Court File No. CV-21-00658361-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

ORBIT FREIGHT LTD.

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT, THE TORONTO-DOMINION BANK

March 9, 2021

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Tab 1

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

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

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

Tab 2

Courts of Justice Act, RSO 1990, c C-43.

Injunctions and receivers

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

Tab 3

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
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Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed
Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 35 O.A.C. 305, 62 D.L.R. (4th) 277, 1989 CarswellOnt 191 (Ont. C.A.) — referred to
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Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered
Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered
Toronto Dominion Bank v. Pritchard (1997), 154 D.L.R. (4th) 141, 104 O.A.C. 373, 1997 CarswellOnt 4277 (Ont. Div. Ct.) — considered
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s. 243 — referred to

s. 243(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

***Newbould J.*:**

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was

completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it 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. 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; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. 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: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
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> 12. 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

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

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

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
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> . . .
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> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether

each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek*.

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

Tab 4

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

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Alan J. Lenczner, Q.C. and *Linda L. Fuerst* , for defendants.

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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 5

CITATION: Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023
COURT FILE NO.: CV-13-10244-00CL
DATE: 20131203

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

APPLICATION UNDER S. 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c-B-3, S. 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c.C-43, and RULES 14.05(2), (3) (d), (g) and (h) OF THE *RULES OF CIVIL PROCEDURE*

RE: **BANK OF MONTREAL, Applicant**

AND:

SHERCO PROPERTIES INC., SHERK FARM LIMITED, COSHER PROPERTIES INC., AND DONALD SHERK, Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **S. D. Thom, for the Applicant**

R. B. Moldaver, Q.C., for the Respondents

HEARD: **NOVEMBER 4, 2013**

ENDORSEMENT

[1] This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

[2] Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

[3] The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

[4] The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

[5] Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

[6] Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

[7] In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

[8] As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

[9] Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

[10] Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

[11] In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

[12] The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

[13] The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and

Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

[14] In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

[15] At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

[16] Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

[17] As of September 9, 2013, interest arrears total approximately $124,346.79.

[18] In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;

(b) 325 Estate Court: $59,596.49.

[19] The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

[20] On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

[21] On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

[22] The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

[23] The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

[24] Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

[25] The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

[26] The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

[27] Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

[28] Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

[29] In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

[30] The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;

(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;

(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and

(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

[31] The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

[32] From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

[33] Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

[34] Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

[35] In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

[36] From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or

receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

[37] Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

[38] The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

[39] Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers to be just or convenient to do so:

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

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

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

[40] Section 101 of the *Courts of Justice Act* states:

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

[41] In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.).

[42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.

[43] Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investment Limited* (1982) 21 Sask. R. 14 (Q.B.) where Estey J. (as he then was) reasoned as follows:

> …that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

[44] Similar comments were stated in *Royal Bank of Canada v. Whitecross Properties Limited Saskatchewan*, (1984) 53 C.B.R. (N.S.) 96.

[45] Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

[46] Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

[47] I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

(b) the terms of the mortgages permit the appointment of a receiver upon default;

(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

[48] In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

[49] In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

[50] I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

[51] However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the

matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

[52] In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

[53] The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

[54] The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

[55] The Bank is also entitled to its costs on this application.

MORAWETZ J.

Date: December 3, 2013

Tab 6

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Table of Authorities
Cases considered:
Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*
Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, *(*sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*
Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*
Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*
Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*
Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*
Statutes considered:
Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101*referred to*
Rules considered:
Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it 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. 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; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. 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: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

Tab 7

2007 CarswellOnt 89
Ontario Superior Court of Justice

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.

2007 CarswellOnt 89, [2007] O.J. No. 84, 154 A.C.W.S. (3d) 381, 27 C.B.R. (5th) 1

TEXTRON FINANCIAL CANADA LIMITED (Applicant) v. BETA LIMITEE/BETA BRANDS LIMITED (Respondent)

Lax J.

Heard: January 3, 5, 2007
Oral reasons: January 5, 2007
Written reasons: January 12, 2007
Docket: 06-CL-6820

Counsel: Patrick E. Shea for Applicant, Textron Financial Canada Limited
Jeffrey J. Simpson for Proposed Receiver, Mintz & Partners Limited
Steven Weisz for Sun Beta LLC, Sole Shareholder, Beta Brands Limited
Sam Babe, Steven Graff for Proposed Purchaser, Bremner, Inc.
Michael Klug, Steven Bosnick for Bakery, Confectionary, Tobacco & Grain Millers International Union, Local 242G

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.B Preservation of assets

Table of Authorities

Cases considered by *Lax J.*:

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

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 2006 CarswellOnt 2541, 9 P.P.S.A.C. (3d) 185, 21 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 100 — referred to

s. 101 — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

s. 69 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 67 — referred to

***Lax J.*:**

1 The applicant, Textron Financial Canada Limited ("Textron") is the major secured creditor and operating lender of the respondent, Beta Limitee/Beta Brands Limited ("Beta Brands"). It moved under sections 100 and 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 and section 67 of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 for an order appointing Mintz & Partners Limited ("Mintz") as receiver and receiver manager of the assets of Beta Brands and for an order authorizing the Receiver to complete a sale of a portion of its assets ("the bakery business") to a purchaser, Bremner, Inc. and vesting the assets in Bremner. The Bakery, Confectionary, Tobacco and Grain Millers International Union, Local 242G ("the Union") strenuously opposed both orders. At the end of a lengthy hearing on January 3, I granted the receivership order, substantially in the form of the Commercial List standard form Order.

2 The Bremner transaction was scheduled to close on January 4. During the course of the hearing on January 3, I was advised that the closing had been extended to January 5. On January 4 and 5, the parties attempted to negotiate terms of an order approving the sale. These negotiations were unsuccessful and commencing on the late afternoon of January 5 and extending well into the evening, I heard the motion for approval. At its conclusion, I indicated that I was satisfied that the proposed sale was in accordance with the principles in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) and granted the requested order with reasons to follow.

Background

3 Beta Brands is a manufacturer of bakery and confectionary products for the Canadian and U.S. markets with its head office and manufacturing facilities located in a 5-storey building on Dundas Street East in London, Ontario. The company has operated from these premises since 1913, originally as the McCormick Manufacturing Co. Ltd and from 1997, by Beta Brands. Its sole shareholder is Sun Beta, LLC., a Delaware corporation. The company's assets consist of the Dundas Street plant and land, intellectual property, including various trademarks and formulas, accounts receivable, and inventory and equipment. The company currently has about 295 unionized employees and 30 salaried employees.

4 Beta Brands carries on three distinct manufacturing, marketing and sales businesses: (a) baked goods; (b) confectionary goods; and (c) panned chocolate products. Beta Brands also manufactured Breath Savers brand hard candies, but this division was sold in May 2006. A subsidiary, Beta Brands U.S.A. Ltd., carries on business in the United States marketing Beta Brands' products to U.S. customers, but Beta USA does not have assets or carry on business in Canada.

5 Pursuant to a Loan and Security Agreement dated as of December 17, 2004, Textron and Beta Brands entered into financing arrangements, which were amended as of August 29, 2005 and June 20, 2006. Pursuant to a Participation Agreement made as of August 29, 2005 and amended as of June 20, 2006, Sun Beta, LLC purchased from Textron an interest in certain of the advances made by Textron to Beta Brands. Almost from the beginning of the relationship between Textron and Beta Brands, the company found it difficult to operate within the Loan Facilities. The amendments and the Participation Agreement were intended to assist Beta Brands in overcoming its financial difficulties, but it continued to default on the financial covenants contained in the Loan and Security Agreements.

6 In August 2005, Beta Brands, in consultation with Sun Beta, determined that it needed to restructure its operations and considered the possibilities of selling its business to a third party in whole or parts, completing a strategic acquisition, moving to leased premises using existing or new equipment, or an orderly liquidation of the assets of the company. On September 19, 2005, it engaged Capitalink, L.C. of Coral Gables, Florida to investigate several of these options, most notably, marketing the business and/or each of its divisions to potential acquirers throughout North America and Europe.

7 The efforts of Capitalink resulted in the sale of the Breath Savers business in May 2006 for about $1.2 million. It was also successful in generating a proposal in March 2006 from Ralcorp Holdings, Inc. of St. Louis, Missouri, to purchase certain

of the assets of the bakery business at a purchase price of US$3 million. The Ralcorp proposal was not pursued at that time as the company decided to focus on a restructuring in an attempt to preserve the business and continue operations. Several restructuring alternatives were explored, but none were completed. No further proposals were received for the bakery business or for the other divisions.

8 In November 2006 and in the face of a pending liquidity crisis, company management resurrected discussions with Ralcorp with respect to the sale of the bakery business. Ralcorp was prepared to honour its March 2006 proposal and to complete the transaction through its subsidiary, Bremner. Also in November 2006, the company retained Mintz as its consultant to review the company's financial position, its short-term cash flow forecasts and to conduct a security position review. Mintz concluded that the realizations from the company's assets would be significantly lower if the Bremner transaction was not completed.

9 Textron has valid, perfected security over the property of the company and delivered the notices required under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 in late November. On December 13, 2006, an Asset Purchase Agreement ("APA") was executed between Beta Brands and Bremner. On the same day, the company entered into a Forbearance Agreement with Textron whereby Textron agreed to forbear on enforcing its security and provide Beta Brands with financing to complete the sale to Bremner.

Appointment of Receiver

10 The subordinated creditors did not appear and take no position. The Union opposed the appointment of the Receiver and submitted that its true purpose was to avoid or eliminate the contractual and/or legislative obligations for severance and termination pay, which are substantial.

11 In its materials, the Union indicated its intention to exercise its rights under the collective agreement and in the event of a sale to Bremner, to file an application before the Ontario Labour Relations Board under section 69 of the *Labour Relations Act, 1995*, alleging that there has been a "sale of a business" to the Receiver and/or Bremner and to confirm that the current collective agreement is binding on them. There is no reasonable prospect that a privately-appointed receiver could effectively and efficiently carry out its duties and obligations in the face of this. The Union will exercise its rights as it sees fit, but the appointment of a receiver whose activities will be supervised by the court is necessary to protect the interests of all creditors. It provides the greatest likelihood of maximizing the recovery for all creditors and will permit all stakeholders to have input into the best process to achieve this: see, *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) at paras. 11 and 13.

Sale to Bremner

12 Bremner is purchasing the trademarks associated with the bakery business, customer lists, and some, but not all of the equipment involved in bakery production. As well, the APA requires that Beta Brands deliver approximately $750,000 of inventory at cost to permit Bremner to service bakery customers while equipment is moved and production re-established at Bremner's facilities. Bremner is not purchasing the accounts receivable, any assets associated with the candy or panned chocolate businesses, the remaining equipment for the bakery business, the land or building.

13 The Union opposed the sale to Bremner on the basis that it eliminates or curtails the possibility of the sale of the entire business as a going concern and the prospect of recovery for the substantial severance and termination pay claims of its members. It objected to what it described as the "quick flip" nature of the transaction and the fact that it was left out of the process that culminated in the Bremner offer on December 13.

14 I accept that the Union was brought into this late in the day. It was short-served with notice of the application, but once served, it was provided with documentation and information regarding the company's attempts to restructure and market its divisions in an attempt to satisfy the Union that the sale process was the best option available to all parties. Before returning to court on January 5 for an order approving the sale, considerable efforts were made to achieve a resolution on terms acceptable to the Union, the purchaser and the secured creditors whose funds are at risk. The secured creditors were not prepared to forego

the Bremner sale in the faint hope that a third party purchaser can be found who is willing to operate the business and continue the employment relationship. The Receiver and the purchaser do not plan to fulfill this role. The gap could not be bridged.

15 The Union has received assurances that it will have a place at the table in formulating a strategy for the company's remaining assets. Beta Brands no longer has any ability to carry on operations or to fund a marketing effort. The proposed sale to Bremner will generate cash proceeds, some portion of which can be allocated to fund future marketing efforts. The Receiver intends to explore every reasonable option to market the remaining assets of Beta Brands and to maximize recovery for its creditors, and, will attempt to realize sufficient proceeds such that unsecured creditors, including employees, receive some payments of amounts owing to them. There is no evidence that any alternative purchaser for the bakery division or the company as a whole exists. Capitalink's marketing process, discussed more fully below, demonstrates that one is unlikely to surface. The employees stand the best chance of recovering as creditors if the Bremner sale is approved. Without it, there will be a shortfall in the millions of dollars.

16 Courts have looked to the four-part test in *Soundair* for guidance where the court is being asked to approve a realization process, whether or not there is a marketing process and sale conducted by a receiver: *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.*, 2006 CarswellOnt 2541 (Ont. S.C.J. [Commercial List]) at para. 37; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List]) at para.47. The court's duty is to consider:

> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) whether the interests of all parties have been considered;
>
> (c) the efficacy and integrity of the process by which offers are obtained;
>
> (d) whether there has been unfairness in the working out of the process.

17 From approximately September 2005 until November or December 2006, Capitalink engaged in a marketing process of the company's assets, including the bakery division. Potential purchasers were solicited for offers to purchase the entire company, but Capitalink also prepared separate confidential information memoranda ("CIM") for each division. Attached as an Appendix to the Receiver's First Report is a schedule provided to the Receiver by Capitalink that describes the parties Capitalink contacted and the discussions and meetings it held in its efforts to seek purchasers for Beta Brands, including its bakery business. The strategy employed by Capitalink was no different than the strategy typically utilized by receivers in selling assets of a business. As a result of its initial targeting of potentially interested parties, the bakery division CIM was distributed to nine different interested parties. The Ralcorp proposal in March 2006 was the only offer received.

18 The Receiver was not in a position to verify the recorded entries in the schedule provided by Capitalink and it was pointed out that two of the nine potentially interested parties who are believed to have received CIM'S are not referred to at all in the schedule, which is otherwise quite detailed. Nonetheless, based on its review of the schedule as well as other documents provided to it by the company and/or Capitalink and on the basis of discussions with company management, the Receiver believes that the marketing process as a whole conducted by Capitalink was fair and reasonable and that the assets were exposed to the market for a sufficient period of time.

19 The purchase price of $US3 million in the Bremner transaction is the same as proposed by its parent corporation in March 2006. This suggests that the purchase price is closer to true going concern rather than liquidation value. The equipment being purchased appears to be above appraised value. The Receiver is not satisfied that further marketing of the bakery division assets will result in higher net realizations or result in a reasonable chance of locating alternative willing purchasers or what alternative marketing efforts have not already been undertaken by Capitalink. I am satisfied that the Receiver would have proceeded no differently than Capitalink did and a further marketing effort would not be productive. I conclude that sufficient efforts were made to obtain the best price following a marketing process that was fair and reasonable and that it produced a provident sale.

20 Apart from the Union, all parties support the proposed sale. The Receiver recommends it. As the major secured creditors, Textron and Sun Beta have the largest financial stake and their support for the transaction is highly significant, even though Sun Beta *qua* shareholder may not see a penny from it. The realization schedules prepared by Mintz in its consulting capacity show that there is the potential to pay a portion of the unsecured claims with the Bremner sale and none without it. The company explored reasonable alternatives over a six-month period before reviving the Bremner transaction. I am satisfied that there was proper consideration of the interests of all parties and that there was no unfairness in the process.

21 It is true that the Union was given little time to attempt to bring forward other options, but it is also true that it brought forward no concrete proposals or offered any protection to the secured creditors in the event the sale was not approved and the purchaser walked away. There was some suggestion that a Brazilian candy company was prepared to purchase the entire business. When the Receiver investigated this suggestion, the Receiver learned that the possible purchaser had never presented an offer and in discussions with Capitalink, had indicated that it might be interested in purchasing the entire company, but for the same amount that Bremner was prepared to pay for only the bakery business.

22 The terms of the Bremner transaction contemplate an uninterrupted flow of products to assist in an orderly transition of the business. If the transaction is not completed and the company's operations are shut down, the perishable inventory, valued at approximately $750,000, is at risk of spoilage. More importantly, any interruption in supply will likely result in customers sourcing products from other suppliers, thereby significantly impairing value for the bakery trademarks and customer supply relationships in any potential future purchase as well as jeopardizing the value of the accounts receivable. Time is therefore of the essence. Any disruption to the timely and orderly removal of the purchased equipment and inventory will harm the creditors and seriously impair the best chance of maximizing value for all stakeholders.

23 While a going concern sale of Beta Brands would undeniably be in the best interests of the company's employees, a secured creditor is not required to continue to fund a business to satisfy a union's need for an employer. Embarking on a process to attempt to locate one is, in the opinion of the Receiver, not in the interest of creditors and the Receiver does not recommend this for reasons I have already discussed. The court must place a great deal of confidence in the Receiver's expert business judgment for reasons elaborated by Farley J. in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]) at paras. 3-8. On this basis, the material filed and the comprehensive submissions of counsel, I am satisfied that all of the *Soundair* principles are met in this case, that the sale is advantageous to the creditors and other stakeholders of Beta Brands and that it should be approved.

24 A final comment on procedure. On the initial attendance, the Union disputed that the application should be heard on the Commercial List in Toronto. In my view, there was sufficient connection to Toronto to make it appropriate to hear it, particularly in view of its urgency. A number of members of the Union travelled from London to Toronto on January 3 and again on January 5. Textron acknowledged the burden this placed on them, on the Union and on the Union's counsel who are all from London. While consent, unopposed, and purely administrative matters in this receivership will continue to be heard on the Commercial List in Toronto, any proceeding that involves the Union and is opposed by it is to be heard in London. I appreciate the co-operation of the Regional Senior Justice in West Region for facilitating this. Counsel have been informed how to schedule these matters.

Application granted.

Tab 8

1993 CarswellOnt 248
Ontario Court of Justice (General Division)

Josephine V. Wilson Family Trust v. Swartz

1993 CarswellOnt 248, [1993] O.J. No. 2735, 107 D.L.R. (4th) 160, 16 O.R. (3d) 268, 23 C.B.R. (3d) 88, 43 A.C.W.S. (3d) 1061, 6 P.P.S.A.C. (2d) 76

JOSEPHINE V. WILSON FAMILY TRUST v. JEFFREY D. SWARTZ

R.A. Blair J.

Judgment: November 18, 1993
Docket: Doc. B56/93

Counsel: *Bryan C. McPhadden*, for applicant.
Symon Zucker, for respondent.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.d Dealings with security after bankruptcy
X.1.d.i By secured creditor
X.1.d.i.A Realization of security
Personal property security
II Attachment of security interest
II.1 Elements
II.1.a Debtor's interest
Personal property security
II Attachment of security interest
II.1 Elements
II.1.b Giving of value
Personal property security
VI Remedies
VI.4 Sale or realization
VI.4.a Notice
VI.4.a.iv Miscellaneous

Headnote

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Personal Property Security --- Remedies — Sale or realization — Notice — General

Personal Property Security

Secured creditors — Notice of intention to enforce security — Secured creditor serving notice of intention after debtor defaulting in payments under general security agreement — Debtor's proposal to creditors defeated and debtor adjudged bankrupt — Secured creditor appointing receiver without serving new notice of intention to enforce security — New notice not required — Section 244 of Bankruptcy and Insolvency Act requiring such notice only where creditor intending to enforce security against property of insolvent person — Bankrupt not being insolvent person — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 244.

A family trust loaned money to a dentist and took a general security agreement ("GSA") over the undertakings, property and assets of the dentist. The GSA was registered under the *Personal Property Security Act* (Ont.). The dentist defaulted on his payments. The trust served a notice of intention to enforce its security and appointed a receiver. When the dentist refused to acknowledge the appointment of the receiver, the trust obtained a court order appointing the receiver. The parties later entered into a forbearance agreement under which the receivership was terminated and the dentist was permitted to continue his practice under certain conditions of payment. The dentist again defaulted, and the trust served another notice of intention to enforce its security. The dentist made a proposal to his unsecured creditors. When the proposal was defeated, the dentist was adjudged bankrupt. The trust re-appointed the receiver without any further notice to the dentist.

The trust brought a motion for a determination of its entitlement to realize upon its security. The dentist argued that the trust was not entitled to enforce its rights under the GSA because it had failed to deliver a notice of intention to do so after the bankruptcy.

Held:

The trust was entitled to enforce its security.

The purpose of the notice of intention under s. 244 of the *Bankruptcy and Insolvency Act* is to provide the debtor with an opportunity to react, negotiate and reorganize its financial affairs. Once the debtor has become bankrupt, there is no need for such notice. Section 244 requires that notice be given where the secured creditor intends to enforce a security against the property of "an insolvent person". Section 2 of the Act defines an "insolvent person" as one "who is not bankrupt". Therefore, a secured creditor who intends to enforce a security against the secured property of a bankrupt need not deliver a s. 244 notice.

The relationship between a dentist and his or her patients is a fiduciary one. Therefore, the patients ought not to be placed in the position of having to rely upon the proper conduct of a receiver or upon a court order in receivership to protect their privacy. There is also a public interest in preserving and maintaining a dentist's ability to gain access to the information contained in the patient records. Those public interest factors override the business interest in facilitating financing by having the records available. Therefore, the trust was not entitled to seize or have access to the dentist's dental charts and records.

Table of Authorities

Cases considered:

Bacher v. Obar (1989), 28 C.C.E.L. 160 (Ont. H.C.), [1989] O.J. No. 1392 [affirmed (February 10, 1993), Docs. CA 12500/81, 626/89 (Ont. C.A.)] — *considered*

Confederation Leasing Ltd. v. Pickering (April 19, 1993), Browne J. (Ont. Gen. Div.) [unreported] — *referred to*

McInerney v. MacDonald, [1992] 2 S.C.R. 138, 137 N.R. 35, 7 C.P.C. (3d) 269, 93 D.L.R. (4th) 415, 12 C.C.L.T. (2d) 225, 126 N.B.R. (2d) 271, 317 A.P.R. 271 — *considered*

Mitchell v. St. Michael's Hospital (1980), 29 O.R. (2d) 185, 19 C.P.C. 113, 112 D.L.R. (3d) 360 (H.C.) — *referred to*

Statutes considered:

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

s. 2 "insolvent person"

s. 244

Cancer Act, R.S.O. 1990, c. C.1.

Health Care Accessibility Act, R.S.O. 1990, c. H.3.

Health Disciplines Act, R.S.O. 1990, c. H.4 —

s. 41

Personal Property Security Act, R.S.O. 1990, c. P.10.

Regulations considered:

Health Disciplines Act, R.S.O. 1990, c. H.4 —

Dentistry,

R.R.O. 1990, Reg. 547,

s. 37(30)

Health Disciplines Act, R.S.O. 1990, c. H.4 —

Medicine,

R.R.O. 1990, Reg. 548,

s. 27(22)

Motion by secured creditor for determination of its entitlement to realize upon security.

***R.A. Blair J.*:**

1 The Josephine V. Wilson Family Trust advanced funds to Dr. Jeffrey Swartz, a dentist, and took as security a General Security Agreement over "the present and future undertaking, property and assets of the debtor". Dr. Swartz has defaulted in his obligations to the Trust, and to other creditors, and, in fact, has been adjudged a bankrupt as a result of a failed Proposal un der the *Bankruptcy and Insolvency Act*. These Motions concern the Trust's entitlement to realize upon its security and, if it is so entitled, the scope of the reach of that remedy.

2 There are two central issues, namely:

1) whether the Trust, as a secured creditor, is required to give a further Notice of Intention to enforce its security, under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, chapter B-3, as amended (the "BIA"); and, if the Trust is entitled to act under the General Security Agreement,

2) whether that Security Agreement extends to the dental charts and patients' records of Dr. Swartz.

Background

3 The Security Agreement was duly registered under the *Personal Property Security Act*, R.S.O. 1990, chap. P.10 ("PPSA"). It secures a remaining outstanding indebtedness of approximately $300,000.

4 Default occurred in payments on the indebtedness, which originally stood at approximately $600,000, and the Trust demanded payment in December, 1992. On February 10, 1993, the Trust served Notice of Intention to enforce its security on Dr. Swartz. On February 25th, it appointed A. Farber Consulting Ltd. ("Farber") as receiver. After Dr. Swartz refused to acknowledge the appointment of the receiver, the Trust obtained a court order from Mr. Justice Ferrier appointing Farber as receiver under the Security Agreement and the provisions of the PPSA.

5 The Receiver apparently conducted the dental practice of Dr. Swartz for a short period of time, until on March 5, 1993, when a Forbearance Agreement was entered into between the Trust and Dr. Swartz. Pursuant to that Agreement, the receivership was terminated — an Order was obtained from O'Driscoll J. to that effect — and the doctor was permitted to continue his practice, subject to certain conditions of payment and the implementation of certain controls. Included in the Agreement was a consent to an Order appointing a receiver, in the event of default.

6 Dr. Swartz made payments, but allegedly fell into default under the Forbearance Agreement within a short period of time. The Trust served another Notice of Intention to enforce its security under the BIA. Subsequent defaults are alleged, as well.

7 On May 20, 1993, Dr. Swartz file a Notice of Intention to make a proposal to creditors. Subsequently he made a Proposal to unsecured creditors only. The Proposal was defeated on September 30, 1993, resulting in the bankruptcy of Dr. Swartz.

Events Leading Up to the Crisis at Hand

8 The Trust re-appointed Farber as receiver on October 29, 1993, with no further formal notice to Dr. Swartz, and with instructions to carry on the dental practice.

9 There is a conflict on the materials as to whether there was some form of agreement between Dr. Swartz and Mr. Wilshire, on behalf of the Trust, during the Proposal negotiations that, if the Proposal failed and Dr. Swartz went bankrupt, the Trust would co-operate in helping him maintain the integrity of his practice. Dr. Swartz says there was such an agreement, that he was to be able to continue working at the office at a certain salary, and that no one was to interfere with his management of the office. The Trust denies any such agreement.

10 In any event, relations broke down completely this past week. The Trust alleges that Dr. Swartz has appropriated or, at least. redirected cheques generated by the practice contrary to the instructions of the Receiver, and that he has generally interfered with the ability of the Trust to exercise its remedies as a secured creditor. Dr. Swartz alleges that the Trust has breached the foregoing "agreement" and that the Receiver has not acted in a "commercially reasonable" manner and has instituted procedures that are contrary to the Regulations under the *Health Disciplines Act*, R.S.O. 1990, chap. H.4.

11 On November 9, 1993, matters came to a head. The Receiver purported to appoint Dr. Max Nieman as a supervising dentist of Dr. Swartz' practice. A representative of Farber attended at the offices and advised Dr. Swartz that he could no longer work there. Dr. Swartz was told to vacate the premises. He was not to take his dental charts and patients' records with him. Dr. Swartz refused to leave. On the advice of his solicitor he told the Farber representative that *he* was trespassing and that *he* would have to leave. The Farber representative refused to go. The police were called, but in the end cooler heads prevailed.

12 Counsel agreed that *everyone* would leave the office and that the office would simply be closed until a court Order could be obtained resolving the situation. In this fashion, the matter came on before me, late in the day on Wednesday, November 10th. Given the urgency of the situation, I made an interim Order at that time but reserved my final decision for further consideration. The substance of the interim Order was as follows:

> 1) The Trust was permitted to exercise its rights under the General Security Agreement in terms of a draft Order that had been consented to as part of the Forbearance Agreement, but subject to the following;
>
> 2) Dr. Swartz was permitted to continue his practice and the treatment of his patients at the premises in the ordinary course of his practice, pending the release of my further decision;
>
> 3) Dr. Swartz was entitled to retain control of his medical records but was not to remove them from the premises, pending that further decision.

13 This is that further decision.

Notice of Intention to Enforce Security under the BIA

14 Dr. Swartz argues that the Trust is not entitled to enforce its security rights at this time because a fresh Notice of Intention to do so has not been delivered subsequent to his bankruptcy. He submits that the earlier pre-bankruptcy Notice of April 1993 is of no effect because the default was in effect waived or forgiven by the Trust as a result of its accepting further payments under the Forbearance Agreement from Dr. Swartz and as a result of the Trust's participation in the negotiations surrounding the Proposal.

15 It is not necessary to determine whether the April Notice remains effective, because, in my view, the giving of such a Notice, in these circumstances, is unnecessary once the debtor has gone into bankruptcy.

16 The purpose of the section 244 Notice of Intention to enforce security under the BIA is to provide the debtor with an opportunity to react, to negotiate, and to reorganize its financial affairs. There is no need for this protection once the debtor has become bankrupt. Moreover, section 244 itself only requires the advanced notice to be given by a secured creditor "who intends to enforce a security on all or substantially all of [the property] of *an insolvent person*". An "insolvent person", as defined in

section 2 of the BIA, "means a person *who is not bankrupt* ...". It follows, in my opinion, that a secured creditor who intends to enforce a security against the secured property of a bankrupt, need not deliver the section 244 Notice.

17 For the foregoing reasons, and because of the Consent which had been executed by Dr. Swartz in connection with the earlier Forbearance Agreement for use in the event of further default, I made an Order on Wednesday evening, November 10, 1993, granting the Trust the right to enforce its General Security Agreement. I reserved my decision with respect to whether the right to enforce the security could extend to the seizure and sale of the dental charts and patients' records of Dr. Swartz as part of the sale of the goodwill of his practice, however.

The Dental Charts and Patients' Records

18 The law is well established that a patient's medical records prepared by a physician are the physical property of the physician, but that the information in the medical records "belongs" to the patient in the sense that it is confidential and the patient is entitled to have access to and to copy all of the information in the medical file, in the absence of an Order to the contrary: see, *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.

19 *McInerney* is a case involving the records of a medical doctor. I see no difference, however, between a physician and a dentist in this respect. They are each "practitioners", under the *Health Care Accessibility Act*, R.S.O. 1990, chap. H.3, and members of a health discipline under the *Health Disciplines Act*, R.S.O. 1990, chap. H.4. They are each subject to similar duties of confidentiality and to similar legislative provisions and regulatory controls under the *Health Disciplines Act* and the Regulations thereunder. Both are required to keep records. Both are prohibited by their governing regulations from disclosing patient information without the patient's consent, unless required to do so by law: see R.R.O. 1990, Regulations 547, s. 37(30), and 548, s. 27(22). Breach of these obligations constitutes professional misconduct. Information provided by a patient to a dentist can be every bit as sensitive as that provided to a physician. In my opinion, the same principles apply to the treatment of dental charts and records as apply to the treatment of medical records of physicians.

20 With this in mind, I turn to a further analysis of the law and of the particular dilemma which is raised by the Motions before me.

21 In the world of debtor-creditor relations, and from the perspective of arranging financing for a dental or medical practitioner's business, the law as articulated above creates some difficulties. If the records themselves are indeed the physical property of the practitioner, then they are, in that sense, things capable of being pledged — for whatever they may be worth — and seized. On the other hand, if the contents of the records are totally confidential between the patient and the doctor — as they are — can it be said that the records are in their true nature the "property" of the practitioner for purposes of pledging?

22 Other questions arise, too. Are there policy considerations which affect the use of confidential dental or medical records as assets or property to be pledged in the course of raising financing for a practitioner's office or other endeavours? One must recognize that dentists and other health care professionals need to have access to sources of financing, just like other businesses. If they are handicapped in this quest by an inability to proffer what might be viewed as an important aspect of their goodwill — the health records that would accompany the all-important list of patients — will their recourse to such financing be hampered?

23 Perhaps a good point of departure in considering these questions is the nature of the relationship between a doctor and patient. It is a fiduciary relationship. It is a relationship in which "trust and confidence" is placed in the doctor: see, *McInerney, supra*, at p. 149. Certain duties arise from this special relationship. In *McInerney*, La Forest J. characterized them, in this context, in the following fashion (at pp. 149-150):

> Among these are the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. ... When a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected.

24 Can this "legitimate expectation" be respected, and protected, if the records containing the patient's confidential, personal, and sometimes highly sensitive information are utilized as an asset by the dentist for purposes of raising financing? In my view,

it cannot. For public policy reasons, it seems to me, patients should not be placed in the position of having to rely upon the proper conduct of a receiver or upon a protective court Order in a receivership to ensure that their privacy is maintained. As the Task Force on *Privacy and Computers* (1972) stated, at p. 14 (as cited in *McInerney, supra*, p. 148), the patient has a "basic and continuing interest in what happens to this information, *and in controlling access to it*" (emphasis added). Patients and their records should not become pawns in a financial-realization chess game between dentist or doctor and secured lender.

25 This brings me to a consideration, then, of the quality of the interest of the patient in the dental charts and records. Some medical textbooks and cases speak in terms of the patient having a "propriety" or "property" interest, or something akin to such an interest in such records: see, for example, *Mitchell v. St. Michael's Hospital* (1980), 112 D.L.R. (3d) 360 (Ont. H.C.). Mr. Justice La Forest felt it unnecessary, in *McInerney, supra*, to characterize the patient's interest in such a fashion, preferring instead to protect the patient through the fiduciary concept and to characterize the patient's interest in the information contained in the records as *a "trust-like 'beneficial interest' "* (p. 152).

26 I find this latter concept helpful in analyzing the true quality of the dental records from the point of view of their utilization as pledged assets. It is an impossibility, in this context, to disengage the physical records themselves — which the Supreme Court of Canada has said are the "property" of the practitioner — from the contents of those records — which give them their true character, and in which the Supreme Court of Canada has said the patient has a "trust-like 'benefi cial interest' ". In my view, while the dental records may be the physical property of the dentist, they are property affixed with an inseverable trust of confidentiality in favour of the patient. Just as trust property is not property belonging to a bankrupt, the dental records are not property which belongs to the dentist for purposes of pledging as part of his or her "undertaking, assets and property".

27 I am fortified in this conclusion, as well, by the proviso in Regulation 547, s. 37(32) that it constitutes professional misconduct for a dentist to fail to continue to provide professional services to a patient until the services are no longer required or until the patient has had a reasonable opportunity to arrange for the services of another member. Pledging his or her dental records as security could well place a dentist in a position, in the event of default under the security document, where compliance with this Regulation would be jeopardized.

28 While this latter proviso, together with professional misconduct rule prohibiting disclosure of a patient's dental information and the general preservation of secrecy stipulation in s. 41 of the *Health Disciplines Act*, cannot in themselves deprive what is otherwise pledgable property of that characteristic, they are supportive of a construction which views the records as property affixed with a trust preserving the confidentiality emphasized by them.

29 In an unreported decision released by endorsement on April 19, 1993, Mr. Justice Browne came to a similar conclusion in the result, holding that medical records were not subject to seizure by reason of the confidentiality requirements of the Regulation referred to above: *Confederation Leasing Ltd. v. Pickering and Nix*.

30 Mr. Justice Saunders dealt with the issue of patient's records in a dispute arising out of the breakup of a dental practice, in *Racher v. Obar*, [1989] O.J. No. 1392 [reported at 28 C.C.E.L. 160 (H.C.)]. The following remarks, at p. 13 of the Quicklaw Report [pp. 174-175 C.C.E.L.], have a bearing on the issue here:

> Patients have a right to choose their dentist. *They are not property to be bought and sold like inventory*. Each dentist had the right to provide service to anyone who requested it.
>
> Patient records present little difficulty. On termination, Dr. Obar was entitled to obtain from Bo-Jay (the office management company) the records of patients he had treated who continued to required his services. The patients do not have a right to their records but in my opinion, the dentist must have that right. *Lack of access to records could severely compromise treatment*. (emphasis added)

31 The comment that patients do not have a right to their records may not be entirely accurate — at least in terms of access — as a result of the subsequent decision of the Supreme Court of Canada in *McInerney, supra*. However, Mr. Justice Saunders' observation that "lack of access could severely compromise treatment" by the dentist, and his statement that patients "are not

property to be bought and sold like inventory" are reflective of the characteristics of a dentist's practice and the records generated by it which bolster the view that I have taken regarding the seizure of those records by a secured creditor.

32 I recognize that my conclusion in this regard may have adverse business implications for the financing of professionals such as dentists. However, there is a public interest in preserving and maintaining the confidentiality of information imparted by a patient to his or her doctor, and the right of the patient to control access to it. I note that where the right to control access is lost, it is lost only where the Legislature has specifically provided for statistical or other identifiable information to be made available without consent, such as, for example, the various professional governing bodies and institutions or organizations involved in research or the gathering of statistics: see, for instance, the *Health Disciplines Act* and Regulations thereunder; the *Cancer Act*, R.S.O. 1990, chap. C.1; and the various other legislative provisions referred to in 14 C.E.D. (Ont. 3rd) Title 72, paragraph 151.

33 As well, there is a public interest in preserving and maintaining the doctor's ability to continue to have access to the information contained in the records in performance of the "continuing care" obligation imposed by the Regulations. These public interest factors override the business interest in facilitating financing by having the "physical property" of the records available for that purpose.

34 This is not to say, of course, that a dental practice cannot be sold, and that the dental records may not be dealt with at all as part of the sale of goodwill in that process. Presumably vendor and purchaser could co-operate in sending a notice of the transaction to the vendor's list of patients, together with a request that a signed consent be returned if the patient wishes to be treated by the purchasing doctor or instructions as to the disposition of the patient's file otherwise if that is not the patient's wish. Nor is it to say that a security document could *never* be drafted in a fashion that would enable the values outlined above to be preserved. It is not for me to speculate in that regard. The General Security Agreement entered into between the Trust and Dr. Swartz in the case at bar, does not fall within this latter category, however.

Conclusion

35 In the result, I am satisfied that the Trust is entitled to exercise its remedies under the Security Agreement in the manner ordered previously. It is not entitled, in the course of doing so, however, to seize or to have access to the dental charts and records of Dr. Swartz' patients. Dr. Swartz shall retain custody and control of those charts and records and shall be entitled to utilize them in continuing to treat his patients. In the circumstances, unless the parties can agree to the contrary, I think it is best if he vacates the office premises, and I accept the alternative put forward in his affidavit that he "vacate the office in an orderly manner within 10 days, ensuring the best interest of the practice, the patients and the Trust". The 10 days will run from the date of this Order.

36 Order accordingly. The parties may make written submissions as to costs within the next two weeks.

Order accordingly.

End of Document

Tab 9

1995 CarswellSask 5
Saskatchewan Court of Queen's Bench

Delron Computers Inc. v. Peat Marwick Thorne Inc.

1995 CarswellSask 5, [1995] 5 W.W.R. 174, 127 Sask. R. 287, 31 C.B.R. (3d) 75, 53 A.C.W.S. (3d) 475

DELRON COMPUTERS INC. v. PEAT MARWICK THORNE INC. and ITT INDUSTRIES OF CANADA LTD.

Gerein J.

Judgment: February 3, 1995
Docket: Doc. Saskatoon 341/95

Counsel: *G.A. Meschishnick*, for applicant.
J.M. Lee, for respondent ITT Industries of Canada Ltd.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.d Dealings with security after bankruptcy
X.1.d.i By secured creditor
X.1.d.i.A Realization of security
Headnote
Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security
Secured creditors — Realization of security — Creditor sending notice of intention to enforce security and letter of proposal — Debtor accepting terms of proposal and defaulting again — Creditor appointing receiver — Debtor's application under s. 248(1)(b) for order restraining creditor and receiver from realizing on security being dismissed — Creditor not lacking requisite intention to enforce — Letter of proposal not showing lack of intention but merely giving debtor opportunity to rectify default — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 248(1)(b).
The applicant obtained an inventory line of credit from ITT. The parties also entered into an agreement whereby an accounts receivable line of credit was provided to the applicant to finance its business operations. To secure repayment of all indebtedness, the applicant granted to ITT a security interest in all of its present and after-acquired personal property. Upon default, ITT would have the power to appoint a receiver. The security interest was registered.
A few months after receiving the financing, the applicant was in breach of the covenants in the agreement. ITT delivered a "Notice of Intention to Enforce Security", a letter demanding repayment, and a letter of proposal suggesting a plan for maintaining the credit for two months, which the applicant accepted. Despite accepting the proposal, the applicant did not act in accordance with its terms. As a result, ITT delivered an "Appointment of Receiver" and a letter informing the applicant of its default under the proposal and advising it of ITT's intention to enforce its security and appoint a receiver.
As soon as the receiver took possession of its premises and assets, the applicant brought an application pursuant to s. 248(1)(*b*) of the *Bankruptcy and Insolvency Act* for an order restraining ITT and its receiver from realizing or otherwise dealing with the applicant's property, alleging that ITT had failed to give notice under s. 244(1) of its intention to enforce its security. The applicant argued that, when the statutory notice was served, ITT did not have the intention of enforcing its security and, therefore, its notice was ineffective. Further, after the statutory notice was served, the parties entered into a new agreement, which gave rise to the requirement that a second statutory notice be served.
Held:

The application was dismissed.

The purpose of s. 244 is to make it apparent to a debtor that a creditor intends to enforce its security and to give the debtor the opportunity to forestall or avoid the enforcement. The demand for payment did not have to precede any other step to enforce the security. In certain circumstances the statutory notice can be combined with a demand notice. The applicant's liability to pay was not contingent upon a demand by ITT; once it was in breach of the agreement, ITT was entitled to act. The fact that a letter of proposal was sent did not change the situation, given that the purpose of s. 244 is to give the debtor an opportunity to solve the default problem. The proposal did not indicate a lack of intent on ITT's part.

A second statutory notice was not required. The letter of proposal did not alter or replace the original financing agreements or the security interest granted by them. It merely represented the creation of better safeguards for ITT's position. Further, the letter of proposal, the terms of which the applicant accepted, indicated that the assistance provided to the applicant was contingent upon ITT not compromising its security position and ability to act to protect its interests, and that the term of the arrangement was limited. No new agreement was created. The proposal merely represented a postponement of enforcement. When the applicant defaulted under the proposal, the statutory notice was still effective.

Table of Authorities

Cases considered:

Josephine V. Wilson Family Trust v. Swartz (1993), 23 C.B.R. (3d) 88, 107 D.L.R. (4th) 160, 16 O.R. (3d) 268, 6 P.P.S.A.C. (2d) 76 (Gen. Div.) — *referred to*

Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership (1994), 25 C.B.R. (3d) 139, 18 O.R. (3d) 201 (Gen. Div.) — *applied*

Statutes considered:

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

s. 244

s. 244(1)

s. 248(1)

s. 248(1)(*b*)

Application for order restraining creditor and its receiver from realizing or otherwise dealing with property of applicant.

***Gerein J.*:**

1 This is an application for an order restraining the respondent creditor, ITT Industries of Canada Ltd. ("ITT"), and its receiver, Peat Marwick Thorne Inc., from realizing or otherwise dealing with the property of the applicant, Delron Computers Inc. ("Delron"). The application is brought pursuant to s. 248(1)(*b*) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended S.C. 1992, c. 27 (the "Act"), and is grounded in an alleged failure by the respondent creditor to give notice of its intention to enforce a certain security as required by s. 244(1) of the Act. I have concluded that the application should not be granted.

The Facts

2 In 1994 the respondent, ITT, agreed to provide financing to the applicant, Delron. As a result, on January 26, 1994, the parties entered into an agreement for wholesale financing pursuant to which an inventory line of credit was provided by ITT to Delron. On February 1, 1994, the parties entered into an additional agreement, namely, a business financing agreement whereby an accounts receivable line of credit was provided by ITT for the purpose of financing the business operations of Delron. Addenda to these agreements were executed on July 21 and August 10, 1994, which modified the terms and conditions of the respective lines of credit.

3 In both agreements it was stipulated that to secure repayment of all indebtedness, Delron grant to ITT a security interest in all of its present and after-acquired personal property. In the event of default, ITT was empowered to do several things, one

of which was to appoint a receiver by instrument in writing. The security interests were registered in the Personal Property Registry for Saskatchewan on March31, 1994. The financing was formally advanced to Delron in early August, 1994.

4 It did not take long for problems to appear. By November, 1994, Delron was in breach of covenants contained in the agreements. Having decided to act, ITT caused three documents to be simultaneously delivered to Delron on November 29, 1994. The first of these, a "Notice of Intention to Enforce Security", I reproduce in its entirety:

Notice Of Intention To Enforce Security

TO: Delron Computers Inc.

14 - 301 45th Street

Saskatoon, Sask.

S7L 5Z9

Take Notice That:

1. ITT COMMERCIAL FINANCE, a division of ITT Industries of Canada Ltd., a secured creditor, intends to enforce its security on the property of the insolvent person described below:

ALL INVENTORY, EQUIPMENT, FIXTURES, ACCOUNTS, CONTRACT RIGHTS, CHATTEL PAPER, INSTRUMENTS RESERVES, DOCUMENTS OF TITLE, REBATES, DEPOSIT ACCOUNTS AND INTANGIBLES, WHETHER NOW OWNED OR HEREAFTER ACQUIRED AND ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, ACCRETIONS, SUBSTITUTIONS, RENEWALS AND/OR REPLACEMENTS THERETO AND ALL PROCEEDS THEREOF.

2. The security that is to be enforced is in the form of WHOLESALE FINANCING AGREEMENT [SECURITY AGREEMENT]

3. The total amount of indebtedness secured by the security is $859,726.02 plus interest, plus all funded open credit approvals.

4. The secured creditor will not have right to enforce the security until after the expiry of the ten day period following the sending of this notice, unless the insolvent person consents to an earlier enforcement.

DATED at Mississauga, Ontario, this 29th day of November, 1994.

ITT Commercial Finance

a division of ITT Industries of Canada Ltd.

"*G. McGugan*"

Gary McGugan

Regional Vice President.

Consent To Earlier Enforcement

Delron Computers Inc. hereby acknowledges receipt of this Notice and of a Demand dated as of today's date and hereby waives all notice periods set out therein and consents to the immediate enforcement by ITT Commercial Finance of its security.

Delron Computers Inc.
By: "B. King" Dated: 11/29/94

B. King, President

5 The second document was a letter from ITT to Delron, bearing the date November 29, 1994. In the letter ITT asserts that Delron is in breach of certain covenants which constitute a default under the security agreement. Demand was made for payment in full of these sums:

Inventory Loan - principal balance		$324,527.95
Accounts Receivable - loan balance		535,198.07
	TOTAL	$359,726.02

Time to pay was extended to 9:00 a.m. on December 9, 1994.

6 The third document was another letter from ITT to Delron, dated November 29, 1994. I call this a letter of proposal and because it is central to the applicant's position, I reproduce it in its entirety despite its length:

> In view of the recently released revised Financial Statements for Delron Computers Inc. ["Delron"] for the year ended April 30, 1994, the Company is in breach of its Financial Covenants pursuant to the Amendment to the Agreement for Wholesale Financing dated July 21, 1994. Due to the material change in retained earnings reported at April 30, 1994 Delron remains out of Covenant at September 30, 1994 despite Net Profit of $37M reported in the Interim Statements for the period.
>
> Delron is also in default of the Amendment to the Business Financing Agreement and Wholesale Financing Agreement [Paydown Agreement] dated August 10, 1994 based on the Collateral Summary and audit conducted by you and me on November 11, 1994, whereby a shortfall in Collateral of $221M was revealed. Today based on the Seanix inventory reported by you, Delron remains in default of $90,000 which is due and immediately payable to ITT.
>
> As discussed over the past two weeks, ITT will endeavour to assist to assure Delron's survival as a going-concern. However, any assistance is contingent upon ITT not compromizing [sic] its security position, and its ability to act in a timely manner to protect its interest. In the event that the parameters set out in this letter below are not adhered to, ITT reserves all of its rights to take steps to enforce its security pursuant to its Agreement for Wholesale Financing and Business Financing Agreement and applicable law.
>
> Subject to the above, ITT is prepared to maintain credit facilities during the next two months under the following strict parameters:
>
> a) ITT will maintain a $600,000 Accounts Receivable Credit line and a $400,000 Inventory credit line on the following terms:
>
> i) the minimum Tangible Net Worth Covenant of $250,000 must be attained by December 31, 1994 and
>
> ii) The Debt: Tangible Net Worth ratio does not exceed 5.0:1 by February 15, 1995. This will be facilitated by a reduction in ITT's combined Credit line of $100,000 per month commencing January 1, 1995, unless additional new shareholder's equity is injected prior to this date, to ensure that Delron is within both Covenants.

b) The terms of the Seanix Credit line will be Net 25 days. As discussed and agreed, a $50,000 Reserve will be held from the Accounts Receivable Credit line. These measures will correct the collateral deficiency which will continue to occur under the Paydown Agreement due to the fast turnover of Seanix product.

b) A Lockbox will set up at a local Branch of the Royal Bank of Canada on Delron's behalf. All payments of Accounts Receivables must be directed for deposit to the address [to be advised in due course]. This process will replace the daily deposits to the Blocked Account.

c) All Visa and Mastercard cash sales deposits will be remitted through the Blocked Account, by cheques cleared three times a week on the two respective deposit accounts. These funds will be applied to the Accounts Receivable Loan account, and provided there is sufficient availability, an advance will be made back to Delron.

d) The following additional weekly reporting must be received in ITT's Mississauga office no later than the following Monday of each week:

— Cheque register detailing all disbursements on all Bank accounts.

— Inventory listings of all Seanix product on hand.

— Aged Accounts Payable listings.

— Copies of GST, PST and Employee Deductions remittances/ returns for each month [only when payable & due]

— Copies of Bank Statements [monthly by the 10th of the following month].

Reporting of Accounts Receivable and cash receipts will continue as agreed.

e) ITT will conduct audits of its collateral and all supporting accounting documentation weekly or at its sole discretion. Delron has agreed to reimburse ITT $2,000 per month to defray such audit costs.

f) ITT will avail the use of its Short Term Accounts Receivable program to facilitate any large sales to qualifying institutional customers.

Brendan, as discussed the Company's severely depleted capital base makes it an arduous task to return it to the point of viability. It is my view that management control has been lacking, and that Regina appears to have been a losing proposition, primarily due to uncontrolled costs. As mentioned, variable selling expenses have exceeded 50% of gross margin, which leaves little to cover overhead. Regina's sales have also consistently been well below budget, which should have prompted early remedial action on the part of management.

While any "workout arrangement" poses considerable risk to ITT, we sincerely wish to assist if possible, but stress that it is up to yourselves as managers of Delron to not only safeguard ITT's position but to take the appropriate steps to ensure the Company's survival.

Kindly acknowledge your agreement with the above parameters by signing and returning to ITT a copy of this letter.

Delron acknowledged and agreed to the parameters.

7 However, things did not work out. Delron failed or was tardy in providing financial statements; it failed to utilize a lock box at the Royal Bank of Canada; and cash sales receipts were not forwarded as agreed. By January 25, 1995, inventory valued at $79,000 had been sold, but the proceeds had not been remitted to ITT. As of January 27, 1995, the monies owed by Delron to ITT were:

Receivables line	$197,649.47

Inventory line		225,179.77

	TOTAL	$422,829.24

During the preceding two months, Delron did pay some $800,000 to ITT. However, some of this was drawn back by a further extension of credit. As well, while the indebtedness to ITT was significantly reduced, the financial statements suggested the overall economic state of Delron warranted concern.

8 In consequence of the above, ITT had two documents delivered to Delron on January 26, 1995. The first was a copy of an "Appointment of Receiver" addressed to the respondent, Peat Marwick Thorne Inc. The second document was a letter from ITT to Delron wherein the following was stated:

> We refer to our letters of November 29, 1994, demanding payment in full of all amounts owing to ITT Commercial Finance ("ITT") and conditions under which ITT would continue to maintain credit facilities to Delron;
>
> You are in breach of a number of these conditions, some of which are as follows:
>
> 1. Based on the financial statement dated December 31, 1994, Delron is well outside the stipulated financial covenants, since the company is reporting a negative worth.
>
> 2. You have been unable to meet the terms on the Seanix credit line, with $ "*a substantial amount*" past due.
>
> 3. There is a collateral deficiency on the Seanix line of approximately $79,000.
>
> 4. You have not used the lock-box set up at the Royal Bank for accounts receivable receipts.
>
> 5. Deposits of Visa and Mastercard receipts have not been made to the blocked account.
>
> In addition, ITT has been prepared to co-operate with the proposed sale of Delron to Asean Holdings Inc. which you have now advised collapsed two days ago. The events leading to the withdrawal of the offer to purchase Delron from Asean were not adequately disclosed to us, potentially compromising our security.
>
> We are therefore proceeding to enforce our security and appointing a receiver to safeguard our interest, and would ask for your full co-operation in ensuring an orderly transition.

Immediately after the documents were delivered, the receiver took possession of Delron's business premises and assets both in Saskatoon and Regina. In response, Delron brought this application.

Submissions

9 Two submissions were made on behalf of the applicant. The first was that when the statutory notice was served, the creditor did not possess an intention to enforce its security and as a result the notice was ineffective. The second was that after the statutory notice was served, the parties entered into a new agreement which made it necessary that there be a second statutory notice.

10 In response, the submission of the respondent is that the necessary intention was present at the relevant time and that the various happenings did not give rise to a new agreement. This being so, a second notice was not required.

Analysis

11 The application is brought pursuant to s. 248(1) of the Act, which section provides:

> 248. (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has

> failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,
>
> (*a*) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or
>
> (*b*) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out, or both.

The breach of duty alleged is that ITT has failed to comply with s. 244, the relevant provisions of which provide:

> 244. (1) A secured creditor who intends to enforce a security on all or substantially all of
>
> (*a*) the inventory,
>
> (*b*)the accounts receivable, or
>
> (*c*)the other property
>
> of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.
>
> (2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

12 In my opinion, the object of s. 244 is to clearly bring home to a debtor that a creditor intends to enforce a certain security and to afford that debtor some opportunity to forestall or avoid such enforcement. In the case of *Josephine V. Wilson Family Trust v. Swartz* (1993), 23 C.B.R. (3d) 88 (Ont. Gen. Div.), at 92 Blair J. put it this way:

> The purpose of the section 244 Notice of Intention to enforce security under the BIA is to provide the debtor with an opportunity to react, to negotiate, and to reorganize its financial affairs.

13 To salvage a situation a debtor may do any of a variety of things. These may range all the way from obtaining totally new financing to a form of temporizing by way of some form of forbearance on the part of the creditor. Thus, the particular circumstances will be considered in each case to properly ascertain what actually transpired and how it impinges upon s. 244 of the Act. Against that background I turn to the situation which presents itself here.

14 It will be remembered that on November 29, 1994, the letter demanding payment, the Notice of Intention to Enforce Security and the letter of proposal were all delivered simultaneously. It is now argued on behalf of the applicant that the demand for payment had to precede any other step to enforce the security; and further that this coupled with the letter of proposal, which the applicant accepted, demonstrates that the creditor lacked the necessary intent.

15 As to the demand, I have been referred to the following from Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (Toronto: Carswell, updated 1994), at p. 7-141:

> If the security which the secured creditor wishes to enforce is a demand loan, it would seem that the security holder should make a demand for payment before giving the notice under s. 244(1), because it could be argued that until the demand period has expired, the creditor cannot have "an intention to enforce his security". If the security agreement calls for term payments and a payment is overdue, then there seems no reason why the notice under s. 244(1) could not be combined with a *Lister v. Dunlop* [[1982] 1 S.C.R. 726] notice.

In *Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership* (1994), 25 C.B.R. (3d) 139 (Ont. Gen. Div.), at 152 and 153 Farley J. quotes the above statement and emphasizes the concluding half of the last sentence. He then goes on to say:

> Further, I do not see that the 10-days' notice provision pursuant to s. 244 of the BIA is to act as an "add on" or extension of every common law, statutory or contractual notice in any proceedings relating to enforcement of security. Rather, it would seem to me to be in the nature of a minimum notice.

I read Farley J. as adopting the position that in certain instances the statutory notice can be combined with a demand notice. I agree with that and conclude the present case is such an instance.

16 In this case I am not dealing with a demand loan. Rather, there were breaches of covenants in the financing agreements as of November 29, 1994, and it was on that basis that the respondent made a demand. The document informed the applicant that there was default, demanded payment and provided nine days to pay. Delron's liability to pay was not contingent upon a demand by ITT. Once Delron was in breach of the agreement, ITT was entitled to act. It gave reasonable notice by way of the demand letter in conjunction with the statutory notice. That the two notices were given does not justify a conclusion that ITT could not or did not have the requisite intention when the statutory notice was delivered.

17 Adding the letter of proposal to the mix does not change the situation. As stated earlier, the purpose of s. 244 is to afford a debtor an opportunity to rectify an unhappy situation. The sooner the debtor gets at the task the better it is for all concerned. If the creditor seeks to assist in the task and play a part in a possible resolution, the creditor should be praised and not punished.

18 To my way of thinking, it is not inconsistent for a creditor to intend to realize on its security; give notice to that effect; and still be willing to resolve or attempt to resolve the difficulty. The creditor is simply communicating the fact that its intended course is capable of change. If one were to adopt the applicant's position, a creditor would always be at risk if an arrangement was entered into; for it may be construed as establishing a lack of the intent required by the section. This certainly would be contrary to business efficacy.

19 When I consider the prevailing circumstances I have no hesitation in concluding that on November 29, 1994, ITT intended to enforce its security, but was prepared to assist Delron to avoid that drastic course of action. That being so, ITT was possessed of the intention which is required by s. 244(1) of the Act.

20 I now move on to the second suggestion, namely: that the parties entered into a new agreement and therefore a second notice had to be given. In my opinion, a creditor and debtor may enter into an arrangement which replaces an earlier one. Should that happen, the original security agreement would be at an end and any notice given with respect to it would also be at an end. Therefore, if subsequently the creditor decided to enforce the new or replacement security, then a further statutory notice would be required. Yet that comes about because you are dealing with different security agreements. Such is not the situation which presents itself in the instant case.

21 The arrangement which came about as a result of Delron accepting and agreeing to what was set out in the letter of proposal of November 29, 1994, did not supplant the original financing agreements or the security interest granted by them; nor was it intended to do so. Rather, additional parameters were added to better safeguard the position of ITT in return for it maintaining their existing lines of credit. In essence, those parameters pertain to the operation of Delron's business and not to the original agreements. That being so, the provisions can hardly be said to constitute a new agreement.

22 In addition, at least two things must be noted about the content of the letter. There is a specific assertion that any assistance provided to Delron "is contingent upon ITT not compromizing [sic] its security position, and its ability to act in a timely manner to protect its interest." Further, the term of the arrangement is limited, for the letter states: "... ITT is prepared to maintain credit facilities during the next two months ..." Delron agreed to both of these provisions, both of which are inconsistent with the notion that the letter constituted a new agreement.

23 When I consider all the circumstances I conclude that ITT intended to realize on its security. However, it was prepared to assist Delron to avoid enforcement and proposed a "workout arrangement" as it was described at the end of the letter of proposal. This is the very thing contemplated by s. 244 of the Act and the fact that the proposal originated with the creditor is irrelevant. Even when agreed to by Delron, the arrangement was nothing more than an attempt to resolve the financial crises. It

did not amount to a new agreement which restricted or impeded the rights created by the original agreements. They continued in full force and effect and the most recent arrangement was simply intended to get Delron back into compliance with the original contracts. There was only a postponement of enforcement. When this failed, ITT was entitled to proceed to realize on its security as the statutory notice was still effective.

Conclusion

24 In the result, there is no basis upon which to conclude that there has been a failure to comply with s. 244 of the Act and the application is dismissed. The interim order made on January 28, 1995, is now at an end and of no further effect.

25 I consider extra party and party costs are warranted in this instance because the application was brought on suddenly and at an unusual hour which meant counsel for the respondent had to appear with little notice and prepare during the early morning hours. Accordingly, the respondent will have its costs of the application which I fix at $1,000.

Application dismissed.

THE TORONTO-DOMINION BANK v. ORBIT FREIGHT LTD.

Applicant Respondent

Court File No. CV-21-00658361-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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