Court File No. CV-24-00713253-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

- and -

WEST EGLINTON MEDICAL CENTRE LTD.

Respondent

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

BOOK OF AUTHORITIES

March 1, 2024

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I N D E X

Tab 1

1995 CarswellOnt 39
Ontario Court of Justice (General Division — Commercial List)

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

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

SWISS BANK CORPORATION (CANADA) v. ODYSSEY INDUSTRIES INCORPORATED and WESTON ROAD COLD STORAGE COMPANY

Ground J.

Heard: December 7 and 15, 1994
Judgment: January 31, 1995
Docket: Docs. 94-CU-80416, B 280/94

Counsel: *Frank Newbould, Q.C.* , for plaintiff.
Alan J. Lenczner, Q.C. and *Linda L. Fuerst* , for defendants.

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.D Irreparable harm
Debtors and creditors
XIII Loans
XIII.1 General principles
Financial institutions
VI Loans and discounts
VI.11 Miscellaneous

Headnote
Banking and Banks --- Loans and discounts — General
Creditors and Debtors --- General — Loans
Receivers --- Appointment — Application for appointment — Grounds
Secured creditors — Validity of loan — Where loan made by lending institution in contravention of statute or regulation, loan still enforceable.
Receivers — Application for appointment — Creditor under no obligation to prove that irreparable harm would result from failure to appoint receiver.
Two debtor companies were part of a group of companies carrying on a frozen food business. OI Inc. was a holding company and WR Co. was a limited partnership. The bank advanced a loan of $47.5 million to a partnership in which OI Inc. was a partner. In return it received assignments of mortgages and a fixed and floating charge on all of OI Inc.'s assets. The loan was payable on demand.
The bank also made a loan not to exceed $10,179,750 to WR Co. In return it received a collateral mortgage over two warehouses, a general security agreement over the assets and undertaking of WR Co. and guarantees by OI Inc. and JR, who controlled the group of companies.
The group of companies proposed a restructuring plan under which certain conveyances and transfers between the various companies were made. A master agreement provided that the restructuring plan would not be effected or would be reversed unless certain parts of the plan were settled to the satisfaction of the bank.

Both loans were in default. The bank brought a motion for the appointment of a receiver-manager of the property, undertaking and assets of OI Inc. and WR Co. The debtor companies argued that the bank was not entitled to the appointment of a receiver-manager because the loan to OI Inc. was illegal, having been made in breach of regulations under the *Bank Act* . They also argued that the bank was in breach of certain provisions of commitment letters related to both loans and in breach of its fiduciary duty to the companies as borrowers. Finally, they argued that, under s. 101 of the *Courts of Justice Act* (Ont.), a receiver-manager may be appointed by the court where it is just and convenient to do so. In the circumstances, they argued that it would be unjust and inequitable to make the appointment.

Held:

The motion was allowed.

There was no evidence to suggest that various transactions resulted in the security for the loans being in jeopardy or that the ability of the companies to repay the loans was materially affected in such a way as to require the appointment of a receiver-manager. However, defaults under both loans provided ample justification for the appointment of a receiver-manager. The bank was not required to establish that irreparable harm would result from the failure to appoint a receiver-manager. Further, under the master agreement the transfer of assets was reversed or deemed never to have taken place. Therefore, the bank would receive substantial benefit from the appointment of a receiver-manager.

There was no evidence to suggest that the companies would suffer undue or extreme hardship if a receiver-manager were appointed. The fact that a receiver-manager would not have the background and expertise of the companies' principal in running the business was not a reason to refuse the motion for appointment.

The loan to OI Inc. was not illegal because it was made by an institution that was not subject to the regulations under the *Bank Act* . Further, even if a loan is made in contravention of a statute or regulation governing the lending institution, the loan is still enforceable by the lending institution.

There was little evidence to establish a special relationship or exceptional circumstances such as would result in the bank owing the companies a fiduciary duty. The commercial transactions between the parties did not go beyond the normal relationship of lender and borrower. In any event, such allegations would have to be established in an action in damages against the bank. They did not constitute a reason to refuse to appoint a receiver-manager.

Table of Authorities

Cases considered:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (S.C.) — *referred to*

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (2d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 160, 49 B.C.A.C. 1, 40 W.A.C. 1 — *considered*

Sidmay Ltd. v. Wehttam Investments Ltd., [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (C.A.) , affirmed [1968] S.C.R. 828, 69 D.L.R. (2d) 336 — *followed*

Statutes considered:

Bank Act (being Pt. 1 of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40) [R.S.C. 1985, c. B-1].

Bankruptcy Code, 11 U.S.C.

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

s. 101

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) —

s. 88

***Ground J.*:**

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

Factual Background

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

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

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

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

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

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

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

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

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

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

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to exceed $10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

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

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

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

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

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

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

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

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

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

If:

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

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

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

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

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

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

Submissions

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

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

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

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

by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

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

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

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

Reasons

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

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be

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

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

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

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

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

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

31 With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

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

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

34 There is also very little evidence before this court to establish that this a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in *Hodgkinson v. Simms* , September 30, 1994, (unreported) [now reported at [1994] 9 W.W.R. 609]. At pp. 20-22 [pp. 629-630] of his reasons, LaForestJ. stated:

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith* . I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

> As I noted in *LAC Minerals* , however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...
>
> In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 ; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) , leave to appeal refused, [1982] 1 S.C.R. xi (note) ....

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27 [pp. 632-633]:

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

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

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

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

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

Motion allowed.

Tab 2

1988 CarswellSask 27
Saskatchewan Court of Queen's Bench

1988 CarswellSask 27, [1988] C.L.D. 1921, 11 A.C.W.S. (3d) 447, 71 C.B.R. (N.S.) 65

STANDARD TRUST COMPANY v. PENDYGRASSE HOLDINGS LTD.

Grotsky J.

Judgment: September 19, 1988
Docket: Saskatoon No. 2445

Counsel: *G. Scharfstein*, for applicant.
B. Wirth, for respondent.

***Grotsky J.*:**

Background

1 In the fall of 1987 a motion was launched on behalf of the applicant pursuant to the provisions of:

a. Sections 234(2) or 95 of the Business Corporations Act, R.S.S. 1978, c. B-10; or alternatively

b. Section 45(8) of the Queen's Bench Act, R.S.S. 1978, c. Q-1; or alternatively

c. Section 56(2) of the Personal Property Security Act, S.S. 1979-80, c. P-6.1

for an order appointing Annaheim Properties Ltd., with an office at the city of Saskatoon, in the province of Saskatchewan, as receiver-manager of all present and future undertakings, property and assets of the respondent which are presently located on premises legally described as Condominium Units Nos. 1 to 144, both inclusive, each of which said condominium units are included in Condominium Plan No. 82-S-23659 and therein more particularly described.

2 This application was, thereafter, on a number of occasions, adjourned from time to time. Ultimately it was heard concurrently with a number of other applications, in several other actions, brought at the suit of either Standard or Pendygrasse. Particularly, an application at the suit of Standard in Q.B. Action No. 1465 of 1988 wherein, amongst other things, Standard sought as against Pendygrasse, et al., an interlocutory mandatory injunction to compel those respondents to call, convene and conduct an annual general meeting in compliance with the statutory requirements of the Condominium Property Act, R.S.S. 1978, c. C-26, and applicable bylaws in that regard.

3 On 3rd June 1988 I delivered my reasons for decision (not yet reported) on the application for injunctive relief in Action No. 1465/88. I directed the respondents to call an annual general meeting. I further directed that notice of the meeting be given in accordance with the requirements of the Act and bylaws in sufficient time to permit the meeting to be properly convened, held and conducted by or before 30th June 1988.

4 In view of my disposition of the application in Action No. 1465/88, and my perceived expectations therefrom, in reasons delivered by me on 9th June 1988 in respect of the application for appointment of a receiver-manager in Action No. 2445/87 (not yet reported), I directed that this application be adjourned sine die with leave to either counsel, if so advised, on not less than five days' notice to the other, to return this application to the chamber's list.

5 On 8th September 1988 counsel for Standard gave notice to Pendygrasse through counsel of its intention to return its application for appointment of a receiver-manager to the chamber's list. In due course this matter came before me on 15th September 1988.

Conclusion

6 For the reasons which follow, this application is dismissed without any order as to costs.

The facts

7 The facts pertinent to this application, as they existed prior to June of 1988, are contained in my reasons for decision delivered on 9th June 1988. There is no need to repeat them. Suffice it to add to them that as directed by me, on 29th June 1988, pursuant to notices properly given (or properly waived) an annual general meeting of the owners: Condominium Plan No. 82-S-23659 ("the condominium association") was convened, held and properly conducted at the city of Winnipeg, in the province of Manitoba in accordance with the applicable bylaws and statutory requirements.

8 At this meeting, amongst other things, it was proposed, discussed, and ultimately unanimously agreed (passed) that "Bylaw Number 26 in Condominium Plan Number 82-S-23659", which had previously been passed on 18th August 1982, be repealed and replaced with a new Bylaw No. 26 to read:

> The Board shall consist of not less than one and not more than seven persons who are owners or registered mortgagees and shall be elected at each general meeting.

9 Following passage of new Bylaw No. 26, a discussion followed re specting the composition and election of a board of directors. Eventually, four names were put into nomination. Three of the nominees were identified as being from Standard Trust Company. The other was identified as being from Pendygrasse. In time it was agreed that a board of three would be sufficient at this time. In due course three persons were elected as the board. Two of those elected were proposed by Standard. The other elected member was proposed by Pendygrasse. These three persons are now the board.

The law

10 Generally, there are a number of principles which guide the court in determining whether it should exercise its discretion in favour of an application to appoint a receiver-manager. In appropriate circumstances one or more of a number of factors will be required to be shown. These include: (1) the fact that under its security instrument the applicant has not the power to appoint a receiver-manager; (2) the security may at the time of the application be, or have become, insufficient to secure the indebtedness; (3) the debtor may have broken or otherwise failed to carry out its obligations; (4) an appointment is necessary to protect the security from existing or realistically perceived jeopardy or danger; (5) the debtor's failure to account; (6) the applicant will suffer irreparable harm or injury if that which is sought is not granted; (7) there is a demonstrated urgency for that which is sought; (8) the costs (to the parties) of making the appointment sought, in the context that such an appointment might, if granted, lead to dissipation instead of preservation of the secured assets; (9) the balance of convenience is a factor to be given proper weight; (10) whether the proposed appointee is capable of carrying out the purpose for which the appointment is sought.

11 The foregoing is not an exhaustive list of factors to be considered but are some which come to mind on this application which, as required, is made in the context of an existing action.

12 Whatever may have been the situation prior to the annual meeting of 29th June 1988, that situation has now undergone a significant change. While, under its mortgage security, the applicant does not possess the power to appoint a receiver-manager, since 29th June 1988 it, through its members on the condominium association board of directors, now has significant control of the security. It, through its dominated board, has access to the records of the association; the board will now be in a position to determine how the complex ought to be managed; any previously complained of non-compliance by the mortgagor can be effectively addressed and dealt with. If the security is, or has been, in any danger or jeopardy, that concern too can now be addressed and dealt with.

13 In short, with the election and present composition of the condominium association new board of directors, all of Standard's previous alleged concerns can now, without this court's intervention, be adequately dealt with.

14 The renewal of this application is not founded upon any of the previously expressed concerns as delineated in my reasons delivered on 9th June 1988. Rather, this application is founded upon a letter recently received by Standard's solicitors from Pendygrasse's solicitors. It reads as follows:

> Enclosed is a copy of the Management Agreement between Duraps Corporation and the investors (hereinafter referred to as the "Management Agreement"). This Agreement was assigned by Duraps Corporation to Pine Hill Management Ltd. and must be read in conjunction with the Agreement between the Owners: Condominium Plan No. 82-S-23659 and Pine Hill Management Ltd. (hereinafter referred to as the "Condominium Corporation Agreement").
>
> For the record, the position of Pendygrasse Holdings Ltd. and Pine Hill Management Ltd. with respect to these agreements is as follows:
>
> 1. There is no basis upon which the newly-elected Board of Directors of the Condominium Corporation can legally or justifiably terminate the Condominium Corporation Agreement;
>
> 2. Even if the Board of Directors could terminate the Condominium Corporation Agreement, any new management agreement entered into would have to exclude those management functions provided for in the Management Agreement, since those functions are the subject of an agreement between Pine Hill Management Ltd. and the investors, and the Board of Directors has no legal right to interfere with that agreement;
>
> 3. If as a result of the actions of Standard Trust Company, either through the newly-elected Board of Directors or otherwise, Pine Hill Management Ltd. is prevented from carrying out its contractual duties under the Management Agreement with the result that it becomes disentitled to the remuneration provided for under that agreement, Pine Hill Management Ltd. will be forced to sue Standard Trust Company for the loss of all such remuneration and all other damages it suffers. As you will appreciate, the amount involved would be substantial.

15 I am satisfied that the renewal of this application has its real root in the above letter because in the supporting affidavit deposed to by Standard's mortgage manager on 7th September 1988 he deposes to the following:

> 6. By letter of June 30, 1988 the solicitors for Pendygrasse Holdings Ltd. wrote our solicitors advising of the legal repercussions and recourse of Pine Hill Management Ltd. and Pendygrasse Holdings Ltd. should the new Board of Directors of the Condominium Corporation terminate the Agreements exhibited hereto as Exhibits "C" and "D". Attached hereto as Exhibit "E" is a true copy of the said letter.
>
> 7. The appointment of a Receiver/Manager *appears necessary to preclude legal action* against Standard Trust Company and/or the Condominium Corporation *and that would be the only way the current management could be replaced until December 31, 1989 whereupon the Management Agreement will be terminated pursuant to paragraph 13 of Exhibit "C"*. [emphasis added]

Disposition

16 Clearly, Standard seeks to avoid possible future legal liability for anticipated future action by it, under the protection of a judicial umbrella.

17 Standard and Pendygrasse each have their own legal counsel. It is for their counsel to read, consider, interpret and thereafter to advise them of their legal duties, obligations and responsibilities arising under their various agreements with each other or others party to and/or affected thereby. If, under the existing contractual, or other relationship between them, the right exists to terminate Pine Hill Management Ltd. as the complex manager, then, whether or not that right can now, or should in the circumstances, be exercised by Standard, is a matter for its decision based upon the advice it receives from its own solicitors.

If the advice it receives and acts upon is called into question by Pine Hill Management Ltd., and/or Pendygrasse on its behalf, if indeed Pendygrasse is able so to do, or others entitled so to do on its behalf, and legal action follows, then, and only then, in the context of the nature of the proceedings brought for determination, will this court, if required so to do, be required to determine the issues then raised thereby.

18 In the circumstances, this application will be, as it is, dismissed.

Costs

19 When this application was first brought forward, and, indeed, until the meeting held on 29th June 1988, there appears to have been some basis for that which was being sought. However, since the 29th June meeting, any basis for the appointment sought has disappeared. In these circumstances, the renewal of the application appears not to have been necessary. As there has, therefore, to some extent been divided success on this application, and, as well, as neither counsel pressed the issue of costs, there will not be any order as to costs of or incidental to the application, either in its original form or as brought forward.

Application dismissed.

Tab 3

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00705869-00CL **DATE:** October 18, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC V.TEN 4 SYSTEM LTD et. al

BEFORE JUSTICE: Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Doug Smith	RBC	dsmith@blg.com
Roger Jaipargas	RBC	rjaipargas@blg.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Manjit Singh	TEN 4 SYSTEM LTD	MSingh@MSinghLaw.ca

ENDORSEMENT OF JUSTICE OSBORNE:

Chronology

1. The Applicant, RBC, seeks an order appointing msi Spergel Inc. as receiver over the assets and properties of the Respondents/Debtors Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. pursuant to section 243(1) of the *BIA* and section 101 of the *CJA*.

2. The full Application Record was originally served September 13, 2023. At the first return date of September 20, 2023, I scheduled the hearing of the Application on the merits for October 11, 2023 at the request of the Respondents, Debtors, to give them their requested additional opportunity to fully respond and to file responding materials. I imposed a timetable that required the delivery of responding materials by October 2.

3. The Application was heard on the merits as scheduled on October 11, 2023.

4. While the matter was under reserve, counsel for the Respondents wrote to the Court unilaterally to advise that a funding commitment had been obtained. The Applicant objected to the unilateral communication, but requested a short case conference before the Court to address the matter. That case conference proceeded today.

5. Just prior to the case conference, the Respondents filed supplementary materials including, as discussed below, the late-breaking commitment referred to above.

6. The Applicant maintains its position that the appointment of a receiver is appropriate. The Respondent urges the Court to consider alternatives as further described below.

The Test for the Appointment of a Receiver

7. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

8. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, 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. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

9. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

10. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

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

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

11. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

12. The issue is whether a receiver should be appointed in the circumstances of this case.

The Facts and Application of the Relevant Factors

13. Many, and indeed almost all, of the material facts are not in dispute. The Applicant relies on the Affidavit of Tro DerBedrossian sworn September 12, 2023 together with Exhibits thereto, and the Reply affidavit sworn October 4, 2023 together with Exhibits thereto.

14. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

15. Ten 4 is an Alberta Corporation extra provincially registered in Ontario, primarily engaged in the business of shipping, transportation and logistics. The director of Ten 4 is Nasir Mahmood. The other two numbered company Respondents are essentially holding companies that hold title to real estate properties.

16. RBC made available to the Debtors credit facilities. Those included an RBC visa business card agreement. The obligations of Ten 4 to RBC were guaranteed by each of the two numbered company Respondents and by Mr. Mahmood. His guarantee is for a maximum amount of $2.5 million plus interest.

17. As security for the advances thereunder, the parties entered into three general security agreements; one from each of the Debtors. Each GSA gives RBC the contractual right to appoint a receiver. The guarantees were entered into also. Mortgages registered on title to real property and assignments of rents and insurance were also given.

18. The Debtors are in default of their obligations. RBC has delivered demands and section 244 Notices of Intention. The defaults are material and have not been waived. As of August 31, 2023, Ten 4 was indebted to RBC in amounts as set out in the Application materials of approximately CDN $5,200,000 and USD $453,000. The numbered company Respondents are indebted in the approximate amounts of CDN $4.2 million and CDN $5.3 million respectively.

19. The concern of RBC has been exacerbated by the fact, of which it has just recently learned, that a writ of execution has been filed against Ten 4 on August 10, 2023 in respect of a judgment in favour of BVD Capital Corporation in the amount of $1,099,763.44, the enforcement of which would erode the RBC security.

20. In addition, the Respondents have committed covenant defaults in that, for example, Ten 4 is required to report to the bank on a monthly and quarterly basis with respect to aged accounts receivable and quarterly financial statements, neither of which were received on either of May 15, 2023 or August 14, 2023, as required. In addition, monthly reporting of borrowing base certificate, aged accounts receivables, payables in priority payables was not provided on September 30 as required.

21. RBC has therefore demanded payment of the obligations which are clearly (and admitted to be) repayable on demand according to their contractual terms. As stated above, demands and section 244 Notices were delivered, all in August, 2023. No repayment has been made by any of the Debtors or the guarantors.

22. RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

23. The Respondents rely on the Affidavit of Mr. Mahmood affirmed October 2, 2023, together with Exhibits thereto, the Supplementary Affidavit sworn October 10, 2023 together with Exhibits thereto, the Further Supplementary Affidavit of October 17, 2023 and the Affidavit of Abdul Ishaq sworn October 17, 2023 together with the one Exhibit thereto. I pause to observe that the last two affidavits were filed yesterday, without leave, in advance of the case conference today.

24. The Respondents advance the position that the triggering event for RBC was the fact that one of the primary customers of Ten 4, Northwest Carrier Ltd., paid certain outstanding accounts in the amount of CDN $1.1 million by cheque, and certain of those cheques were returned as NSF. All of this resulted in a trickle-down effect on the liquidity of the Respondents and their inability to pay RBC. The Respondents emphasized that this event was out of their control.

25. In addition, the Respondents say that Northwest subsequently paid approximately two thirds of the amount owing (CAD $720,840.57) but the balance remains outstanding. RBC submits and the banking records show that the relationship and transactions with Northwest are more complicated than indicated. Numerous different cheques from two different entities were sent. The returned cheques were effectively replaced on August 9 and 10, 2023, with the deposit to accounts of Ten 4 of a further series of 69 checks, totaling over $3,500,000 in the aggregate from two other entities that RBC believes to be connected to the Respondents or their principal. All of those 69 cheques were also all subsequently returned NSF between August 11 and August 14, 2023. This resulted in the overdraft position referred to above.

26. With respect to property taxes, the Respondents asserted, and subsequently filed supplementary materials confirm, that real property taxes had in fact been paid.

27. The Respondents stated that the accountant for Ten 4 was out of the country between July and September for vacation with the result that the company could not provide its August and September reports to RBC. In my view, it is not an answer to a contractual commitment to provide formal reports on the agreed-upon terms and by the agreed-upon deadlines, to say that an accountant was on vacation for some three months.

28. Concerningly to RBC, however, the Respondents disclosed for the first time in their responding materials filed just prior to the hearing of the Application that they are currently in the process of removing a charge registered by a non-party (Pride Truck Sales Ltd.) but encumbering the property of the Respondents in the amount of $6 million.

29. The Respondents maintain, however, that the $6 million charge against title to the property was registered in error, and that in fact it was supposed to be registered in a maximum amount of $3 million and moreover, the debt outstanding that is secured by the charge totals significantly less than that, and in any event, counsel for the Respondents advises that the Respondents are "in the process of settling that dispute". There is, however, no evidence in the Record beyond the admitted fact of the $6 million charge.

30. Finally, the Respondents submitted an appraisal report of the Property dated October 10, 2023 reflecting a current value with the result, the Respondents submit, that the bank is not at risk since there is ample equity in the property to pay out all indebtedness to RBC, even if that became necessary.

31. At the hearing of this Application on October 11, 2023, counsel for the Respondents advised that while the Respondents had no firm commitment for refinancing or a buyout, they were in active negotiations with third parties. No commitment was in the record.

32. As noted above, following the hearing, counsel to the Respondents wrote to the Court unilaterally to advise that commitment had in fact been obtained, resulting in the case conference today at the request of the Applicant. Also as noted above, further affidavit evidence was filed without leave yesterday, but I have considered it nonetheless.

33. As part of that evidence is what was represented by the Respondents to be a commitment letter which would fully satisfy the obligations to RBC. That commitment letter, dated October 12, 2023, is attached as Exhibit "A" to the affidavit of Abdul Ishaq.

34. However, and as submitted by counsel for the Applicant, the commitment letter is problematic in a number of ways:

    a. it contemplates first mortgage financing for the numbered company Respondents over the Property;

    b. the commitment, from Toronto Wire Solutions Corp., contemplates the numbered company Respondents as borrowers and a number of other parties, including Nasir Mahmood, to be joint and several guarantors;

    c. it contemplates a loan amount of $23,600,000 "in favour of [existing properties]", interest at 9% per annum payable monthly on account of interest-only in the amount of $177,000 per month or a one year term;

    d. it contemplates an advance date of January 16, 2024; and

    e. it includes various express conditions precedent to which the obligation to advance funds are expressly subject, including appraisals, inspections, surveys, "up-to-date Environmental Reports, satisfactory to the lender in its sole discretion" and other conditions.

35. In short, and having considered the commitment letter notwithstanding the manner and timing of its filing, it does not get the Respondents where they need to be. The commitment is highly conditional, and even if the conditions were met, it does not provide for funding until January next year. It simply does not answer the problem, let alone do so in any timely way.

36. I am satisfied that, considering all of the relevant factors in the circumstances of this case, that the appointment of a receiver is appropriate. Not only have the parties contractually agreed the appointment of a receiver in an event of default, which has clearly occurred here, but I am satisfied that it would otherwise be appropriate in any event.

37. The indebtedness is outstanding and payments are not being made. A receivership will provide for stability, transparency and orderly conduct under the supervision of a court-appointed officer that is necessary here. It may well be that the receiver negotiates a firm, unconditional and more expedient source of alternative funds, either with the proposed lender referred to in the commitment letter discussed above, or any other investor or lender. I would expect the receiver to investigate and explore all available options.

38. If those options bear fruit in the sense that there is a binding and unconditional commitment that will generate funds sufficient to pay out RBC inclusive of all indebtedness, fees, interest and costs, I would expect that the receivership could be terminated relatively quickly. But unless and until that occurs, a receivership is appropriate here.

39. There is considerable uncertainty about the status and amount of possibly competing claims. There is uncertainty about whether the value of the Property, even if accurate as reflected in the appraisal report, would be sufficient to pay out all claims. The fact that the mortgage is currently registered in the amount of $6 million (in addition to the security of RBC) suggests that there may not be a material surplus, if indeed there is any at all.

40. A receivership will allow for the orderly exploration, investigation and analysis of those claims, and the available assets, all in circumstances where potential chaos of competing claims, and the ensuing expensive litigation, can be avoided or minimized. It will also allow for the avoidance of further chaos and an analysis of the receivables and payables of the Debtors.

41. Counsel for the Respondents urges that the Court considered creative or more flexible relief, such as a standstill agreement and an order imposing terms that no further encumbrances could be placed on the Property of the Debtors without consent or order of the Court, and that the indebtedness to Pride secured by the mortgage is in question referred to above in the aggregate sum of $6 million, be limited to an amount of $2 million in the aggregate.

42. Even if I had the jurisdiction to impose such terms, which I am far from certain I do, I would decline to do so in the circumstances of this case. Such would amount to rewriting of the agreements between the Debtors and counterparties which are not represented here and in which in my view would not be appropriate in any event.

43. For all of these reasons, I am satisfied that the appointment of a receiver is not only just or convenient, as is the test, but indeed that it is just *and* convenient in the circumstances.

44. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Addendum: This Endorsement was amended on the consent of all parties on October 26, 2023 to remove a dollar figure in para. 30 per endorsement of that date. No other changes made.

Court File No. CV-24-00713253-00CL

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 -** **WEST EGLINTON MEDICAL CENTRE LTD.**

Applicant **Respondent**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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