675, ... and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.

> In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for stay should be considered on the merits.

6 The above passage is, in my view, a complete answer to the position put forth by counsel to the Respondent. The Court of Appeal did not take issue with the fact that the proceeding to appoint the receiver was brought by way of application which resulted in a final order.

7 In any event, the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver.

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

> (a) the credit agreement is in default;
>
> (b) the indebtedness is not in dispute;
>
> (c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and
>
> (d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

23 The application is granted and the Fuller Landau Group Inc. is appointed Receiver.

Application granted.

End of Document

Tab 3

2018 ONSC 3437
Ontario Superior Court of Justice

Potentia Renewables Inc. v. Deltro Electric Ltd.

2018 CarswellOnt 12310, 2018 ONSC 3437, 295 A.C.W.S. (3d) 502, 62 C.B.R. (6th) 10

POTENTIA RENEWABLES INC. (Applicant) and DELTRO ELECTRIC LTD. (Respondent)

T. McEwen J.

Heard: April 30; May 9, 2018
Judgment: July 27, 2018
Docket: CV-17-587425-00CL

Counsel: George Benchetrit, Michael Kril-Mascarin, for Applicant
Michael C. Mazzuca, Fred A. Platt, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue
Civil practice and procedure
XVIII Summary judgment
XVIII.7 Effect of counterclaim
Headnote
Civil practice and procedure --- Summary judgment — Effect of counterclaim
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount — Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — There was no entitlement to equitable set-off on part of company — There was no deductible cross-claim by company.
Bankruptcy and insolvency --- Receivers — Appointment
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount — Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — Receiver was to be appointed if company could not repay outstanding funds within 30 days.
Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount —

Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — Trial was not necessary to determine issues, which could be determined on record before court — Court had jurisdiction to hear application — There was no judicial estoppel — It was within court's powers to appoint receiver — Company's claim that final approval was obtained was not supported — Conversations took place, but no approval was signed or agreed upon — Having failed to obtain final approval, company was obligated to pay back $1,500,000 USD of $2,000,000 USD owing — Remaining payment of $500,000 USD was payable, based on terms of letter of intent — Company could not disavow terms of letter, then recover on same contract.

Table of Authorities

Cases considered by *T. McEwen J.*:

Algoma Steel Inc. v. Union Gas Ltd. (2003), 2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78 (Ont. C.A.) — followed

BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10, 1993 CarswellBC 1254 (S.C.C.) — considered

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

BlackBerry Ltd. v. Marineau-Mes (2014), 2014 ONSC 1790, 2014 CarswellOnt 3522, 2014 C.L.L.C. 210-030, 18 C.C.E.L. (4th) 51 (Ont. S.C.J.) — referred to

Business Development Bank of Canada v. 2197333 Ontario Inc. (2012), 2012 ONSC 965, 2012 CarswellOnt 2062, 94 C.B.R. (5th) 28 (Ont. S.C.J. [Commercial List]) — followed

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to

Cuddy Food Products v. Puddy Bros. Ltd. (2002), 2002 CarswellOnt 2722, [2002] O.T.C. 580, 35 C.P.C. (5th) 159 (Ont. S.C.J.) — considered

Ebert v. Atoma International Inc. (1997), 1997 CarswellOnt 1478, 28 C.C.E.L. (2d) 158, 97 C.L.L.C. 210-013, 31 O.T.C. 101 (Ont. Gen. Div.) — referred to

Fasco Motors Ltd. v. General Refrigeration Inc. (1998), 1998 CarswellOnt 1827, 62 O.T.C. 276 (Ont. Gen. Div.) — considered

Federal Commerce & Navigation Co. v. Molena Alpha Inc. (1978), [1978] Q.B. 927, [1978] 3 All E.R. 1066, [1978] 3 W.L.R. 309, [1978] 2 Lloyd's Rep. 132 (Eng. Q.B.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Ivey v. Oakrun Farm Bakery Ltd. (2002), 2002 CarswellOnt 2522, 27 B.L.R. (3d) 143 (Ont. S.C.J.) — referred to

Langille v. Keneric Tractor Sales Ltd. (1987), [1987] 2 S.C.R. 440, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 43 D.L.R. (4th) 171, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 82 N.S.R. (2d) 361, 79 N.R. 241, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 207 A.P.R. 361, 1987 CarswellNS 343, 1987 CarswellNS 390, 30 B.L.R. 1, 67 N.S.R. (2d) 404, 19 D.L.R. (4th) 652 (S.C.C.) — followed

Niro v. Caruso (2015), 2015 ONSC 7446, 2015 CarswellOnt 19557 (Ont. S.C.J.) — referred to

Royal Bank of Canada v. CFNDRS Inc. (2017), 2017 ONSC 7661, 2017 CarswellOnt 20429 (Ont. S.C.J.) — considered

Telford v. Holt (1987), 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234, 1987 CarswellAlta 188, 1987 CarswellAlta 583 (S.C.C.) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

Total Electrical Systems Inc. v. Collège Boréal d'Arts appliqués & de technologies (2011), 2011 ONSC 4586, 2011 CarswellOnt 7779, 107 O.R. (3d) 27, 8 C.L.R. (4th) 129 (Ont. S.C.J.) — considered

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 BCSC 640, 2003 CarswellBC 1084, 9 R.P.R. (4th) 279, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 243 — considered

s. 243(1)(a) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — considered

APPLICATION by power producer, for declaratory relief and judgment on outstanding funds from respondent company as well as appointment of receiver.

***T. McEwen J.*:**

1 The applicant, Potentia Renewables Inc. ("Potentia"), seeks a declaration that the respondent, Deltro Electric Ltd. ("Deltro"), is indebted to it in the amount of $2,000,000.00 USD [1] ; judgment for that amount; and the appointment of BDO Canada Ltd. ("BDO") as receiver of the property, assets, and undertakings of Deltro, with certain limited powers.

2 The dispute between the parties stems from agreements they entered into with respect to the development of a ground-mount solar project in the Barbados (the "Barbados Project").

3 For the reasons below, I am granting the declaration that Deltro is indebted to Potentia for the amount of $2,000,000.00 and the resulting judgment. I am also, subject to the terms and conditions below, appointing a receiver over the property and assets and undertakings of Deltro.

OVERVIEW

4 Potentia is an independent power producer focused on developing, owning and operating renewable energy facilities throughout the Americas. It has its head office in Toronto.

5 Deltro, amongst other things, provides business development services with respect to renewable energy projects. Its head office is in Mississauga. As a part of the Barbados Project, Deltro incorporated Deltro Group Ltd. ("DGL") to develop the Barbados Project.

6 In 2014, Deltro began to explore expansion of its business into the Caribbean market. In May 2015 the Barbadian government expressed interest in accepting a proposal from Deltro with respect to the Barbados Project in Saint Michael, Barbados. The Barbados Project envisioned the creation of the ground-mount solar facility which would produce 24 MW of direct current (D/C) energy that would be converted into 20 MW of alternating current (A/C) of energy for consumer use.

7 On May 15, 2016 Potentia and DGL entered into a letter agreement (the "LOI"). The LOI set out the essential elements of their agreement with respect to the Barbados Project. Essentially, DGL would seek the approval of the ground-mount solar facility, develop it, and Potentia would ultimately purchase the Barbados Project from DGL.

8 Of note is the fact that, in 2016, Potentia and Deltro also entered into a number of agreements with respect to development of renewable energy projects in the Dominican Republic (the "DR Projects"). For reasons I will outline below, those projects are of relevance in this application, although this application only involves the Barbados Project.

9 Paragraph 4 of the LOI set out the purchase price and various milestones for which payments would be made by Potentia to DGL. The relevant portions are as follows [2]:

> **4. Purchase Price.**
>
> Subject to the terms and assumptions set out in this Letter, to be confirmed by the Lenders' Independent Engineer, the Purchaser would receive anunlevered rate of return of its negotiated annual interest rateof third party non-recourse Project debt financing plus 400 basis points which is agreed not to exceed 12% per annum. The unlevered rate of return calculated on the term of the PPA, without any consideration of option extensions, will determine the total value of the SPV. It is further agreed that any and all amounts in excess of the final unlevered rate of return after consideration of the final constructed cost of the Project will be paid to Deltro for Deltro's interest in the SPV and the Project ("Purchase Price"). For greater certainty the calculation of the Purchaser's return shall be calculated net of any applicable local forecasted cash taxes payable by the SPV. The characterization of such payment shall be as determined by the parties and set out in the Binding Agreements (as defined below). **The timing of payments shall be as follows:**
>
> i. *$500,000 USD on signing of this Letter;*
>
> ii. *$1.5 million USD on formal zoning and site approval from the Barbados Town and Country Planning;*
>
> iii. $1 million USD upon receiving a Generators license, with a legally binding prescribed electricity rate that the generator would receive for each kwh delivered to the Barbados electricity grid, from the Government of Barbados or entering into a PPA, whichever is earlier;
>
> iv. 50% of the total Purchase Price (inclusive of the progress payments) on Financial Close; and
>
> v. the balance of the Purchase Price on the Final Payment Date, meaning for greater certainty, the 15th business day after the Project's Commercial Operation Date is achieved and accepted by the Utility.
>
> **If Financial Close is not achieved within 12 (twelve) months following the date of execution and delivery of the Binding Agreements, then the Purchaser shall have the right to sell all of the acquired interest in the SPV back to Deltro for an amount equal to the progress payments, such that the parties shall be returned to the position they were in prior to the execution of this Letter. Deltro's obligation to repay the progress payments as provided above shall be secured in a manner acceptable to the Purchaser within commercially reasonable terms.** [Emphasis Added]

10 As can be seen from the above, the parties contemplated the execution of Binding Agreements. It is not disputed that the Binding Agreements were never executed. It is also not disputed that Financial Close was not achieved. This is of some importance because as can be seen from the emphasized portion of paragraph 4, if Financial Close was not achieved within 12 months following the delivery of the Binding Agreements then Potentia would have the right to sell all of its acquired interest in the Barbados Project back to Deltro for an amount equal to the aforementioned progress payments. Potentia rightfully does not base its claim in DGL's failure to achieve Financial Close, but rather on later events described below.

11 The first payment of $500,000.00 was advanced on May 30, 2016. Thereafter, a dispute arose between the parties as to whether DGL had received the necessary formal zoning and site approval from the Barbados Town and Country Planning Office ("BTCPO") as required by subsection (ii) above which would generate the second payment of $1,500,000.00.

12 In an effort to resolve the dispute as to whether formal zoning and site approval had been granted by the BTCPO for the Barbados Project, Potentia, Deltro and DGL, entered into another agreement (the "Amendment") on November 15, 2016. The Amendment specifically identified the dispute between the parties.

13 The Amendment also, amongst other things, contained the following relevant provisions:

> Whereas the parties have not reached an agreement as to whether the final formal zoning and site approval has been granted by the Barbados Town and Country Planning Office for the Project, or any other Barbados governmental body that has the authority to grant the said approval, in accordance with the *Town and Country Planning Act*, Cap. 240 (Barbados) or any other applicable legislation (the "Final Approval"); nonetheless, Potentia has agreed to advance the Second Progress Payment to Deltro Electric pending the receipt of the Final Approval, the whole subject to the terms and conditions of this letter agreement.
>
> 1. Advance of Second Progress Payment. Subject to Deltro Electric's acceptance of the terms and conditions of this letter agreement, *which terms shall take precedence over the terms of the LOI with respect only to these matters*, Potentia hereby agrees to advance to Deltro Electric the Second Progress Payment on the terms and conditions herein upon execution of this Letter and GSA (as defined below). On the date hereof, Deltro Electric shall provide to Potentia the wire transfer details of the bank account to which the Second Progress Payment is to be transferred.
>
> 4. Security. As security for the advance of the Second Progress Payment and as **security for all its liability or indebtedness hereunder**, Deltro Electric, has agreed to deliver prior to the date on which the advance of the Second Progress Payment is disbursed, a general security agreement ("**GSA**") providing for a charge and security interest on the Collateral (as defined in the GSA).
>
> 5. Final Approval Obtained. If, within twelve (12) months from the date of disbursement (the "Term"), the Final Approval is granted by the Barbados Town and Country Planning Office or any other Barbados government body that has the authority to grant the Final Approval, the Second Progress Payment shall be kept by Deltro Electric and the security interest granted pursuant to the GSA shall be released by Potentia promptly thereafter.
>
> 6. Final Approval Not Obtained. **If the Final Approval is not granted during the Term, Potentia shall have the right (but not the obligation) to demand full and immediate repayment of the Second Progress Payment by sending a twenty (20) business days written repayment notice to Deltro Electric**. In addition to its repayment request right set out in this Section 6, Potentia shall have the right to setoff any other progress payments or any other payments that may have become due after the date hereof and withheld pursuant to Section 7 below up to and against the Second Progress Payment (including by way of setoff), the security interest granted pursuant to the GSA shall be released by Potentia promptly thereafter. [Emphasis Added]

14 As can be seen from the above sections, the Amendment was to take precedence over the terms of the LOI with respect to the issue of Final Formal Zoning and Site Approval (the "Final Approval"). Deltro was to receive the Second Progress Payment of $1,500,000.00 and had to obtain Final Approval within 12 months.

15 Further, and importantly, the clock was now ticking as the Amendment provided, as per paragraph 6, that if Final Approval was not obtained within 12 months Potentia could demand repayment of the Second Progress Payment. Also, of significance, is that Deltro, in paragraph 4, agreed to provide security for the advance of the Second Progress Payment for all of Deltro's liability and indebtedness under the Amendment. As security, Deltro granted a general security interest over all of its assets in favour of Potentia by way of a General Security Agreement (the "GSA").

16 On November 15, 2016 Potentia and Deltro also executed the GSA which provided for the aforementioned charge and security over all of Deltro's assets. As noted, the GSA was to be released if Final Approval was obtained or if full repayment of the Second Progress Payment was made by Deltro should Final Approval not be granted.

17 Final Approval was defined in the Amendment and GSA as:

> " . . . formal zoning and site approval . . . granted by the Barbados Town and Country Planning Office for the Project, or any other Barbados governmental body that has the authority to grant the said approval, in accordance with the *Town and Country Planning Act*, Cap. 240 (Barbados) or any other applicable legislation."

18 The Barbados Project as defined in the LOI, the Amendment, and the GSA continued to be a "24 MW(DC)/20 MW(AC) ground-mount solar project".

19 After entering the Amendment and GSA the relationship between the parties continued to deteriorate.

20 On January 28, 2017 counsel for Deltro/DGL sent a letter to Potentia alleging that Potentia had repudiated a letter of intent dated July 28, 2016 between Potentia and Deltro concerning one of the DR Projects (the "DR LOI").

21 The letter stated in part:

> We are hereby putting you on notice that Potentia has repudiated the Letter including but not limited to engaging in surreptitious communications and negotiations with respect to the Monte Plata Solar Project (located in the Dominican Republic) and without the knowledge or consent of Deltro. Such activity has been purposely and intentionally concealed from Deltro and motivated in order deprive and divest Deltro of its lawful entitlements and interests. Your conduct is very serious and has caused inter alia a serious breach of trust and confidence and accordingly impacted all projects and agreements between the parties. As a result, Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or deliver any interests in any project under any agreement between the parties.
>
> Potentia shall immediately refrain from taking any further steps of any kind with respect to any of the projects listed in Schedule A of the Letter as well as any projects or region under any other agreements between the parties, including the Barbados Solar Project (St. Michael).

22 As can be seen from the above excerpt, Deltro took the position that it was no longer under any contractual or other obligation with respect to the Barbados Project, notwithstanding the fact that it did not take the position that Potentia had breached any of the agreements relating to the Barbados Project.

23 Counsel who was acting for Potentia at the time responded on February 6, 2017 stating, amongst other things, that Potentia had not breached or repudiated the DR LOI. Potentia's counsel further took the position that even if Potentia had breached the DR LOI there was no basis in law that would give Deltro the right to unilaterally terminate all of the existing contractual relationships with Potentia including those involving the Barbados Project.

24 The letter went on to state that Potentia accepted Deltro's repudiation of the Projects, including the Barbados Project and was treating the Barbados Project as being at an end. The letter also stated that the $2,000,000.00 that had been advanced pursuant to the LOI and the Amendment was now due and payable to Potentia by Deltro.

25 The letter further stated that since Final Approval had yet not been obtained and since Deltro obviously did not intend to proceed to Final Approval, an event of default had occurred within the meaning of the GSA. The letter concluded by stating that if Deltro failed to pay the $2,000,000.00 within 20 business days, as per the Amendment, Potentia would take steps to enforce its security interest under the GSA which could include appointing a receiver and taking possession of Deltro's collateral under the GSA.

26 Thereafter, on March 27, 2017 Potentia issued a statement of claim against Deltro with respect to the Barbados Project only.

27 On April 11, 2017, Deltro launched a lawsuit against Potentia with respect to only the DR Projects.

28 Twelve months after the Amendment was entered into Potentia took the position that Final Approval as defined in the Agreements had not been achieved. In addition to its statement of claim, Potentia then brought this application seeking the declaration that Deltro is indebted to it in the amount of $2,000,000.00 along with judgment, the appointment of the receiver and other related relief in accordance with the terms of the LOI and the Amendment (collectively the "Agreements").

ANALYSIS

29 The dispute between the parties raises a number of issues and Deltro has raised a multitude of defences with respect to these issues.

30 I will deal with each of the issues and the defences in turn below.

Is a trial of an action necessary?

31 I do not believe a trial is required to deal with the issues raised in the application. Further, it is my view, that this application can properly be dealt with notwithstanding the existence of the two actions.

32 Deltro submits that a trial of an action is required with respect to the issues surrounding the Barbados Project. In particular, Deltro submits that the issues with respect to the creation of the LOI, the issues concerning Final Approval and the issue of equitable set-off require a full evidentiary record and *viva voce* of evidence. I disagree. The parties have put before the court voluminous materials including hundreds of pages of cross-examination. Although some of the issues raised, as will be seen below, are complicated, I am of the view that they can be determined on the record before me.

33 In some cases the parties have made decisions not to provide certain evidence. For example, Potentia did not produce affidavit evidence from some current and former executives who had knowledge of the matters important to this application. Similarly, Deltro chose not to produce affidavit evidence from individuals who had information as to whether Final Approval had been obtained and took no steps to examine those representatives, current and former, of Potentia that did not swear affidavits in this application.

34 Those decisions, presumably tactical in nature, did not assist in determining the issues, but a suitable record exists. There are no significant credibility issues and the parties had every opportunity to address evidence concerning the factual issues in dispute.

Does this court have jurisdiction to hear this application?

35 Deltro submits that there are two reasons for which I lack jurisdiction to hear this application. Neither has merit.

36 First, Potentia previously brought a motion before Justice Hainey, the Team Lead for the Commercial List, to transfer both of the aforementioned actions that were commenced by way of statement of claim from the Civil List to the Commercial List. Justice Hainey allowed the transfer. Deltro submits that Potentia conceded in the transfer request that both actions were "inextricably linked". Deltro therefore submits that Potentia is attempting to make "end run" around these two actions by pursuing this application and is estopped from pursuing this application after conceding that the two actions were linked.

37 In this regard, Deltro submits that Potentia is seeking to inappropriately proceed with the application in priority to the other two actions.

38 Deltro argues the doctrine of judicial estoppel therefore applies and Potentia is estopped from now singularly proceeding with the application concerning the Barbados Project when it previously took the position that the two actions involving the Barbados Project and the DR Projects were inextricably linked. Deltro also further submits that, based on what transpired, I lack jurisdiction to hear the application.

39 I disagree. While I agree that it makes sense to have the two actions tried together since the parties are the same and the causes of action arise out of similar subject matter it must be kept in mind that they arise from different contracts as between the Barbados Project and the DR Projects. It must also be kept in mind that since the two statements of claims were issued the 12 months period during which Deltro was to obtain Final Approval has expired. Pursuant to the terms of the Amendment Potentia takes the position that it can now proceed to demand a refund and to appoint a receiver pursuant to the provisions of the Amendment and GSA. I agree with Potentia that there is nothing prohibiting it from doing so. If it was unsuccessful in this application, which it is not, the two actions would then proceed in the normal fashion. Nothing in Potentia's approach to this

litigation and the transfer to the Commercial List, in my view, estops it from proceeding with this application and it has not taken an inconsistent position. Further, there is no genuine issue concerning my jurisdiction in this regard.

40 Second, Deltro submits that I do not have jurisdiction to appoint a receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") or s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the "*BIA*"). Again, I disagree.

41 Deltro conflates the concept of jurisdiction with the issue as to whether a receiver ought to be appointed in the circumstances of this case.

42 In submitting that I do not have jurisdiction to appoint a receiver under s.101 of the *CJA* Deltro relies upon the decision in *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (Ont. S.C.J.). In that decision the court discussed the distinction between s. 101 of the *CJA* and s. 243 of the *BIA*.

43 I respectfully disagree that this decision assists Deltro. Indeed, as shown in the reasoning of R.S.J. Morawetz in *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965 (Ont. S.C.J. [Commercial List]), an application for the appointment of a receiver can be brought by way of application pursuant to s. 101 of the *CJA*. R.S.J. Morawetz relied on earlier Court of Appeal authority in this regard.

44 Deltro also takes the position that I cannot appoint a receiver pursuant to s. 243 of the *BIA* since Potentia has not established that Deltro is insolvent as required by s. 243(1)(a). I agree with Deltro that the record before me does not establish that Deltro meets the definition of an insolvent person. The evidence that Potentia relies upon has been disputed by Deltro and the evidence filed on the motion is not conclusive one way or the other. I am simply unable, based on the myriad of financial information and affidavit evidence filed, to determine this issue.

45 In any event, based on the provisions of s. 101 of the *CJA* and the provisions of the GSA, I have the jurisdiction and ability to appoint a receiver in the appropriate circumstances.

46 The question simply is whether this is an appropriate case.

47 The jurisprudence supports such a conclusion. In *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]), the British Columbia Supreme Court held that where a mortgagor provided an express covenant agreeing with the appointment of receiver in the event of a default the court should not ordinarily interfere with the contract between the parties.

48 Further, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) ("*Freure Village*") Justice Blair (as he then was) similarly noted the significance of a contractual right to a court appointed receiver in stating at para. 13:

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

49 Nothing in the *CJA*, or the *BIA*, for that matter, ousts the jurisdiction of this court to consider the issue as to whether a receiver ought to be appointed.

50 Further, in any event, the GSA, signed by the parties, provides that a receiver may be appointed. In these cases it is up to the court to determine, in the exercise of its discretion, whether it is more in the interest of all concerned to have a receiver

appointed. The relief is no longer considered to be extraordinary: *Freure Village*, at para. 13, and *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]), at para. 75.

51 Based on the above, I have jurisdiction to hear the application.

Did DGL obtain Final Approval as required by the Amendment?

52 DGL did not obtain the required Final Approval.

53 One of the most contentious disputes between the parties is whether Final Approval was obtained as required by the Amendment. As noted, the Amendment required that Deltro obtain Final Approval within 12 months of the $1,500,000.00 being advanced.

54 Final Approval is defined in the Amendment and GSA as, "the final formal zoning and site approval . . . granted by the Barbados Town and Country Planning Office for the Project, or other Barbados governmental body that has the authority to grant the set of approval, in accordance with the *Town and Country Planning Act*, CAP. 240 (Barbados) or any other applicable legislation."

55 At the outset I should note that the parties dispute who bears the burden of proof as to whether Final Approval was obtained. Deltro takes the position that Potentia bears the burden of proof since it is the applicant. Potentia submits that Deltro bears the burden of proof since it was the one that was charged with the responsibility of obtaining Final Approval.

56 In my view, Deltro bears the burden of proof. That said, however, it is immaterial as the evidence falls far short of establishing that Final Approval was obtained, notwithstanding who bears the burden of proof.

57 In support of its contention that Final Approval was obtained Deltro relies on the affidavits of its president, Mr. Del Mastro. In addition to his own statement that Final Approval was obtained, he relies upon a memorandum and three letters attached to his affidavit.

58 In my view, this documentation falls well short of establishing that Final Approval was obtained.

59 I will deal with the memorandum and each letter in turn.

The Chief Town Planner Memorandum dated October 21, 2016 (the "CTP memorandum")

60 The CTP memorandum was prepared specifically with respect to the Barbados Project. It is a lengthy 19 page document that provides an analysis of the application for the Barbados Project, the nature of the proposal, and other related information.

61 A review of the CTP memorandum, however, demonstrates that it did not provide Final Approval.

62 The CTP memorandum is addressed to the Prime Minister's Office. The memorandum clearly states in the first sentence that Deltro's application "is referred to the Minister for a decision in accordance with s. 18(1) of the *Town and Country Planning Act*". Further, at page 16, paragraph 10, it is clear that the Chief Town Planner who prepared the memorandum is recommending permission for Final Approval, but that the Final Approval was subject to 19 conditions. At page 16 of the CTM memorandum the Chief Town Planner then went on to conclude that he was "recommending permission". The Chief Town Planner went on to state that the matter is "referred accordingly".

63 Further, of significance, is that the CTP memorandum refers to permission being potentially granted for only a 10 MW solar farm and not the Barbados Project as defined between the parties as being a 20 MW solar project. Potentia agreed to invest in a 20 MW solar farm and never agreed to lower the scope of the project to a 10 MW solar farm [3] .

Letter of Michael Yearwood, dated May 10, 2017

64 Mr. Yearwood, a Barbadian lawyer, wrote to Mr. Del Mastro on May 10, 2017 (over three months after Deltro's lawyers wrote to Potentia advising that they were no longer under any contractual obligations with respect to the Barbados Project). The letter purports to provide an update concerning the Barbados Project. Although Deltro's materials do not make clear Mr. Yearwood's relationship to Deltro, it appears as though Mr. Yearwood was acting in some legal capacity for Mr. Del Mastro and/or Deltro and DGL.

65 In any event, the letter, which is unattached to any affidavit, when addressing the issue of Final Approval states as follows:

> Town and Country Planning completed their review of the application as of October 21, 2016, and sent notification that they had approved the application **subject to conditions** . . . There is nothing further required of Deltro in this regard, all requirements of the approval are satisfied . . . The approved land parcel at the Waterford site meets the full requirements for the 20 MW solar generation project as originally envisioned . . . [Emphasis Added].

66 As can be seen from the plain wording of the above excerpt the application was still "subject to conditions". In my view, this is not evidence of Final Approval. It is also consistent with the CTP memorandum which, approximately 6 months earlier, also noted that Final Approval was recommended subject to 19 conditions.

67 Overall, however, the letter largely consistent of hearsay and falls far short of constituting evidence of Final Approval.

Letter of the Honourable David Eastwick, Minister of Agricultural, Food, Fisheries and Water Resource Management, dated May 11, 2017

68 Although Minister Eastwick's letter was promising, it did not constitute formal approval. It was also obtained after litigation began.

69 In totality it reads as follows:

> Following the approval from the Town and Country Development Planning Office, the public land required a modification to its designation to include renewable energy as a public purpose. **That matter, which required consideration from the Cabinet, is being dealt with and I fully expect will be resolved very soon.**
>
> Keep in mind that an element of the planning approval was the consultation of all impacted departments and ministries, all of whom indicated their support for the project at Waterford. As such, there is no reason for any concern. I do understand that the processes and approvals related to the project have been taken quite some time, **but they are all but completed**. [Emphasis Added]

70 First, it is not clear what role Minister Eastwick played in the Barbados Project given the fact that he is the Minister of Agriculture, Food and Fisheries and Water Resource Management. In any event, Minister Eastwick in his rather brief letter refers to "the approval from the Town and Country Development Planning Office". It does not however elaborate on exactly what "approval" he is referring to. There is nothing in the letter to lead one to the conclusion that he is referring to the Final Approval.

71 In any event, the letter goes on to discuss a modification to "public land" that was necessary and had not yet been resolved and, as a result, all of the "processes and approvals" are "all but completed". In my view, even if it pertained to Final Approval of the Barbados Project this does not constitute evidence of a Final Approval and, conversely, BTCPO was still awaiting Final Approval from cabinet.

Letter of the Honourable Denis Lowe, Minister of Environment and Drainage, dated December 13, 2017

72 This letter was prepared almost a year after Deltro advised Potentia that the contract concerning the Barbados Project was at an end, several months after both statements of claim were issued and shortly after this application was issued.

73 In my view, this letter is also equivocal.

74 Minister Lowe, who appears to be the Minister in charge, on the critical issue concerning Final Approval wrote as follows:

> I am writing to confirm that I attended a dinner meeting at your invitation with representatives of DELTRO, as well as Mr. Fernando Joffre [4] from Potentia Renewables on Thursday, October 26, 2016.
>
> The meeting was convened to clarify and run through the remaining processes and approvals necessary to break ground on the 20 MW Solar Farm which DELTRO has been working to develop at the intersection of Waterford and ABC Highway in Barbados.
>
> Mr. Joffre asked a number of pointed questions which I was happy to answer and I recalled him making it clear, that he was pleased to learn of the progress that had been made. Of specific interest to him was the approval from the Town and Country Planning Department, something I had made clear that the project had obtained as the Chief Town Planner had actually signed off on the project the previous week **and sent notice to the Prime Minister of the approval**.
>
> This meeting followed a previous meeting that I had with the senior Potentia Renewable representatives, Messrs. Chris Asimakis and Jeff Jenner on April 8, 2016. During that meeting my colleague, the Minister of Energy, Senator Darcy Boyce, **indicated very clearly that he supported the project and intended to sign-off on the necessary Generators License once Town and Country Planning had issued their approval**. It was a good exchange that once again made clear that progress was made and underscored very broadly the government's support, while describing and explaining the remaining processes and approvals necessary for the project. [Emphasis Added]
>
> I trust this satisfies your request to confirm my meetings with representatives from Potentia as well as what was discussed and confirmed to them during these meetings.

75 As can be seen from the second paragraph of the letter the meeting was convened five days after the CTP memorandum was prepared and the second paragraph of the letter seems to refer to that memorandum. At that time there was no Final Approval since, as noted, the CTP memorandum was subject to several conditions and dealt with a smaller solar farm.

76 The letter also simply refers to a number of conversations that took place wherein Minister Lowe advises the representative of Potentia, Mr. Joffre, that the Chief Town Planner had signed off on the Project and sent notice to the Prime Minister for approval. This is clearly not what is stated in the CTP memorandum. There is also no evidence that in the five days between the time the CTP memorandum was prepared and the dinner meeting took place that Final Approval actually occurred and, given the contents of the CTP memorandum, it is impossible to draw such a conclusion. Also the letter is silent on the issue of the size of the project. The CTP memorandum, as noted, only referred to the smaller 10 MW solar project, not the 20 MW project contemplated by the parties.

77 Simply put, the letter simply refers to a conversation and not Final Approval of a 20 MW solar project.

78 The above three letters and CTP memorandum constitute essentially all of the evidence that the respondent was able to produce in support of Deltro's position other than Mr. Del Mastro's affidavit evidence which, simply states that Final Approval had been obtained without reference to any other documentation. When I asked counsel what further evidence Deltro would produce at trial, there was none proffered.

79 In my view, the above documents contained in Mr. Del Mastro's affidavit fall well short of establishing Final Approval had been obtained. The letters are inconsistent and equivocal. Deltro had plenty of time to produce cogent affidavit evidence or make efforts to provide *viva voce* evidence on this point. Instead, it chose to rely primarily upon a memorandum and three letters unsupported by accompanying affidavit evidence of the persons who prepared those documents [5].

80 In addition to the above, it is extremely significant that Deltro has been unable to, or has failed or refused to, produce any official documentation prepared by the government of the Barbados which provides for Final Approval. One would think that had Final Approval been achieved some sort of official document would have been prepared by a ministerial office or cabinet.

No such document has been produced. Instead, Deltro relies upon the aforementioned CTP memorandum and correspondence which, for the reasons above, is not persuasive.

81 Based on the above, there is no cogent evidence to support Deltro's position that the BTCPO or other Barbados governmental body granted Final Approval. The conditional approval of the BTCPO for a 10 MW solar farm was subject to ministerial approval. The correspondence that followed is equivocal and unhelpful.

82 It bears noting that Deltro submits that a trial is necessary to determine the issue of Final Approval.

83 Deltro could have attempted to adduce evidence by way of affidavit from the authors of the correspondence but chose not to do so. It did not also attempt to have *viva voce* evidence available at the hearing of the application. It simply submitted that a trial was necessary.

84 Last, I should note that both parties attempted to refer to online newspaper articles at the hearing of the application. I have not relied upon in these reasons. In my view, they are of no probative value. They were largely based on second and third hand information and innuendo.

Is Deltro obliged to repay the $2,000,000.00 pursuant to the terms of the LOI and the Amendment?

85 Deltro is obliged to repay the $2,000,000.00.

86 Deltro submits that it is under no obligation to repay either the $500,000.00 or $1,500,000.00 amounts advanced by Potentia.

87 In support of its position it relies upon sections 7 and 12 of the LOI which provide as follows:

> **7. Other Projects and Right of First Refusal.**
>
> The Purchaser and Deltro will work together in good faith to jointly develop solar assets, where the Purchaser will be the owner at commercial operation, in jurisdiction for Caricom member states and the Dominican Republic. In a situation where Deltro has independently of the Purchaser, developed a solar project and received a bona fide offer to purchase specific solar assets from a third party, Deltro shall grant the Purchaser a Right of First Refusal ("**ROFR**") to match the offer and the Purchaser shall have 30 days to do so. If the Purchaser matches an offer for the acquisition of specific solar power assets on substantially the same terms and conditions, Deltro will be obligated to sell to the Purchaser. In the event that the Purchaser declines to match the bona fide third party offer and Deltro does not execute the contemplated sale within three (3) months on substantially the same terms as disclosed to the Purchaser ROFR in respect to the project shall be reinstated as jointly developed project.
>
> **In the event that the Project does not reach commercial operations, any milestone payments paid to Deltro by the Purchase towards the Project's Purchase Price shall not be refunded by Deltro but may, at the Purchaser's sole option, be credited against any payments due to Deltro by the Purchaser in relation to any other transaction between the Parties.** [Emphasis Added]
>
> **12. Terminations.**
>
> This Letter may be terminated:
>
> a) by written notice of the Purchaser and Deltro;
>
> b) by the Purchaser upon written notice to Deltro to the Expiry of the Exclusivety Period;
>
> c) by Deltro upon within notice to the Purchaser at any time following the expiration of the Exclusivity Period; or
>
> d) 5:00 pm (EST) 90 days from the date of this letter, unless extended by mutual agreement between the Parties;

> provided, however, that the termination of this Letter shall not affect the liability of a party for breach of any of the provisions prior to the termination. Upon termination of this Letter, the parties shall have no further obligations hereunder, **except for their obligations which under their terms shall survive any such termination**. [Emphasis Added]

88 First, with respect to the $1,500,000.00 payment, the LOI does not apply. As noted, the $1,500,000.00 payment is governed by paragraph 1 of the Amendment which states that the LOI is superseded by the terms of the Amendment with respect to the Second Progress Payment of $1,500,000.00.

89 Further, if Final Approval is not obtained within 12 months from the time that the Second Progress Payment was made Potentia could demand repayment, failing which it could act upon the GSA.

90 As I have found Deltro failed to obtain Final Approval and it has failed to repay the $1,500,000.00 as demanded by Potentia.

91 This amount is therefore due and owing.

92 The first payment of $500,000.00 was not subject to the Amendment and one must therefore look to the terms of the LOI to determine whether it is refundable. In my opinion it is.

93 Deltro relies upon section 7 which states that if the Barbados Project does not reach commercial operations then the milestone payments are not refundable but may be credited to any other transactions between the parties. They also rely on section 12 which states that, if the LOI is terminated, Deltro would have no obligations to Potentia except obligations which under the terms of the LOI survive termination.

94 In my view, these sections do not assist Deltro. First, as noted in paragraph 4, Potentia was entitled to a refund of the Progress Payments if Financial Close was not achieved. It was therefore contemplated by the LOI that Potentia was entitled to a refund of the monies advanced if Financial Close was not achieved within 12 months following the execution of the Binding Documents. As further noted, the Binding Documents were never prepared but when one reviews the overall intention of the LOI and the subsequent Amendment the logical conclusion of the overall thrust of the two agreements was that if the Barbados Project did not come to fruition Potentia was entitled to a refund of the advance payments. In my view, this was the intention of the parties as revealed by the plain, literal and ordinary meaning of the words considered in the context of the two agreements as a whole.

95 As held in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.), where Rothstein J.A. stated at para. 47:

> The overriding concern is to determine "the intent of the parties and the scope of their understanding" . . . To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. [Citations Omitted].

96 In addition, where two clauses seemingly contradict, La Forest and McLachlin JJ. stated at para. 9 of *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.):

> Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: . . . In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: . . . A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms — or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term. [Citations Omitted]

97 While there is no doubt that the wording of section 4 and section 7 are somewhat contradictory in that section 7 provides for no refunds (whereas section 4 specifically contemplates them) it is my view that section 7, by its wording, is limited to situations where there are other projects in place between the parties. Since, as noted below, Deltro has repudiated its obligations to Potentia, it is questionable whether there are any other projects in place which would trigger the operation of section 7. In any event, I find that the overall intention of the contract was to permit Potentia to recoup its investment in the case of Deltro's non-performance. It cannot have been the intention of the parties to permit Deltro to keep Potentia's money with no apparent remedy should Deltro decide to abandon their end of the bargain.

98 Given the wording of paragraphs 4, 7 and 12 I conclude that it was the intention of the parties that Potentia could demand a refund of the monies advanced if the project was not concluded as per section 4 of the LOI and paragraph 6 of the Amendment. For the reasons noted, neither section 7 nor section 12 relieves Deltro from repaying the $2,000,000.00 advanced.

99 Further, and in any event, as I will note below, it is my view that Deltro repudiated the agreements and therefore Potentia is entitled to repayment of the $2,000,000.00. In particular, I find that Deltro cannot disavow its obligations to Potentia and then turn around and attempt to invoke provisions from the very same contract it had just repudiated (see: *Ebert v. Atoma International Inc.*, 1997 CarswellOnt 1478 (Ont. Gen. Div.), at para. 23 and *Ivey v. Oakrun Farm Bakery Ltd.*, 2002 CarswellOnt 2522 (Ont. S.C.J.), at para. 28.). In other words, Deltro cannot accept Potentia's money, repudiate the agreement, and then rely on a clause from the very same agreement as justification for keeping the money.

Did Deltro repudiate the Agreements with Potentia?

100 As stated above, the answer is "yes".

101 Just two months after the Agreement and GSA had been executed, Deltro took the position that it was no longer under any contractual obligations to Potentia with respect to the Barbados Project. It did not allege any breaches committed by Potentia with respect to the Barbados Project but instead relied upon breaches concerning the DR LOI. It later took the position that it was also not obligated to return the $2,000,000.00 that it had obtained from Potentia with respect to the Barbados Project.

102 It is important to note that, in the letter provided by Deltro's counsel to Potentia on January 20, 2017, it simply alleged that Potentia had repudiated the DR LOI. It never alleged that Potentia repudiated any agreements concerning the Barbados Project, but simply stated that it was no longer obliged to honour any contractual or other obligations to Potentia, including the Barbados Project.

103 It is also important to note that in the action commenced by Potentia against Deltro, Deltro in its statement of defence and counterclaim, in very general terms, without any particularity whatsoever, alleges that Potentia breached the Barbados Agreement. Tellingly, Deltro seeks no specific damages. These bald allegations are completely unsupported by any contemporaneous documentation prepared by the parties and, as noted, in the January 28, 2017 letter from counsel for Deltro/DGL to Potentia there are no allegations whatsoever that Potentia breached the Barbados Agreement. Rather that Deltro took the position that it was no longer obligated to perform under the Agreement concerning the Barbados Project given Potentia's conduct with respect to the DR Projects.

104 Deltro has also never attempted to resile from the position set out in the January 28, 2017 letter wherein it was stated that "Deltro is no longer under contractual or other obligation" to Potentia with respect to the Barbados Project.

105 As previously noted, the solicitors acting for Potentia at the time responded to Deltro's counsel advising in part as follows:

> We are counsel for Potentia Renewables Inc. (formerly Potentia Solar Inc.) ("Potentia").
>
> We have received your letter dated January 28, 2017, in which you assert that Potentia has "repudiated" the Letter of Intent between the Potentia and Deltro Group dated July 28, 2016" (the "DR Letter Agreement") and that as a result of that alleged repudiation. "Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or delivery any interests in any project under any agreement between the parties".

Potentia has not breached, let alone repudiated, the DR Letter Agreement or any other agreement with Deltro. Rather, Potentia has at all times conducted itself in good faith and in accordance with the terms of the agreements between the parties.

Even if Potentia had engaged in conduct that could amount to a breach of the DR Letter Agreement (which it did not), there is no basis at law on which such conduct could give Deltro the right to unilaterally terminate all existing contractual relationships with Potentia. Accordingly, by the positions taken in its letter dated January 28, 2017, Deltro, not Potentia, has now wrongfully repudiated the following existing contractual agreements between Potentia and Deltro:

- The letter agreement between Potentia Solar Inc. and Deltro Electric Inc. dated May 15, 2016 in respect of the ground-mount solar project in Barbados (the "Barbados Project"), as amended by the letter agreement dated November 15, 2016 providing for the advance by Potentia of a Second Progress Payment to Deltro (the "Barbados Letter Agreement"); and

- The DR Letter Agreement, and any other agreement in furtherance thereof or related thereto.

Potentia accepts Deltro's repudiation, and will now treat these Agreements as being at an end. In the circumstances, our client has no obligation to provide the undertakings referred to in the first two paragraphs of page 2 of your letter, including because Potentia has the right to mitigate the damages caused by Deltro's repudiation.

106 Deltro's counsel later responded by way of letter dated February 22, 2017 that Deltro had obtained Final Approval and asked for the GSA to be discharged. Potentia's counsel refused, issued a statement of claim and demanded to inspect documents with respect to Deltro's claim that it achieved Final Approval, which Deltro refused to produce.

107 Potentia takes the position that Deltro repudiated the Agreements concerning the Barbados Project. Deltro, rather curiously, takes the position it was actually Potentia that repudiated the agreements. In my view, Deltro's position is unsustainable in law.

108 In these circumstances Deltro repudiated its Agreements with Potentia. Potentia, therefore, was entitled to accept the repudiation which it did. As of that time the parties were discharged from their prospective obligations under the contract, but the prospective obligations embodied in the contract is relevant for the assessment of damages.

109 In this regard I rely upon the Supreme Court of Canada decision in *Langille v. Keneric Tractor Sales Ltd.*, [1987] 2 S.C.R. 440 (S.C.C.). In that decision the court held as follows:

24. In order to answer this question we must go back to first principles in the law of contract. If a party to a contract breaches a term of sufficient importance the other party has the right to treat the contract as terminated and consider himself discharged from any future obligations under it: Pigott Construction Co. v. W. J. Crowe Ltd. (1961), 27 D.L.R. (2d) 258 (Ont. C.A.), at pp. 269-72; Alkok v. Grymek, [1968] S.C.R. 452, at p. 456; Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 (C.A.), per Diplock L.J., at pp. 65-66, 71; Cehave N.V. v. Bremer Handelsgesellschaft m.b.H., the "Hansa Nord", [1976] Q.B. 44 (C.A.) An identical right arises where one party to a contract by words or conduct indicates to the other party that he does not intend to perform his contractual obligations. In the latter instance the first party is said to have repudiated the contract: see Sir W. R. Anson, Anson's Law of Contract (26th ed. by A. G. Guest), pp. 470-84; G. C. Cheshire, C. H. S. Fifoot and M. P. Furmston, Law of Contract (11th ed. 1986), pp. 521-33. The question at hand is whether the assessment of damages in a case of termination based on breach of a term of the contract should be any different from the assessment of damages in a case of termination based on repudiation.

. . .

28. The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations

> under the contract as from the date of termination but the prospective obligations embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), and *Moschi v. Lep Air Services Ltd*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.) Such is the law for contracts generally and it is this law which should apply equally to breaches of chattel leases.

110 Based on the above, Deltro repudiated its Agreements with Potentia concerning the Barbados Project by way of its January 20, 2017 letter, which repudiation was accepted by Potentia as per its counsel's letter dated February 22, 2017.

Is Potentia Entitled to Damages as a result of Deltro's Failure to Obtain Final Approval and its Repudiation?

111 Given Deltro's failure to obtain Final Approval, its breach and repudiation of the Agreements, Potentia is entitled to damages of $2,000,000.00.

112 This includes damages in the amount of $500,000.00 given the provisions of the LOI and Deltro's repudiation.

113 It also includes damages of $1,500,000.00 given the wording of the Amendment and given Deltro's repudiation. Further, and in any event, based on the decision in *Sattva*, I am of the view that even if Financial Close had been achieved Potentia would still be entitled to a return of the $2,000,000.00 advanced to Deltro given the wording of the LOI and Amendment and the repudiation.

Is Deltro Entitled to Set-Off?

114 Deltro is not entitled to set-off.

115 Deltro concedes it is not entitled to legal set-off but submits that it is entitled to equitable set-off. In this regard Deltro submits that the proceedings commenced by Potentia with respect to the Barbados Project are connected to the DR LOI.

116 In part, Deltro relies on the portion of paragraph 7 of the LOI which provides as follows:

> In the event that the Project does not reach commercial operations, any milestone payments paid to Deltro by the Purchaser towards the Project's Purchase Price shall not be refunded by Deltro but may, at the Purchaser's sole option, be credited against any payments due to Deltro by the Purchaser in relation to any other transaction between the Parties.

117 I do not accept that this creates the necessary linkage. While this portion of paragraph 7 does allow Potentia a credit of payments due between the parties in any other transaction (which would presumably include the DR LOI), it is a right that is afforded exclusively to Potentia. Neither the LOI nor the Amendment provides Deltro with any rights that would invoke any linkage between the two projects.

118 The Court of Appeal summarized the principles applicable to equitable set-off in the case of *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) ("*Algoma Steel*"), as follows:

> (a) The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
>
> (b) The equitable ground must go to the very root of the Plaintiff's claim.
>
> (c) A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
>
> (d) The Plaintiff's claim and the cross-claim need not arise out of the same contract.
>
> (e) Unliquidated claims are on the same footing as liquidated claims.

119 Both the Court of Appeal in *Algoma Steel* and the Supreme Court of Canada in *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.) referred with approval to the statement of Lord Denning, M. R. in *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (Eng. Q.B.):

> We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? . . . This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

120 In *Fasco Motors Ltd. v. General Refrigeration Inc.*, 1998 CarswellOnt 1827 (Ont. Gen. Div.) Justice Ground stated:

> . . . it is settled law that a party may not maintain a set-off claim based upon rights it may have arising from a contract to purchase different goods, under a different contract, at a different time, from the same vendor.

121 In *Cuddy Food Products v. Puddy Bros. Ltd.*, 2002 CarswellOnt 2722 (Ont. S.C.J.), the plaintiff had moved for summary judgment for the price of goods sold and delivered. The defendant counterclaimed and claimed equitable set-off based on an alleged breach of another contract between the parties. In finding that equitable set-off was not available to the defendant, Justice Lane opined:

> In my view there is no connection between these claims at all, beyond the identity of the parties. The claim of the defendant is based upon the 1999 agreement for the same of equipment to debone turkeys and release some of the product to the plaintiff. That agreement came to an end, for practical purposes, if not legal ones, with the termination/repudiation of it in November, 1999. The subsequent sales of chicken are not connected to that agreement. One may test this by asking, in Lord Denning's phrase, whether the defendant's claims about the deboning agreement "go directly to impeach" the plaintiff's claim for the price of the goods. Clearly not; the two are totally separate matters.

122 Deltro's claim for damages in connection with the DR LOI is not remotely connected to the Barbados Project. I accept Potentia's submissions that, pursuant to terms of the contract, the damages claimed by Deltro in the DR LOI involved different agreements between the parties and a different country. I can see no legal connection between the Barbados Project and the DR LOI except for section above which, as mentioned, provides no comfort to Deltro. As such, Deltro may not maintain a claim for set-off based on the rights that it might have arising from a different contract involving a different subject matter. There is no connection between the claims beyond the identity of the parties. In these circumstances, since they are two separate matters, equitable set-off is not allowed.

123 It also bears noting that, with respect to the DR LOI, Deltro sought an interlocutory injunction against Potentia from having any further involvement in the Project primarily on the basis that Potentia misused confidential information provided by Deltro.

124 Justice Belobaba in his reasons dated July 5, 2017 was critical of Deltro's position. In his reasons he concluded that Deltro had failed to show a *prima facie* case, let alone a strong *prima facie* case. He observed that Potentia, if it used any confidential information, did so "precisely as intended" for due diligence and project evaluations. He further found that there was no "end run around Deltro" and significantly:

> it appears that Deltro terminated its relationship with PRI Potentia at the 11th hour in large part because it was unhappy about the projected amount of the contingent fee that it would receive. [6]

125 Further, Deltro also has a counterclaim against Potentia in the action concerning the Barbados Project, which it relies upon in support of its assertions of equitable set-off. As previously stated, however, the counterclaim is a bald pleading and is devoid of any particularity and unsupported by contemporaneous documents. No specific damages or dollar amount is sought.

In this case, I agree with the decision of Hennessy J. in *Total Electrical Systems Inc. v. Collège Boréal d'Arts appliqués & de technologies*, 2011 ONSC 4586 (Ont. S.C.J.) ["*Total*"], where the court found that a bald allegation of set-off does not provide an arguable defence to a summary disposition proceeding.

126 While I appreciate that *Total* was determined in the context of a summary judgment, where the respondent has a positive obligation to put their best evidentiary foot forward, I find that the same principle applies in this context. It is Deltro that commenced the counterclaim and is now relying on it in support of their claim for equitable set-off. Despite this, they have provided no cogent evidence which can be used to support their allegations.

127 Based on the above jurisprudence Deltro has not satisfied me that it has a cross-claim which can be deducted.

128 Based on the all of the above, and the principles set out in *Algoma Steel*, Deltro is not entitled to equitable set-off.

129 It bears noting that Deltro took the position at the application that a trial was necessary to determine whether it is entitled to equitable set-off. Deltro submits that when considering the issues of equitable set-off the first three principles set out in *Algoma Steel* also require a complete record involving *viva voce* evidence.

130 I disagree. In my view, the pleadings adequately set out the basis for the Barbados Project and the DR LOI which I have concluded are separately and distinct and lack any tangible connection, particularly from Deltro's prospective.

131 Deltro could have provided all of its evidence in this regard by way of affidavit.

132 As case management judge, I am of the view that there was sufficient record before me to determine the issues of Final Approval, repudiation and equitable set-off and my decision to do so is in keeping with the principles in set out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) where the court has urged trial judges to dispose of matters in the most expeditious and economical way possible (see also: *BlackBerry Ltd. v. Marineau-Mes*, 2014 ONSC 1790 (Ont. S.C.J.); *Niro v. Caruso*, 2015 ONSC 7446 (Ont. S.C.J.)).

Should A Receiver Be Appointed Given The Above Findings?

133 A receiver should be appointed subject to terms.

134 Given the answer to the questions above, I am of the view that a receiver ought to be appointed where:

- Deltro willingly entered into a GSA over its assets.
- It failed to obtain Final Approval.
- It repudiated the Agreements.
- It has refused to repay any of the $2,000,000.00.
- It has never provided particulars of any claim it has against Potentia with respect to the Barbados Project.

135 Deltro submits, however, that it is in no way insolvent and has adduced financial documentation in support of this claim.

136 While I am skeptical of the strength of this documentation, particularly where many of its assets include intercompany loans which may be of a dubious nature given the fact that there are no financial statements or list of assets available for these related parties, Deltro should be provided with an opportunity to repay the $2,000,000.00 before a receiver is appointed.

137 I am therefore making the following order in this regard:

i. No receivership will be appointed for 30 days to afford Deltro the opportunity to repay the $2,000,000.00;

ii. after 30 days an interim receiver will be appointed to run the business but not to interfere with the business. It will control receipts and disbursements for 30 days to determine if a sensible plan of repayment can be made;

iii. if after 30 days the interim receiver determines that Deltro is incapable of repayment with a reasonable timeline Potentia is entitled to the order sought to have a receiver appointed over the assets, properties and undertakings of Deltro to affect a sale.

138 Deltro objects to BDO being appointed as receiver given the fact that the proposed partner at BDO indicated on his cross-examination that he had a personal relationship with one of the principles of Potentia and was currently engaged by Potentia to provide with advice.

139 In these circumstances I agree with Deltro that another receiver ought to be appointed who would be viewed as completely impartial, disinterested and able to deal with the parties in a fair manner.

DISPOSITION

140 Potentia is therefore entitled to the declaration it seeks that Deltro is indebted to it in the amount of $2,000,000.00 and is entitled to judgment and pre-judgment interest on that amount.

141 A receiver will be appointed as per the terms above.

142 Pre-judgment interest shall run at the rate of 12% per annum, to be calculated daily, as per section 2 of the Amendment.

143 With respect to the $500,000.00 pre-judgment interest will run as per the provisions of the *CJA*.

144 I can be spoken to with respect to the specific terms of the order.

145 If the parties cannot agree on costs they are to provide me with written submissions not to exceed five pages, excluding the bill of costs.

146 Brief submissions can be provided when the matter returns to settle the form of order.

Application granted.

Footnotes

1 All funds referred to in these Reasons are expressed in United States Dollars (USD).

2 Typographical errors are in the original text.

3 While it is true that the Barbados Project could be built in two phases of 10 MW each it is significant that there is no mention of overall approval for a 20 MW solar farm.

4 Mr. Joffre was a Senior Executive of Potentia responsible for Caribbean Projects.

5 Deltro did raise a number of other minor arguments, such as the fact it had ordered a generator. I have considered them but do not propose to deal with each in detail.

6 Endorsement of Justice Belobaba dated July 5, 2017. An appeal from this decision was dismissed on October 6, 2017.

Tab 4

2019 ONCA 779
Ontario Court of Appeal

Potentia Renewables Inc. v. Deltro Electric Ltd.

2019 CarswellOnt 15397, 2019 ONCA 779, 311 A.C.W.S. (3d) 240, 73 C.B.R. (6th) 165

Potentia Renewables Inc. (Applicant / Respondent) and Deltro Electric Ltd. (Respondent / Appellant)

M. Tulloch, L.B. Roberts, B.W. Miller JJ.A.

Heard: June 5, 2019
Judgment: October 2, 2019
Docket: CA C65744

Proceedings: affirming *Potentia Renewables Inc. v. Deltro Electric Ltd.* (2018), 2018 ONSC 3437, c, 62 C.B.R. (6th) 10, T. McEwen J. (Ont. S.C.J.)

Counsel: Fred Platt, Michael Mazzuca, for Appellant
George Benchetrit, Aryan Ziaie, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.i General principles
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles
Applicant power producer entered into agreement with respondent company for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged producer had repudiated letter of intent regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2 million USD due and payable from company — Producer sought declaratory relief as to amount owed and sought appointment of receiver of property and assets for company — Company was ordered to repay producer amount in Canadian currency sufficient to purchase $2 million USD and application judge appointed interim receiver (KSV) over company's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, producer would be entitled to have KSV appointed as receiver of all company's property — Company did not repay amounts ordered and KSV became receiver to ensure payment was made — Company appealed — Appeal dismissed — Appeal turned on application judge's interpretation of documents exchanged between parties and procedural underpinnings of proceedings initiated — Application was properly brought under R. 14 of Rules of Civil Procedure (Rules) — While in accordance with R. 14.06(3) of Rules, producer should have stated rule or statute under which application was brought, which was procedural, not substantive, requirement — Its omission did not invalidate application that otherwise complied in substance with R. 14.02 of Rules — It was open to application judge to conclude that documents proffered by company, including proposed fresh evidence, fell short of demonstrating that final approval had been granted — Application judge's interpretation was reasonable and was owed deference on appeal — Moreover, application judge was not obliged to accept fresh affidavits or re-open application — Application judge correctly

observed, prior to its request to re-open application, that company had never advanced position that it was not party letter of intent — Decisions for repayment and appointment of receiver if failure to pay were decisions that represented reasonable exercise of application judge's discretion as case management judge of Commercial List of Ontario Superior Court of Justice — There was no dispute that KSV qualified as receiver — Further, application judge understood that he was not obliged to limit receiver's liability to gross negligence or wilful misconduct — KSV's limited liability permitted orderly execution of its duties without concern that it would be subject to needless litigation.

Bankruptcy and insolvency --- Receivers — Appointment

Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2 million USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount and sought appointment of receiver of property and assets for company — Company was ordered to repay producer amount in Canadian currency sufficient to purchase $2 million USD and upon failure to repay within 30 days, application judge appointed interim receiver (KSV) over company's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, producer would be entitled to have KSV appointed as receiver of all company's property — Company did not repay amounts ordered and KSV became receiver to ensure payment was made — Company appealed — Appeal dismissed — Decisions for repayment and appointment of receiver if failure to pay were decisions that represented reasonable exercise of application judge's discretion as case management judge of Commercial List of Ontario Superior Court of Justice — There was no dispute that KSV qualified as receiver — Further, application judge understood that he was not obliged to limit receiver's liability to gross negligence or wilful misconduct — KSV's limited liability permitted orderly execution of its duties without concern that it would be subject to needless litigation.

Table of Authorities

Cases considered by *L.B. Roberts J.A.*:

Jethwani v. Damji (2017), 2017 ONSC 1702, 2017 CarswellOnt 3783, 46 C.B.R. (6th) 96 (Ont. S.C.J. [Commercial List]) — referred to

Western Larch Ltd. v. Di Poce Management Ltd. (2013), 2013 ONCA 722, 2013 CarswellOnt 16223, 117 O.R. (3d) 561, 313 O.A.C. 108, 21 B.L.R. (5th) 47 (Ont. C.A.) — referred to

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 150 O.A.C. 12, 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, *(*sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.)* 2002 C.L.L.C. 210-013, 55 O.R. (3d) 782, 2001 CSC 59 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 2.01 — referred to

R. 14 — considered

R. 14.02 — considered

R. 14.05(3)(d) — considered

R. 14.05(3)(g) — considered

R. 14.06(3) — considered

APPEAL by company from judgment reported at *Potentia Renewables Inc. v. Deltro Electric Ltd.* (2018), 2018 ONSC 3437, 2018 CarswellOnt 12310, 62 C.B.R. (6th) 10 (Ont. S.C.J.), ordering repayment to producer and failing repayment, appointing receiver over company's assets, undertakings and property.

***L.B. Roberts J.A.*:**

1 The appellant, Deltro Electric Ltd., appeals from the order that it repay to the respondent, Potentia Renewables Inc., the amount in Canadian currency sufficient to purchase $2 million USD and that, failing repayment, a receiver be appointed over the appellant's assets, undertakings and property.

2 For the reasons that follow, I would dismiss the appeal.

A. BACKGROUND FACTS AND PROCEDURAL HISTORY

3 As this appeal turns on the application judge's interpretation of documents exchanged between the parties and the procedural underpinnings of the proceedings initiated by them, it is useful to set out a brief summary of the background facts and procedural history.

4 The respondent's application was one of three proceedings arising out of the parties' failed business relationship in relation to the development of a ground-mount solar project in Barbados ("the Barbados project") and an unrelated renewable energy project in the Dominican Republic. The other two proceedings were actions that the respondent and appellant instigated against each other. The application judge was appointed to case manage these proceedings on the Commercial List of the Superior Court of Justice in Toronto.

5 The application judge determined that the appellant, as part of a group of related companies, controlled by Mr. Del Mastro, referenced as the "Deltro Group of Companies", had entered into a number of obligations with the respondent to finance and complete the Barbados project, as largely memorialized in the letter of intent ("LOI") dated May 15, 2016, and the amendment to the letter of intent ("ALOI") and General Security Agreement ("GSA") dated November 15, 2016. In accordance with those agreements, the respondent advanced $2 million USD in two tranches to the appellant: $500,000 USD under the LOI and $1.5 million USD pursuant to the ALOI and GSA.

6 By its counsel's letter on behalf of the "Deltro Group of Companies", dated January 28, 2017, the appellant advised the respondent that as a result of the latter's alleged misconduct in relation to an unrelated solar project in the Dominican Republic, "Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or deliver any interests in any project under any agreement between the parties." In its counsel's responding letter of February 6, 2017, the respondent denied the allegations of misconduct but accepted the appellant's repudiation of all agreements, including the Barbados project, and demanded repayment of the $2 million USD that it had advanced.

7 In its counsel's subsequent correspondence of February 23, 2017, the appellant advised that it had obtained final approval of the Barbados project, as required under the parties' agreements, and demanded that the GSA be discharged. Responding by its counsel's letter of February 28, 2017, the respondent did not accept that the appellant provided proper proof of the requisite final approval and advised that, in any event, it was not obligated to discharge the GSA in light of the appellant's repudiation that the respondent had accepted.

8 Taking the position that final approval had not been achieved and that the appellant had repudiated the LOI and ALOI, the respondent brought an application seeking the appointment of a receiver, as well as a declaration of the appellant's indebtedness and corresponding judgment.

The application judge's decisions

9 The application judge rejected the appellant's argument that final approval of the Barbados project had been obtained and concluded that the appellant had breached and repudiated its obligations and was therefore required to repay the respondent

the equivalent of $2 million USD. In the event that the appellant failed to make payment within 30 days, the application judge appointed KSV Kofman Inc. ("KSV") as an interim receiver over the appellant's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, the respondent would be entitled to have KSV appointed as receiver of all the appellant's property. The appellant did not repay the amounts ordered and KSV became receiver to ensure payment was made.

10 The appellant asked the application judge to re-open the application, arguing that the appellant could not have repudiated the LOI because it was not a party to it; and the appellant had not breached the ALOI because final approval of the Barbados project had been obtained, in support of which the appellant tendered as fresh evidence the affidavits of two former Barbadian ministerial officials.

11 The application judge refused to re-open the application. He precluded the appellant from raising the new argument that it was not a party to the LOI. He also rejected the fresh evidence, holding that it was, at best, equivocal as to whether final approval had been obtained, and would not therefore have changed the outcome of the application.

B. ISSUES

12 The appellant pursued the following issues on the hearing of the appeal:

1. The application judge had no jurisdiction to grant any of the relief requested on the application and should have directed it proceed to trial with the other two actions that were ordered to be heard together.

2. The application judge erred in finding that the appellant had failed to obtain final approval of the Barbados project and had repudiated the ALOI, and in failing to admit fresh evidence and re-open the application on this issue.

3. The application judge erred in finding that the appellant had repudiated and breached the LOI to which it was not a party, and in failing to re-open the application on this issue.

13 The appellant relied on its factum for the other discrete issues raised on this appeal, namely: the application judge erred in appointing KSV as receiver and in limiting KSV's liability as receiver to gross negligence or wilful misconduct.

C. ANALYSIS

(i) The application judge's jurisdiction

14 The appellant submits that the application judge should not have allowed the proceeding to be commenced by application as it was not authorized under r. 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellant also argued that the application judge lacked jurisdiction to appoint a receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that allows only for interlocutory orders to be granted. Moreover, no recourse could be had to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 that permits the appointment of a receiver where the debtor is insolvent because, as the application judge found, the appellant was not insolvent.

15 I would not accept these submissions.

16 The application was properly brought under r. 14 of the *Rules of Civil Procedure.* While, in accordance with r. 14.06(3), the respondent should have stated the rule or statute under which the application is brought, this is a procedural, not a substantive, requirement. Its omission does not invalidate an application that otherwise complies in substance with r. 14.02: see r. 2.01 of the *Rules of Civil Procedure*.

17 Here, the substance of the application was in respect of a matter under r. 14.05(3)(d): "the determination of rights that depend on the interpretation of a . . . contract or other instrument". This included the interpretation of the LOI, ALOI and GSA, about which there were no issues of credibility that required a trial to resolve. Rule 14.05(3)(g) permitted the respondent's

request for a "declaration", "the appointment of a receiver" and damages, as "other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application".

18 Moreover, there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *Bankruptcy and Insolvency Act*, for authority to appoint a receiver. Article 6.1(l) of the GSA specifically allows the respondent to "appoint, by an instrument in writing delivered to the [appellant], a receiver, manager or a receiver and manager (a "Receiver") . . . or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver", upon the appellant's default.

19 As a result, the application judge had jurisdiction to hear and determine the respondent's application and to grant the requested relief.

(ii) Final approval of the Barbados project

20 It is common ground that according to the LOI, the second progress payment of $1.5 million USD was payable by the respondent when the final formal zoning and site approval by the Barbados Town and Country Planning for the Barbados project was obtained. The dispute between the parties as to whether final approval had been obtained led them to enter into the ALOI and the GSA to secure the second progress payment.

21 There is also no dispute that the ALOI provided that the appellant could keep the second progress payment if, within 12 months of the date of the disbursement, final approval was granted by the Barbados Town and Country Planning Office or any other Barbados governmental body with the authority to grant the final approval. But, if final approval was not obtained within this 12-month period, the ALOI stipulated that the respondent "shall have the right (but not the obligation) to demand full and immediate repayment" of the $1.5 million USD progress payment. Following full repayment, the GSA would be discharged.

22 The appellant does not dispute that if final approval were not obtained within the stipulated period, it would be obliged to make the $1.5 million USD repayment. However, it maintains that the application judge made palpable and overriding errors in his interpretation of the various letters and affidavits of the former Barbadian ministers which, according to the appellant, established that final approval had been granted. The application judge erred, according to the appellant, in failing to admit the fresh evidence of the ministers' affidavits and in failing to reopen the application. As a result, the appellant argues, the GSA should have been discharged and there was no obligation to repay the $1.5 million USD progress payment.

23 I disagree.

24 First, it was open to the application judge to conclude that the documents proffered by the appellant, including the proposed fresh evidence, fell far short of demonstrating that final approval had been granted. His interpretation was reasonable and is owed deference on appeal. Moreover, he was not obliged to accept the fresh affidavits of the former Barbadian ministers or re-open the application.

25 It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened. Further, the case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.), at paras. 60-61.

26 I see no error in the application judge's refusal to re-open the application based on the fresh evidence of the former ministers' affidavits. As already noted, his conclusion that the fresh evidence would not have affected the outcome was reasonable. There is no basis to interfere with it.

27 Further and in any event, as the application judge found, regardless if final approval were ultimately obtained, that approval came too late because it followed the appellant's clear repudiation of the ALOI by its counsel's January 28, 2017 letter and

the respondent's equally clear acceptance of its repudiation. Upon the respondent's acceptance of the appellant's repudiation, the appellant's obligation to obtain final approval, among other obligations, came to an end but its obligation to repay $1.5 million USD arose.

28 I would therefore reject this ground of appeal.

(iii) Did the appellant repudiate the LOI?

29 Nor do I accept the appellant's argument that the application judge erred in finding that the appellant had repudiated the LOI when, according to the appellant, it was not a party to that agreement. Accordingly, the application judge was not required, as the appellant submits, to re-open the application to correct any error or to prevent a miscarriage of justice.

30 With respect to the appellant's request to re-open the application, the application judge concluded:

> The argument now advanced by Deltro was available when the matter first appeared before me. I have, however, reviewed my Reasons, the documents Deltro produced for this motion, and considered Deltro's argument. I see no basis to change the relevant findings in my Reasons. This is particularly so in light of Deltro's admission at this motion that the January 28, 2017, letter sent by counsel for the "Deltro Group of Companies" to Potentia included both/either Deltro and DGL.

31 As the application judge correctly observed, prior to its request to re-open the application, the appellant had never advanced the position that it was not a party to the LOI. Indeed, the artificial and technical distinction that the appellant now advocates for is not supported by the evidence or its pleadings. Rather, the appellant's correspondence with the respondent, its pleadings, and the appellant's supporting affidavits on the application establish that the appellant consistently represented itself and operated as part of an integrated group of related companies of which Mr. Del Mastro is the directing mind and will, and which was a party to the LOI.

32 In particular, in its statement of defence and counterclaim to the action commenced by the respondent, the appellant does not differentiate itself from the other members of the "Deltro Group of Companies". Instead, the appellant describes itself in para. 4 as a company that "together with its related companies, conducts business development, financing, construction, and operations of renewable energy projects . . . throughout the Caribbean". Importantly, in para. 6 of its statement of defence and counterclaim, the appellant expressly admits that it entered into the LOI:

> In response to Paragraphs 4 and 5 of the Statement of Claim, [the appellant] admits that it entered into . . . the [LOI] . . . with [the respondent], the former with respect to the Barbados Project.

33 This admission formed the basis for the appellant's claim for damages in paras. 25 to 28 of its counterclaim "related to [the respondent's] breach of contract of the [LOI] . . . for the greater of the expectation interest that [the appellant] would have reasonably expected to receive under the [LOI] but for [the respondent's] breach or in the alternative [the appellant's] reliance interest for funds it has expended in reliance of the said agreement".

34 The appellant has never sought to withdraw its admission, amend its pleadings or withdraw its counterclaim.

35 As a result, I see no error in the application judge's refusal to re-open the application.

36 Given the application judge's finding that the appellant had repudiated the LOI, it was reasonable for him to determine that ss. 7 and 12 of the LOI are of no assistance to the appellant. As the application judge stated: "Deltro cannot accept Potentia's money, repudiate the agreement, and then rely on a clause from the very same agreement as justification for keeping the money". I see no error in the application judge's conclusion.

(iv) KSV's appointment as Receiver and the exclusion of liability

37 The appellant submits that the application judge erred in appointing KSV as receiver because it has a conflict of interest given its ongoing professional relationship with the respondent's counsel in other receivership matters. Further, the appellant

submits that the application judge erred in limiting the receiver's liability to gross negligence or wilful misconduct in the formal order.

38 I would not give effect to these submissions. In my view, both these decisions represented a reasonable exercise of the application judge's discretion as a case management judge of the Commercial List of the Ontario Superior Court of Justice in Toronto.

39 Absent reviewable error, deference must be shown to the reasonable case management decisions of the highly specialized judges who sit on the Commercial List: see *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722, 117 O.R. (3d) 561 (Ont. C.A.), at para. 16. Established in 1991, the Commercial List of the Ontario Superior Court of Justice specializes in the hearing and case management of only commercial law cases, including receiverships. Matters on the Commercial List are governed by a Practice Direction that sets out special procedures specifically adopted for the hearing of matters on the Commercial List. The Practice Direction anticipates that the same judge who determines a substantive component of a proceeding will continue to hear all substantive matters. It is also expected that the proceeding shall be subject to a form of case management. See: *Consolidated Practice Direction Concerning the Commercial List*, effective July 1, 2014.

40 With that context in mind, I turn first to the appointment of KSV as receiver. I see no error in the exercise of the application judge's discretion to appoint KSV. There is no dispute that KSV was qualified to act as receiver. Moreover, KSV was independent; it had no connection with the respondent or the appellant. The fact that KSV has worked professionally with the respondent's counsel on other unrelated matters does not raise a disqualifying conflict or prevent it from complying with its professional obligations to the court. As the application judge reasonably observed, it is not unusual for professional law and accounting firms specializing in insolvency matters to have had previous or ongoing professional relationships. Finally, it must be recalled that KSV, as the court-appointed receiver, is an officer of the court, accountable to the court and all interested parties, including the appellant: see *Jethwani v. Damji*, 2017 ONSC 1702 (Ont. S.C.J. [Commercial List]), at para. 8.

41 With respect to the application judge's limitation of the receiver's liability in the receivership order, I similarly see no basis for appellate intervention.

42 The provisions of the receivership order, with which the appellant takes issue, are standard provisions that form part of the model receivership order prescribed by the Commercial List Users' Committee for the use of practitioners and the court. While not bound by them, counsel is expected to use the model orders developed by the Users' Committee as templates for the draft orders they put before the Court, appropriately adapted as the particular circumstances of each case require, with suggested revisions black-lined. This follows the direction in para. 57 of Part XVIII of the Practice Direction: "[t]he prior preparation of draft orders for consideration by the court at the end of a hearing will greatly expedite the issuance of orders. Where relevant model orders have been approved by the Commercial List Users' Committee, a copy of the draft order blacklined to the model order and indicating all variations sought from the model order must be filed."

43 The theory and approach behind the recommended model orders promote the Commercial List's purposes of efficiency, expediency and uniformity in commercial law matters, while recognizing that any model order serves only as a guide and must be tailored to suit the circumstances of each case before the court. While model orders are extremely useful to parties and the court, they are only tools and must be treated with care. They are not mandatory. Not every provision in the model orders will be suitable in every case. A judge must always appropriately exercise discretion to determine what provisions are reasonable in the circumstances.

44 For ease of reference, I have highlighted the impugned provisions in the text of para. 20 of the order, reproduced below:

> THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, **save and except for any gross negligence or wilful misconduct on its part**, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. [Emphasis added.]

45 The appellant objected to these provisions on the basis that there was no reason to limit the receiver's liability beyond negligence as the ordinary standard of liability to gross negligence or wilful misconduct. The application judge did not accept this submission and determined, in the circumstances of this case, that it was appropriate to include the standard limiting provisions of the model order.

46 In my view, the application judge's decision was reasonable. The application judge understood that he was not obliged to limit the receiver's liability to gross negligence or wilful misconduct. He did not indicate that he was obliged to follow the model order or that the model order was determinative. Rather, he properly exercised his discretion to include the impugned provisions based on the circumstances of the case before him.

47 Why then was it reasonable in this case to include the limited liability shield for the receiver?

48 It is a fair inference, in my view, that, without it, KSV may have refused to act as receiver in the circumstances of this case. A qualified receiver considering accepting an appointment can legitimately take into account whether the limited liability shield will be in place, as contemplated in the model order, to allow for the proper and orderly conduct of the receivership and avoid unnecessary and unjustified proceedings. As observed in the explanatory notes for the 2004 version of the model receivership order:

> the Receiver is not a legitimate target for the competing creditors . . . . [A] gross negligence floor has been continued as the standard of culpability in order to limit the ability of creditors or the debtor from seeking to mount a challenge to the reasonableness of every exercise of the Receivers' discretion.

49 The reasonable expectation of a limited liability shield is also reflected in the respondent's engagement letter to BDO, the proposed predecessor receiver, which provided that it would indemnify the receiver for all liabilities incurred in connection with the receivership, "excepting only any liabilities . . . that arise out of a wrongful act of [the receiver] which is proven to have been committed by it wilfully or out of gross negligence".

50 While it may not be appropriate or required in all cases, KSV's limited liability permits the orderly execution of its duties without the concern that it will be subject to needless litigation, especially in the circumstances of this case, with a recalcitrant debtor who has already objected to KSV's appointment. Recall KSV's mandate in this case: while the scope of its powers is broad, its narrow purpose is to ensure payment of the $2 million USD debt to the respondent, which the appellant has steadfastly refused to pay notwithstanding its liability under the LOI, ALOI and GSA. The limitation of KSV's liability to gross negligence and wilful misconduct lessens the likelihood that the appellant will interfere with the completion of the receiver's mandate.

51 That said, the limitation of its liability does not mean that KSV can act with impunity. KSV is a court-appointed receiver whose conduct of the receivership is subject to the court's scrutiny in which process the appellant will actively participate.

52 As a result, I see no basis to interfere with the provisions of the application judge's order that limit the receiver's liability to gross negligence and wilful misconduct.

D. DISPOSITION

53 For these reasons, I would dismiss the appeal.

54 In accordance with the provisions of the GSA, the respondent is entitled to its full indemnity costs that I would fix in the amount of $50,000, inclusive of disbursements and applicable taxes.

***M. Tulloch J.A.*:**

I agree.

***B.W. Miller J.A.*:**

I agree.

Appeal dismissed.

End of Document

Tab 5

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE:	**IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**
	AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED
BEFORE:	**MORAWETZ J.**
COUNSEL:	**D. Bish, for the Applicant, Tool-Plas**
	T. Reyes, for the Receiver, RSM Richter Inc.
	R. van Kessel for EDC and Comerica
	C. Staples for BDC
	M. Weinczok for Roynat
HEARD & RELEASED:	**SEPTEMBER 29, 2008**

E N D O R S E M E N T

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: October 24, 2008

Court File No.: CV-23-00705869-00CL

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 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

ROYAL BANK OF CANADA	- and -	**TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

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