Court File No. CV-18-597922-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CWB MAXIUM FINANCIAL INC.

Plaintiff

-and-

1970636 ONTARIO LTD. o/a MT. CROSS PHARMACY, UMAIR N. NASIM, SHRIKANT MALHOTRA, 1975193 ONTARIO LTD. dba MTN RX & HEALTH and ANGELO KIRKOPOULOS

Defendants

BOOK OF AUTHORITIES OF THE DEFENDANT, 1975193 ONTARIO LTD. dba MTN RX & HEALTH

Date: August 1, 2018

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Court File No. CV-18-597922-00CL

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Defendants

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Tab 1

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1997 CarswellOnt 988
Ontario Court of Justice, General Division

Royal Bank v. Chongsim Investments Ltd.

1997 CarswellOnt 988, [1997] O.J. No. 1391, 28 O.T.C. 102,
32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 70 A.C.W.S. (3d) 72

Royal Bank of Canada, Plaintiff v. Chongsim Investments Ltd. and ESC Recreation Development Corporation, carrying on business as WWK Partnership, Chongsim Investments (Canada) Ltd. and Wild Water Kingdom Ltd., Defendants

Epstein J.

Heard: January 30 and 31, 1997
Judgment: April 4, 1997
Docket: 96-CU-103033

Counsel: *George Vegh* and *Debora Steggles*, for plaintiff.
John D. Campbell, for defendants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
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Receivers --- Appointment — Application for appointment — General
Defendant companies and partnership, which carried on water park business, were guarantors of credit facility granted by plaintiff bank to related company and also had credit facility with plaintiff secured by debenture and general security agreement — Related company's facility structured as demand loan which plaintiff agreed not to call absent default — Plaintiff established practice respecting facility interest payments whereby funds would be transferred from loan account to cover payment in event of deficiency in operating account and related company would be notified so that it could make deposit, the plaintiff not treating overdrafts as defaults — Plaintiff later departed from established practice, reversed interest payments on several occasions when overdrafts occurred, failed to provide specific notification of non-payment of interest — Plaintiff then wrote indicating arrears, and in response to request for particulars of arrears, called loan thereafter refusing to accept payment and commencing proceedings against related company and guarantors — Plaintiff moved to appoint receiver and manager of water park business on basis that partnership had failed to honour guarantee — Motion dismissed — Neither just nor equitable to appoint receiver in circumstances — Appointment could have serious, permanent adverse affect on business, deprive defendants of right to defend action — Plaintiff had adequate security for amount owed — Plaintiff

did not act in good faith in departing, without notice, from established practice relied on by defendant, to create default with view to forcing restructuring of credit facilities to its benefit — Plaintiff failed to meet obligation to provide particulars of arrears and opportunity to make correction — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

The defendants CI Ltd. and ESC Co. carried on a water park business as WWK partnership and WWK Ltd. The partnership had a credit facility with the plaintiff bank. It was secured by a debenture and a general security agreement, with both contracts binding the partnership and WKK Ltd., and both containing cross-default provisions. While it was structured as a demand loan, the parties agreed that the loan would not be called absent default. In terms of the value of the security, in 1992 the plaintiff had received an appraisal in the amount of $11.3 million. Since 1992, a first mortgage had been paid down from $1.7 million to $.9 million.

The defendant C.I. (Can.) Ltd., also had a credit facility with the plaintiff, structured in the same way as that of the partnership, and guaranteed by CI Ltd., ESC Co. and the partnership.

Between 1992 and 1995 the plaintiff established a practice respecting interest payments on the latter facility. Payment was made from the operating account by automatic transfer. If there were insufficient funds in that account to cover the payment, the plaintiff would make up the deficiency by transfer from the loan account. If the loan account were fully drawn, the plaintiff would allow the operating account to go into overdraft and notify CI (Can.) Ltd., which would then make a deposit. In accordance with that practice, the plaintiff did not return any of CI (Can.) Ltd.'s cheques on the basis of insufficient funds nor did it treat the temporary overdrafts as defaults under the facility.

In early 1995, however, when an interest payment created an overdraft, the new account manager, in a manner contrary to established practice, reversed the payment and failed to contact CI (Can.) Ltd. about the non-payment. The next month, the plaintiff temporarily returned to past practice, but again in March and April reversed interest payments without contacting CI (Can.) Ltd. During this time and into May, the account manager further intervened, again without specifically notifying his customer, by causing various amounts to be deducted from the operating account and credited to interest interest on the loan facility, and returned one of CI (Can.) Ltd.'s cheques NSF for the first time.

In June, the account manager wrote to CI (Can.) Ltd. indicating interest arrears in excess of $12 000. C, the principal of the defendant companies, requested particulars as to how the arrears had accumulated. The plaintiff responded by demanding payment in full of the facility by C.I. (Can.) Ltd., C.I. Ltd., and ESC Co.. CI (Can.) Ltd. then offered to pay the arrears, even though the plaintiff had not clarified the accounting behind the amount claimed. The plaintiff refused to accept payment, and commenced proceedings. It moved for an order appointing a receiver and manager of the water park business, alleging that such an order would be just an equitable as the partnership had failed to honour its guarantee on the loan in question.

Held: The motion was dismissed.

Section 101 of the *Courts of Justice Act* provides that a receiver may be appointed where it is just and convenient. As the appointment of a receiver is particularly intrusive, it is relief which should only be granted sparingly. In the exercise of its discretion, the court should consider the effect of such an order on the parties. Since it is an equitable remedy, the conduct of the parties is also a relevant factor.

Appointment a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations.The plaintiff intended to attempt to sell the water park; a sale under these circumstances frequently results in a lower price and always in substantial receivership fees. In the interim, the receivership might well damage the park's good relations with its landlord, employees, suppliers and customers.

The damage to the defendants must be compared to the position of the plaintiff were receivership not granted. The principal amount outstanding on its current first mortgage had been reduced substantially since 1992, there was no evidence of any problems with creditors, and the plaintiff had more than adequate security for what it was owed.

The order sought would effectively result in a loss to the defendants of some of their investment and of their right to defend the bank's action on the loan. If it were not granted, an acceptable *status quo*, protecting the interests of all parties, could be maintained. Given these observations, it would not be just to appoint a receiver.

Nor would it be equitable having regard to the conduct of the parties.

The worst that could be said about the representatives of CI (Can.) Ltd. was that they failed to notice irregularities in the bank statements indicating the plaintiff's departure from past practice, and perhaps that C had not pressed the plaintiff aggressively enough for particulars of the arrears.

The plaintiff, on the other hand, had been less than straightforward in its handling of the CI (Can.) Ltd. account. Its account manager departed from past practice in reversing loan payments and effectively caused a default, and this knowing that it was reasonable for his customer to assume that the plaintiff would not change its practice without some direct notification. Also notable was the precipitous nature of the demand as well as the plaintiff's failure to provide specific details of the default, to explain what was required for correction and to establish a reasonable timetable for correction.

Given the agreement that the plaintiff would not call the loan unless C were in default, the plaintiff set out to do whatever was necessary to create a default, with a view to forcing C to restructure his credit facilities to its advantage. Parties to a contract have an obligation to deal with each other in good faith toward fulfillment of the agreement. The agreement between the plaintiff and CI (Can.) Ltd. had been modified by established practice, which modification, to the plaintiff's knowledge, was relied on by CI (Can.) Ltd. The plaintiff had a legal obligation to support the defendants so long as they were honouring their obligations under the agreement. However, rather than trying to fulfill its obligations, it was deliberately trying to sabotage the relationship. Against this background it would be neither just nor equitable to grant relief sought.

Table of Authorities

Statutes considered:

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

s. 101 — considered

MOTION by creditor for appointment of receiver.

***Epstein J.*:**

1 This is a motion brought by the plaintiff the Royal Bank of Canada (the "bank") for an order appointing a receiver and manager of the property of the defendants Chongsim Investments Ltd. ("Chongsim Investments") and ESC Recreation Development Corporation ("ECS") carrying on business as WWK Partnership (the "partnership") and Wild Water Kingdom Ltd. ("WWK Ltd.").

2 The partnership owns and operates a water park on premises just north of Toronto. These premises are owned by the government and are leased to WWK Ltd. as bare trustee for, and on behalf of, the partnership.

3 The bank's position is that such an order would be just and equitable in the circumstances of this case based on the allegation that the partnership failed to honour the guarantee it provided to the bank in respect of a loan given by the bank to the defendant Chongsim Investments (Canada) Ltd. ("Chongsim Canada").

4 The primary position of the defendants is that the equitable jurisdiction of this court should not be available to the bank. It is their submission that the bank orchestrated the default upon which it attempts to rely in requesting that a receiver be appointed. Secondly, the defendants argue that the partnership did not, in fact, guarantee the obligations of Chongsim Canada. Accordingly, the demand upon the partnership is invalid.

5 Shortly after the matter was argued, I advised counsel of my decision to dismiss the bank's motion. The following is a brief summary of the reasons for this decision.

6 By commitment letter of May 22, 1992, the bank granted a $1.1 million credit facility to the partnership that was secured by a debenture (the "debenture") executed by WWK Ltd. The partnership agreed to be bound by the terms of the debenture. The bank also had a general security agreement in place (the "GSA") as a result of an earlier credit facility. The GSA was granted by the partnership and was consented to by WWK Ltd. These contracts contain cross-default provisions. A default of the partnership is also a default under the security agreements. The debenture and GSA are the only potential *contractual* sources of the bank's entitlement to a receiver.

7 The Wild Water Kingdom credit facility was structured as a demand loan. However, the parties agreed that the bank would not call for payment on the loan as long as the credit facility was kept in good standing.

8 The bank has considerable security in respect of this credit facility. The commitment letter required "receipt by the bank of an appraisal ... reflecting replacement cost of not less than $11 million ..." The bank received an appraisal dated March 31, 1992, in the amount of $11.3 million. The bank has not disputed this value. I also note that the bank's security has improved through the pay down of a first mortgage from $1.7 million to approximately $900,000.

9 Chongsim Canada is a holding company with several interests. It also has a credit facility with the bank. This facility is reflected in a commitment letter dated August 18, 1992. Again, the parties agreed that the loan would not be called absent default. Chongsim Investments and ESC Recreation guaranteed this facility. I find, based on the evidence, including the wording of the loan documentation, that the obligations of Chongsim Canada were also guaranteed by the partnership.

10 I now turn to the events leading up to the default upon which the bank relies in its efforts to put in a receiver.

11 The monthly payments of the Chongsim Canada credit facility were made from the operating account on the 26th day of each month by automatic transfer. If there were insufficient funds in the operating account to cover the interest payment, the bank would transfer the necessary amount to cover the deficiency from the loan account. If the loan account were fully drawn, the bank would allow the operating account to go into overdraft and would then notify Chongsim Canada's office. Chongsim Canada would then make a deposit to bring the operating account into a positive balance. Prior to May 29, 1995, the bank at no time returned any of Chongsim Canada's cheques on the basis of insufficient funds. Similarly, at no time prior to that date did the bank treat these temporary overdrafts as defaults under the Chongsim Canada credit facility.

12 It was therefore not unusual when on January 26, 1995, Chongsim Canada's interest payment of $7,378.64 created an overdraft. Contrary to the manner in which the bank had historically dealt with such a situation, the then new manager of the account, Mr. Smith, caused the interest payment to be reversed. Further contrary to established practice, the bank did not contact Chongsim Canada about the non-payment of interest.

13 On February 27, 1995, the bank returned to established practice. The automatic withdrawal was made to pay interest. An overdraft was thereby created. The bank still had not tried to contact its customer about the default that had taken place in January as a result of the bank's unprecedented reversal of the interest payment.

14 Again, in March and in April, the bank reversed the interest payments without contacting Chongsim Canada. During this time and into May 1995, Mr. Smith further intervened by causing various amounts to be deducted from the operating account and to be credited to interest on the loan facility. He also, for the first time, returned a Chongsim Canada cheque as "NSF." Again, Mr. Smith did not specifically notify

anyone at Chongsim Canada of the nonpayment of interest, of the other transfers or of his decision to refuse to honour one of his customer's cheques.

15 Then, on June 5, 1995, Mr. Smith sent a letter to Chongsim Canada indicating interest arrears of $12,222.04. Dr. Chong, the principal of these various companies, expressed surprise and asked for particulars as to how these arrears could have accumulated.

16 Instead of providing any type of meaningful response, the bank, by letter dated June 22, 1995, demanded payment in full of the Chongsim Canada credit facility from Chongsim Canada, Chongsim Investments and ESC Recreation. Shortly thereafter, Chongsim Canada offered to pay any interest arrears even though the bank still had not clarified the accounting behind the amount claimed to be due. The bank refused to accept any payment, taking the position that the default could not be cured.

17 Technically, Chongsim Canada defaulted on its loan by failing to maintain its obligation to pay interest. However, is this default, having regard to all of the circumstances, one that warrants the exercise of the court's discretion to put a receiver in charge of the affairs of the operation?

18 The jurisdiction to order a receiver is found in section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

19 As far as the impact of the order sought, there can be no doubt but that the effect of installing a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations. The bank has indicated that it intends to attempt to sell the water park. A sale under these circumstances frequently results in a lower price and always results in substantial receivership fees (estimated by the bank at $400,000). In the meantime, the receivership may well damage the park's apparently good relations with its landlord, employees, suppliers and customers.

20 This damage to the defendants in the form of added expense and reduction of value must be compared to the position of the bank if the receivership is not granted. The first mortgage is current. In fact, the principal amount outstanding has been reduced from $1.7 million in 1992 to $900,000 today. There is no evidence of any problems with creditors. The bank has more than adequate security for the $2 million it is owed.

21 If a receiver is ordered, then the park will be sold, the bank will be paid, and the litigation in which the bank's right to call the loan is in dispute will be rendered academic. There will be a loss to the defendants not only of some of their investment but also of their right to defend the bank's action. If the order is not granted, an acceptable *status quo* can be maintained in which the investment and interests of all parties are protected.

22 In the face of these observations, it would certainly not be "just" to put in a receiver.

23 Nor would it be equitable having regard to the conduct of the parties. The worst that can be said of the conduct of the representatives of Chongsim Canada is that they failed to notice the irregularities that appeared in the monthly bank statements that would have alerted them to the fact that the bank had deviated from established practice and interest payments were therefore not being made. Secondly, perhaps Dr. Chong can be faulted for not pressing the bank aggressively enough for particulars of the arrears in response to a clear demand for payment.

24 However, the conduct of Chongsim Canada must again be compared with that of the bank. The bank has a recognized obligation to treat its customers fairly, meaning in an honest, straightforward

fashion. While the evidence is not sufficient for me to make a finding that the bank was dishonest in its dealings with the defendants, there is certainly ample evidence suggesting that Mr. Smith was being less than straightforward in his handling of the Chongsim Canada account. By reversing the loan payments for January and March 1995, Mr. Smith effectively caused a default. He did this knowing that it was reasonable for his customer to assume that the bank would not change its practice in relation to the account at least without some direct notification. In fact, the evidence shows that Mr. Smith actually met with Dr. Chong during the critical period when the defaults were being created and said nothing to him about this serious state of affairs.

25 Then there was the precipitous nature of the demand. If the bank intended formally to demand, it had an obligation in the circumstances of this case to provide specific details of the default, what was required for correction and establish a reasonable timetable for such correction. This it did not do.

26 The bank relies almost exclusively on the evidence of Mr. Smith in support of the order sought. I find certain aspects of Mr. Smith's evidence troublesome. For example, the record shows regular communication between Mr. Smith and his superior, Mr. Brown, about the Chongsim Canada situation throughout December 1994 and January 1995. Then, curiously, on January 29, 1995 (the same day as Mr. Smith first reverses an interest payment) all communication of this nature stops until after Mr. Brown decided to call the loan. Further, Mr. Smith claims to have been unaware of the default that he created until he requested a computer summary of the Chongsim Canada account on May 31, 1995. Mr. Smith gave this evidence in the face of other evidence that he regularly reviewed weekly computer printouts throughout this time period that showed, among other things, interest arrears. I also note that Mr. Smith, in an effort to explain his deviation from the bank's practice of allowing the Chongsim Canada operating line to go into overdraft, testified that he had authority to permit an overdraft only "up to $5,000." However, in November 1994, he permitted a $9,338 overdraft in the Chongsim Canada account.

27 The conclusion is inescapable that the bank was determined to force Dr. Chong to agree to restructure his credit facilities with the bank to the bank's advantage. Given the agreement that the bank would not call the loan unless Dr. Chong was in default, the bank only had one option — to do whatever was necessary to create a default. The bank was successful — technically, but against this background it would neither be just nor equitable to grant the interlocutory relief requested by the bank and put in a receiver.

28 Parties to a contract have an obligation to deal with each other in good faith toward the fulfilment of the agreement. The agreement between the bank and Chongsim Canada had been modified by established practice. To the bank's knowledge, Chongsim Canada relied on this modification. In this case, the bank had a legal obligation to support the defendants as long as they were honouring their obligations to the bank. On the facts, I find that rather than trying to fulfill its obligations to its customers, the bank was deliberately trying to sabotage the relationship.

29 The motion is dismissed. If the parties are unable to agree as to costs they may make submissions in writing by facsimile. The defendant's submissions should be sent to the plaintiff's solicitors and my office by April 18, 1997, and the plaintiff's submissions should be sent to me and the defendant's solicitors by April 28, 1997.

Motion dismissed.

Tab 2

2011 ONSC 4136
Ontario Superior Court of Justice [Commercial List]

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 5867, 2011 ONSC 4136, 204 A.C.W.S. (3d) 543, 80 C.B.R. (5th) 259

General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

D.M. Brown J.

Heard: June 27, 2011
Judgment: June 30, 2011 * **
Docket: CV-11-9169-00CL

Proceedings: leave to appeal refused *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.)

Counsel: C. Prophet, N. Kluge for Receiver
L. Brzezinski, D. Magisano, G. Kim for Applicants
T. Pinos for Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo
S. Mitra for Proposed Receiver, Albert Gelman Inc.
R. Macklin for 2068308 Ontario Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Bankrupt companies operated retirement residences managed by respondent L Inc. — Respondent 729 Ltd. was shareholder in bankrupt companies — 729 Ltd. had ownership interest in R residences — R residences were sold at profit — Applicant trustee in bankruptcy had concerns about accuracy and completeness of information it received concerning bankrupt companies, 729 Ltd., L Inc., and R residences — Trustee believed 729 Ltd. and L Inc. were debtors of bankrupt companies — Trustee brought motion for order appointing investigative receiver over L Inc. and 729 Ltd. — Motion was granted in part — Investigative receiver was appointed over 729 Ltd. — There were serious concerns about accuracy of information 729 Ltd. provided — There was serious question to be tried as to whether payments made by bankrupt companies to 729 Ltd. were preferences under s. 95 of Bankruptcy and Insolvency Act — Receiver was to look into transactions between bankrupt companies and 729 Ltd., to ascertain 729 Ltd.'s interest in proceeds of R residences, and to ascertain state of disbursement of proceeds of sale — Investigative receiver was not

appointed over L Inc. — There may have been contract-based reason for payments to and from bankrupt companies and L Inc. — There was insufficient evidence regarding L Inc. and its affairs and inconsistencies.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — followed

Century Services Inc. v. New World Engineering Corp. (July 28, 2006), Doc. 06-CL-6558 (Ont. S.C.J.) — considered

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — considered

Pandya v. Simpson (November 17, 2005), Doc. 05-CL-6159 (Ont. Gen. Div.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Stroh v. Millers Cove Resources Inc. (1995), 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) — considered

Stroh v. Millers Cove Resources Inc. (1995), 85 O.A.C. 26, 1995 CarswellOnt 275 (Ont. Div. Ct.) — considered

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc. (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 163 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 248 — considered

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

s. 101 — considered

MOTION by trustee in bankruptcy to appoint investigative receiver.

***D.M. Brown J.*:**

I. Motion to appoint an investigative receiver

1 MNP Ltd., formerly Meyers Norris Penny Limited ("MNP"), is the Trustee in Bankruptcy of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited, and 2007383 Ontario Inc. (the "Bankrupt Companies"). The Bankrupt Companies were part of a group of related companies which invested in and operated retirement homes (the "Liberty Group").

2 MNP seeks an Order appointing Albert Gelman Inc. as receiver with full powers of investigation and monitoring in relation to the respondents, Liberty Assisted Living Inc. ("Liberty Assisted") and 729285 Ontario Limited ("729285"), pursuant to Section 101 of the *Courts of Justice Act*, and section 248 of the Ontario *Business Corporations Act* ("*OBCA*"), but without power or obligation to take possession and control of the property, assets and undertakings of Liberty Assisted or 729285, and with the power to assign 729285 into bankruptcy. MNP argues that the Court should grant the relief requested because it has not received satisfactory answers to its inquiries regarding various transactions and relationships among the Liberty Group entities and investors.

3 The applicants, General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company ("GE"), support the Trustee's motion.

4 The Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, and Rahim Bhaloo, whom I will periodically refer to as the "Liberty Group Respondents", oppose the Trustee's motion, contending that the Trustee is seeking extraordinary receivership orders against a corporation which has no loan or security agreements with the applicants. 729285 submits there is no factual or legal basis for the relief sought, and that the motion represents an unwarranted and inappropriate attempt by the Trustee to reach far beyond the scope of its powers, and to unjustifiably attack these respondents personally and in their business.

5 2068308 Ontario Inc. submits that no order should be made freezing the balance of the Royalton Proceeds presently held in trust at Cassels Brock LLP.

6 For the reasons set out below, I grant the motion, in part.

II. Background Facts

A. The Liberty Group

7 The Bankrupt Companies operated three retirement residences in Toronto and Windsor - Beach Arms, Liberty Place, and La Chaumière. Each Bankrupt Company was owned by a separate company, which in turn was owned by the Beach Group Limited, who in turn held its interests in trust for a group of investor co-owners.

8 The respondent, Liberty Assisted Living Inc., is the management company that until recently managed those three retirement residences. Gregory Goutis is the Chief Financial Officer of Liberty Assisted.

9 729285 Ontario Limited is a company related to Liberty Assisted. 729285 is a shareholder of the Beach Group Limited which holds all the shares of the Bankrupt Respondents.

10 Amir Kassam and Rahim Bhaloo are officers and directors of the Bankrupt Companies, Liberty Assisted, and 729285.

11 729982 Ontario Limited ("729982") is the family holding company of Kassam.

12 In addition to the Bankrupt Companies, Liberty Assisted also manages two other retirement residences in Quebec, Château Royal and Château Dollard.

B. Default by the Bankrupt Companies

13 General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company are the secured lenders of the Bankrupt Companies, and as at April 6, 2011, were owed the sum of $19,399,225.00. GE had purchased the loan and attendant security from Column Financial on June 25, 2008.

14 As a result of a series of defaults under its security, GE secured the appointment of MNP as Receiver of the Bankrupt Companies on March 10, 2011, with the power to assign them into bankruptcy. The defaults included the failure of the Bankrupt Companies to provide quarterly financial statements as required by the terms of the mortgages securing the loans. On March 21, 2011, a further order was made extending the receivership to another numbered company involved in the operation of one of the residences and terminating the management agreement between the residences and Liberty Assisted.

15 The Receiver assigned the Bankrupt Companies into bankruptcy on March 15, 2011. The Receiver is now the Trustee in Bankruptcy.

16 The Trustee contends that the Bankrupt Companies were insolvent during the period from January 1, 2010, and March 11, 2011 (the "Insolvency Period"). The Companies dispute that, but only to the extent that the period of insolvency might have been a few months shorter.

17 During the Insolvency Period the Bankrupt Companies were seriously in arrears of the payment of realty taxes, and GE paid tax arrears to the relevant municipalities in January, 2011. By early this year some of the Bankrupt Companies were in arrears in paying their employees' salaries.

C. Efforts by Trustee to obtain information about the transactions

18 This Court has made several orders requiring the Bankrupt Companies and others in the Liberty Group to provide financial information to the Trustee. On April 14, 2011, Mesbur J. ordered Messrs. Goutis, Bhallo and Kassam to submit to *BIA* section 163 examinations and required Liberty Assisted and 729285 to deliver various financial records to the Trustee. On April 21 I ordered Liberty Assisted and 729285 to deliver to the Trustee copies of their unaudited 2008 and 2009 financial statements. To date the Trustee has obtained evidence regarding activities involving the Bankrupt Companies in the following stages:

(a) Affidavits sworn April 7, 2011 by Bhaloo and Goutis;

(b) Affidavit of Goutis sworn April 13, 2011;

(c) Examinations of Kassam, Bhaloo, and Goutis on April 20 and 21, 2011;

(d) Answers to undertakings arising out the April 21 Examinations;

(e) Affidavit of Goutis sworn May 19, 2011;

(f) Examination of Goutis on May 27, 2011;

(g) Answers to undertakings arising out of the May 27 Examination; and,

(h) Affidavit of Bhaloo sworn June 23, 2011.

D. Financial relationship between 729285 and the Bankrupt Companies

19 As mentioned, Beach Group is the sole shareholder of the Bankrupt Companies. 729285 is the single largest shareholder and co-owner of Beach Group, owning 40 of the 123 units (a 33% interest). Kassam is a director of Beach Group, 729285 and the Bankrupt Companies.

20 In 2007, the Bankrupt Companies refinanced their loan of approximately $17,000,000.00 with Column Financial. Approximately $2,500,000.00 of the loan was distributed to the shareholders/co-owners, including 729285, as an equity takeout proportionate to their co-ownership interest in the Bankrupt Companies. The Trustee presumes that 729285 received $825,000.00 of this equity payout. According to the Trustee, that amount was not used to refinance existing encumbrances or to reinvest into the Bankrupt Companies.

21 It is the position of the Trustee that between January 2010 and March 11, 2011, the Bankrupt Companies were insolvent. In its Second Report dated April 25, 2011 the Trustee reported on the intercompany payments from the Bankrupt Companies to 729285 during that Insolvency Period. The amounts reported, subject to later adjustment, were as follows:

(i) Beach Arms paid a minimum of $145,600.00 to 729285;

(ii) La Chaumière paid a minimum of $633,313.22 to 729285; and,

(iii) Liberty Place paid a minimum of $97,177.84 to 729285.

22 In its Second Report the Trustee stated:

> In the circumstances and on the basis of all the information provided thus far, the Trustee believes that preference actions or action in relation to under-value transactions (in the nature of fraudulent preference or fraudulent conveyance proceedings) should be initiated in relation to payments from the Bankrupt Residences to 729285 and Liberty Assisted during the period from January 1, 2010 to March 11, 2011, at a minimum.

23 Mr. Goutis swore an affidavit dated April 13, 2011, in which he set out the work he had performed to ascertain the intercompany indebtedness as between 729285 and the Bankrupt Companies. He was cross-examined on his work product on May 27. During the course of his cross-examination he admitted that as at the date of bankrupty:

(i) 729285 owed Beach Arms $218,656.00; [1]

(ii) 729285 owed Liberty Place $35,270.00; [2] and,

(iii) La Chaumière owed 729285 the sum of $38,700.00. [3]

24 According to the Trustee, during the Insolvency Period the Bankrupt Companies paid a total of $876,170.97 to 729285 and presently 729285 is a net debtor of the Bankrupt Companies in the amount of $215,926.00, or in the amount of $602,870.25 — the Trustee stated that the evidence of Goutis varied on this point.

25 729285 submitted that the Liberty Group of companies were operated on the basis that the companies transferred funds amongst themselves to meet expenses as they arose. As a result, during the Insolvency Period the Bankrupt Companies, 729285, Liberty Assisted, and 729982 transferred funds from and to each other. Funds were also transferred to and from these entities and Chateau Dollard and Chateau Royale, two retirement residences in Quebec of which Kassam is the director and to which Liberty Assisted provided management services. In its Second Report the Trustee commented on the "complex and apparently random use of corporate vehicles in connection with the Liberty Group and the operation of the Bankrupt Residences".

26 729285 states that when one examines the state of accounts of the Bankrupt Companies during the Insolvency Period in respect of all the other related companies, the Bankrupt Companies are net debtors of the remaining Liberty Group of companies.

E. Financial relationship between Liberty Assisted and the Bankrupt Companies

27 Liberty Assisted was the manager of the Bankrupt Companies which paid it management fees. Amir Kassam is the officer and director of Liberty Assisted and is also the officer and director of the Bankrupt Companies.

28 According to the Trustee, during the Insolvency Period, the following payments were made to Liberty Assisted by the individual Bankrupt Respondents:

(i) Beach Arms paid Liberty Assisted $371,452.00;

(ii) La Chaumière paid Liberty Assisted $1,466,427.05; and,

(iii) Liberty Place paid Liberty Assisted $289,440.00.

29 The Trustee states that Liberty Assisted presently is a debtor of the Bankrupt Companies in the following amounts:

(i) Liberty Assisted owes Beach Arms $308,512.93;

(ii) Liberty Assisted owes La Chaumière $1,288,893.59; and

(iii) Liberty Assisted owes Liberty Place $175,522.58.

F. The Royalton Residences

F.1 Ownership structure

30 729285 had an ownership interest in three retirement residences located in Kanata, Kingston, and London, Ontario, known in these proceedings as the "Royalton Residences". Given the centrality of the Royalton Residences to the relief sought on this motion, let me describe their ownership structure in some detail.

31 Each of the three Royalton Residences was established as a limited partnership. The general partner for each limited partnership was owned 50% by the Maestro Group and 50% by a corporation — one for each residence — which the parties have referred to as the Royalton Companies. The ownership of each of the Royalton Companies was identical: an entity known as the Coram Group owned 50% of each Royalton Company, and 729285 owned the remaining 50%.

32 In sum, 729285 indirectly owned a 25% interest in each of the three Royalton Residences.

33 Whether 729285 held those ownership interests on its own behalf or in trust on behalf of other investors is a key issue on this motion. 729285 asserts that it held the interests only as a trustee for other investors; the Trustee takes the position that matters are not so clear cut and require further investigation.

F.2 Proceeds of sale of the Royalton Residences

34 Why this issue matters is that recently the Royalton Residences were sold and generated significant sales proceeds. The Royalton Residences located in Kanata and Kingston were sold on April 28, 2011, for $89,700,000.00. The balance of the closing funds after deducting amounts required to discharge encumbrances and legal fees (the "Royalton Proceeds") were transferred to the trust accounts of Cassels Brock LLP, counsel for 729285 and Liberty Assisted.

35 The Royalton Residence located in London, Ontario was sold to the Maestro Group for the net amount of $1.00.

36 The Trustee takes the position that a court appointed receiver would be entitled, in law, to a minimum of 25% of net Royalton Proceeds. 729285 contends that its only claim to those proceeds is as trustee for other investors.

F.3 Procedural history following the sale of the Royalton Residences

37 On April 26, 2011, MNP sought the appointment of a Receiver over 729285 and Liberty Assisted. Those Respondents opposed the motion and sought an adjournment.

38 On April 26, 2011, the Mesbur J. ordered, as a term of the adjournment, that 729285 and 729982 not sell, transfer, encumber, or otherwise deal in any manner with any beneficial interest up to a value of $3 million either of them may currently have or in the future may acquire in any of the Royalton Residences, including their interest in the Royalton Proceeds, pending further order of this Court.

39 Royalton Kanata and Royalton Kingston were sold on April 28, 2011.

40 On or about April 28, 2011, Gowlings inquired of Cassels Brock regarding compliance with the Order of Mesbur J. In a letter dated May 12, 2011, Cassels Brock delivered a letter asserting the following:

> [729]285 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.
>
> 729982 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.

41 On May 27, 2011, Goutis, the CFO of the Liberty Group, was cross-examined on his affidavits. Goutis confirmed that the Royalton Proceeds were being held in trust at Cassels Brock.

42 On the same day, Gowlings sent a letter to Cassels Brock claiming an interest in the Royalton Proceeds on behalf of the Trustee and requesting ten days' notice prior to any distribution of the Royalton Proceeds.

43 Around June 8, 2011, Cassels Brock LLP requested an adjournment of this motion without confirming or undertaking that they would not distribute the Royalton Proceeds in the interim. On June 14 the motion came before me, and I adjourned it on the following basis:

> The respondents seek an adjournment; the Tee/Receiver strongly opposes.
>
> The Royalton net sale proceeds have been released from Cassels Brock trust account. As a result the main issue is whether the Tee/Receiver has a claim for interim relief in the nature of the appointment of an investigator/receiver which would facilitate a tracing of those funds. The respondents want an opportunity to respond to their undertakings.
>
> After balancing the respective interests, I adjourn the motion to my list on Monday, June 27/11 on the following terms: ...

I then gave directions regarding the treatment of advisements and refusals made by the Liberty Group Respondents on various examinations which, in the result, disappeared as a problem because the Liberty Group Respondents answered most of the advisements and refusals.

44 In fact not all of the Royalton Proceeds had been disbursed from the Cassels Brock trust account. This became apparent when on June 21 the Liberty Group respondents provided their answers to undertakings and advisements from the examination of Goutis conducted on May 27, 2011. Those answers revealed that $931,212.97 of the Royalton Proceeds remained held in trust for the Kingston and Kanata Royalton Companies.

45 The parties re-attended before me on June 23 at which time I made the following endorsement:

> I order that Cassels Brock shall not disperse any remaining net sale proceeds from the Royalton transactions until my further order. Counsel advise that the hearing shall proceed, as scheduled, in 4

days on Monday, June 27, 2011. The issue of the funds held by Cassels Brock can be addressed at that time.

III. Concerns of the Trustee

46 The Trustee has expressed concerns about the accuracy and completeness of certain of the information it has received concerning the Bankrupt Companies, 729285, Liberty Assisted, and other persons and entities involved with the Liberty Group, and in particular the Royalton Residences. The Trustee regards the evidence obtained to date as incomplete, incorrect, conflicting, or otherwise unclear with respect to a number of aspects of this proceeding, in particular:

(a) The ownership interests in the Royalton Residences;

(b) The nature of the investments by 729285 into the Royalton Residences;

(c) The adequacy of the documentation produced to establish that 729285 held its interest in the Royalton Residences in trust; and,

(d) The disbursement of the Royalton Proceeds.

The Trustee seeks the appointment of an investigative receiver in order to obtain correct and complete information on all of these issues to allow it to evaluate whether the Bankrupt Companies have creditor or preference claims to any of the Royalton Proceeds.

47 By way of a general response the Liberty Group Respondents take the position that the scope of the allegations made by GE and the Trustee about inter-company transfers involving the Bankrupt Companies have shrunk significantly since this application was started. Although in its Preliminary Report dated March 30, 2011 the Trustee identified certain transactions involving Liberty Assisted and 729285 which it "believes required further investigation", the Trustee expressed no view as to the propriety or otherwise of the transfers identified. (It did make comment, however, in its Second Report, as noted above.)

48 When GE then commenced this application it alleged that the assets of the Bankrupt Companies had been "stripped" and asserted that $5 million had been transferred out of the accounts of the Bankrupt Companies.

49 The Liberty Group Respondents then delivered two affidavits to respond in a preliminary fashion to the allegations of GE. In one affidavit Mr. Goutis deposed that contrary to the numbers in the Trustee's preliminary report: (i) the amounts paid into the La Chaumière account in fact exceeded payments out of the La Chaumière account; (ii) an amount in excess of $495,000.00 was paid by Liberty Assisted and 729285 for the payroll of Liberty Place and Beach Arms for a period in 2010, which amount was still owing by Liberty Place and Beach Arms to Liberty Assisted Living and 729285 Ontario Limited; (iii) other amounts were paid by entities in the Liberty Group and by directors and officers of the Liberty Group for expenses of the Bankrupt Companies which have not been repaid; and, (iv) the remaining transfers from Liberty Place and Beach Arms to other Liberty entities were in the course of being reviewed and being reconciled.

50 The Liberty Group Respondents state that further analysis of the inter-company accounts confirmed the incompleteness and inaccuracy of the amounts identified in the Trustee's Preliminary Report: (i) the report failed to identify substantial payments into Liberty Place and Beach Arms from non-bankrupt Liberty entities; and (ii) when one totalled the inter-company transfers to and from the Bankrupt Companies and the remaining entities in the Liberty Group, the end result was that the Bankrupt Companies owed the Liberty Group amounts in excess of $250,000.00. This takes into account the payroll amounts previously identified as owing by Mr. Goutis, and unpaid management fees owing to Liberty Assisted.

51 The Liberty Group Respondents also submit that the Trustee has no factual basis for its allegation that 729285 is entitled to proceeds from the sale of the Royalton Kingston and Royalton Kanata residences and that the evidence only supports the conclusion that 729285 has no beneficial interest in the proceeds of those sales.

A. Ownership Interests in the Royalton Residences

A.1 Concerns of Trustee

52 In his April 13 affidavit Mr. Goutis deposed: "Neither Mr. Kassam nor Mr. Bhaloo own shares, directly or indirectly, in the Royalton companies."

53 Amir Kassam provided answers to undertakings given on his April 21, 2011 examination. One answer concerned "The Royalton Projects" (the "April 21 Royalton Undertaking Answer"). The undertaking answer stated, in part:

> Each Royalton company is held 50% by or for investors associated with the Coram group, the identities of which are unknown to Mr. Bhaloo, Mr. Kassam and Mr. Goutis. The other 50% of each Royalton company is held for a group of investors assembled by Mr. Kassam and Mr. Bhaloo ("Liberty Royalton investors"). Each investor invested varying amounts which were used as 50% of the equity contributed by each Royalton company in connection with the development of each Royalton retirement residence. The other 50% of the equity contributed by each Royalton company was provided by the Coram investors. In other words, Liberty Royalton investors accounted for 25% of the equity contributed to each Royalton limited partnership.
>
> The funds of each Liberty Royalton investor was to be paid to 729285 Ontario Inc., who then disbursed the funds as equity to each Royalton company as required.
>
> The names of each of the Liberty Royalton investors and their total investments to date are as follows:

There then followed the names of some 24 investors who invested $3.889 million through 729285 into the Royalton projects. The undertaking answer concluded:

> None of the money contributed to the Royalton properties came directly or indirectly from the Liberty Group.[4] We take "contribution" to mean investment or advance by way of debt or equity. As was disclosed on the examinations, Liberty Assisted Living made certain payments on behalf of one or more of the Royalton residences, which were reimbursed.

54 The *BIA* section 163 examination of Mr. Goutis continued on May 27. As a result of directions which I gave on June 14, responses to advisements and refusals taken on that examination were delivered to the Trustee on June 21. One question taken under advisement for which an answer was provided concerned the production of documents evidencing the investment of funds in and through 729285 by the investors in the Royalton projects; if no such documents existed, the precise terms of the trust were to be described. The response stated, in part:

> The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects.
>
> (emphasis added)

55 On this motion 870898 Ontario Inc., 842501 Ontario Inc., and 87065 Ontario Inc. were referred to as the "800 Series Companies". Kassam and Goutis are closely involved in the 800 Series Companies: Kassam is an officer and the sole director of 870898 Ontario Inc.; Kassam is an officer, and Goutis is an officer and director, of 842501 Ontario Limited; and, Goutis is an officer and the sole director of 870865 Ontario Limited.

56 The Trustee has expressed concerns about the inconsistent evidence provided about the ownership interests in the Royalton Residences - and the corresponding entitlement to the Royalton Proceeds - particularly the disclosure on June 21 that previously unknown 800 Series Corporations in which Kassam and Goutis are involved received 50% of the interest in the Royalton Proceeds held by 729285. Those companies were not disclosed as investor beneficiaries in the April 21 Royalton Undertaking Answer. It is the Trustee's position that accurate information is crucial to understanding the entitlement, if any, of the Bankrupt Companies as creditors and/or preference claimants to the Royalton Proceeds.

A.2 Position of the Liberty Group Respondents

57 The Liberty Group Respondents submitted that 729285 did not own any beneficial interest in the Royalton projects. It held 50% of its interest in the projects in trust for numerous individual and corporate investors assembled by Liberty for the purposes of investing in the Royalton projects. The remaining 50% interest was held by 729285 in trust for three companies pursuant to the terms of Declarations of Trust which have been produced. These Respondents argued that there was no evidence before the court to support the suggestion that 729285 had any entitlement to any proceeds from the sale of the Royalton retirement residences.

B. Investments by 729285 into the Royalton Residences

B.1 Concerns of the Trustee

58 The Liberty Group Respondents take the position that 729285 held its interest in the Royalton Companies in trust for unrelated investors. In the April 21 Royalton Undertaking Answer the investments by 729285 in the Royalton Residences were described as equity contributions.

59 The 729285 financial statements from 2008 described the investment in the Royalton Residences as a "project in progress" equity asset. In the 2009 financial statements, the Royalton Residences investment had been reallocated to be a "loan receivable" debt investment.

60 Mr. Goutis was asked about this inconsistency on his May 27 section 136 examination.:

> Q. 889: ...But then somehow in 2009 on the GL — I know you changed the designation of the accounts — that equity is now a loan receivable. So what's the basis for that?
>
> A. Yeah, but what I'm saying is if you look in the GL, the actual account numbers never change.
>
> . . .
>
> Q. 891: I get that. But why did you make that change though?
>
> A. I was adding it up. I probably popped it into AR instead of moving it up top.
>
> . . .
>
> Q. 895: And what caused you to make this re-characterization?

A. Well, that was just me typing it in.

The Trustee does not regard this answer as a principled explanation for the change in the financial statement description of the 729285 interest in the Royalton Residences from equity to debt. The Trustee is concerned that disbursements of the Royalton Proceeds by 729285 to the investors may have been improper in light of the conflicting information about the status of the investment by 729285 in the Royalton Residences.

61 The Trustee also has expressed a concern that funds provided to 729285 by the Bankrupt Companies, as part of the inter-company flow of funds within the Liberty Group, may have ultimately flowed to some or all of the Royalton Residences. The Trustee states that at the present time it does not possess information about how the funds received from the Bankrupt Companies were disbursed by 729285.

B.2 Position of the Liberty Group Respondents

62 In response the Liberty Group respondents stated that Mr. Goutis fully explained the alleged change in the asset profile in his May 19th affidavit. There was no change in the assets disclosed by 729285, merely a change in how those assets were allocated to accounts as between the years 2008 and 2009. The Liberty Group submitted that 729285 produced its general ledger listings which confirmed the lack of substantial change with respect to its assets as between 2008 and 2009.

63 The Liberty Group Respondents also submitted that the evidence showed that assertions in the Trustee's April 25 Report and the questions asked on the examinations suggesting that money from the Liberty Group of companies, including the Bankrupt Companies, may have found their way into one or more of the Royalton projects were not true.

64 The evidence of Mr. Goutis was that Liberty Assisted earned substantial management and leasing fees for services performed for the Royalton Kingston and Royalton London projects. While from time to time Liberty would pay incidental expenses associated with the Royalton projects, it sought and received reimbursement from the appropriate Royalton projects for these services.

C. Sufficiency of Trust Documentation regarding investments through 729285 into the Royalton Companies

C.1 Concerns of the Trustee

65 729285 produced documents relating to investments made through it by arm's-length investors in the Royalton Residences. Two basic documents were produced: (i) the Terms and Conditions of Investment Pool Number 1, and (ii) the Investment Commitment for Liberty Fund Number 1.

66 Under the Investment Commitment an investor agreed to make a stipulated investment in one of the Royalton Residences and undertook to make the investment cheque payable to "729285 Ontario Limited, in Trust". The Investment Commitment stated that the investor and Liberty would be bound by the terms and conditions set out in the Terms and Conditions of Investment. That document recited the three Royalton Residences and, as well, a property in Peterborough on which Liberty proposed "to undertake similar projects in partnership with the Project Partner". In section 3 of the Terms and Conditions Liberty agreed and acknowledged "that it shall hold fifty percent (50%) of its ownership interest in each of the Projects in trust for the Investors". (As noted above, Liberty — i.e. 729285 — held an indirect 25% interest in each Royalton Residence.)

67 Some of the Investment Commitments produced by 729285 were signed by the individual investors; some were not. Some were dated; others were not. 729285 also produced a large number of cheques from investors to it.

68 Most of the cheques from investors are dated in 2007 or 2008. The Trustee observed that the interest of Liberty in the Peterborough Project was not acquired until November 13, 2009. From this the Trustee argued that the Terms and Conditions must post-date the investments in the Royalton Residences through 729285 (which appear to have occurred in 2007 and 2008), raising a question as to whether the purported investor trusts were properly settled. That said, from Declarations of Trust concerning the interests of the 800 Series of Companies in the Royalton Residences, it appears that the interests of 729285 in those residences dated back to 2005 and 2006.

69 As noted, in section 3 of the Terms and Conditions Liberty agreed to hold 50% of its ownership interest in each of the Royalton Projects in trust for the investors. In his June 21 undertaking answers Mr. Goutis revealed for the first time that:

> The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects.
>
> (emphasis added)

70 The Liberty Group Respondents produced three Declarations of Trust — one for each Royalton Residence - to support that statement. The Declarations were dated in 2005 and 2006. Under each 729285 was named as the Trustee. Each declaration recited that 729285 owned certain common shares in each of the Royalton Companies (i.e. the level of ownership in which Coram held the other 50%) and that it had acquired half of those shares "as bare trustee and nominee for" one of the 800 Series Companies. The same beneficial interest of each of the 800 Series Companies in the trust shares was recorded in each Declaration of Trust: 50% for 870898 Ontario Limited; 45% for 842501 Ontario Limited; and 5% for 870865 Ontario Limited. Section 3 of each Declaration of Trust provided:

> The Beneficiaries have, as of and from the Effective Date, owned and continued to own the Trust Shares beneficially in the manner set out in paragraph 2 above, which beneficial ownership includes all rights, obligations, losses and liabilities arising or emanating from the Trust Shares.

71 As was revealed by the Liberty Group Respondents in the June 21 answers to advisements given on the May 27 examination of Mr. Goutis, from the net Royalton Proceeds payments were made on May 26 to the three 800 Series Companies: (i) $1.5 million to 870898 Ontario; (ii) $1.35 million to 842501 Ontario and, (iii) $150,000 to 870865 Ontario.

C.2 Position of the Liberty Group Respondents

72 The Liberty Group Respondents submitted that the trust documentation they disclosed clearly showed that 729285 did not have any beneficial interest in the Royalton Residences or any entitlement to the Royalton Proceeds.

D. Disbursement of Royalton Proceeds

D.1 Concerns of the Trustee

73 On his May 27 Examination Mr. Goutis testified that Cassels was holding the net Royalton Proceeds in its trust account. Later that day Trustee's counsel wrote to Cassels requesting an undertaking that the Royalton Proceeds held in trust by Cassels not be disbursed without 10 days' prior notice being provided to the Trustee. Gowlings received no response to that letter.

74 On the morning of June 14, 2011 Cassels sent Gowlings an e-mail stating: "I am advised that the Royalton proceeds have all been disbursed". As mentioned above, I included that apparent state of affairs in my endorsement of June 14.

75 That information provided by Cassels was not accurate.

76 On June 21, 2011, in answers to advisements, the Trustee was informed that, contrary to the June 14, 2011 email, "there remains the sum of $931,212.97 held in trust for Royalton Retirement Residence Inc. and Royalton Retirement Residence (Kanata) Inc. Additional fees payable are being satisfied out of these funds."

77 Those answers to advisements also stated that $1.5 million of the Royalton Proceeds had been paid to 1424800 Ontario Inc. The Liberty Group Respondents had not previously identified 142800 as a beneficiary of any trust in respect of the Royalton Residences, or to otherwise be entitled to any of the Royalton Proceeds. A corporate search conducted by the Trustee revealed that Mr. Bhaloo was the sole director of 142 and the company had been dissolved in 2007 for non-payment of taxes.

D.2 Concerns of GE

78 Amir Kassam is an officer and director of all the Bankrupt Respondents and is an officer and director of 729285, Liberty Assisted, and 729282.

79 On June 18, 2007, Amir Kassam provided to Column Financial, in support of the Bankrupt Respondents' application for a loan, a Certification of Borrower/Principal Financial Statement which included Kassam's Net Assets which were shown to total $26.010 million. Kassam also signed three indemnities in support of each loan to the Bankrupt Respondents.

80 On his cross-examination conducted April 21, 2001, Kassam admitted that he did not own $23.4 million of his reported net assets, but stated the assets were owned by 729282, of which he was not a shareholder. His explained was that he was trying to secure a mortgage so he was presenting the best picture he could by including his family's assets.

81 On April 28, 2011, GE's counsel corresponded with Kassam's counsel referring to the answers given on cross-examination, and advised that GE was taking the position that Kassam had obtained the financing from Column Financial under false pretences and that Kassam, accordingly, was responsible in law for the full indebtedness owed to GE, being $19,806,137.14.

82 On his cross-examination Kassam indicated that the Kassam family company, 729982, owned a $5 million interest in the Royalton Residences as of the date of his 2007 net worth statement and continued to own that interest.

83 729982 owns shares of 729285 and would thereby be entitled to share in any of the Royalton Proceeds in which 729285 had a beneficial interest.

D.2 Position of the Liberty Group Respondents

84 Mr. Bhaloo sought to address the concerns of the Trustee regarding the disbursement of the Royalton Proceeds in his June 23 affidavit in which he deposed that:

> (a) "The 1.5 million paid to [142] was done so at the direction of [the 800 Series Companies] out of proceeds to which they were entitled for use in other projects".

(b) He was "unaware that 142 had been dissolved"; and,

(c) He "did not realize that counsel and the court could take 'disbursed' [as stated in the June 14 Cassels email to Gowlings] to mean 'paid out of Cassels Brock' when in fact what had happened was that some of the Royalton Proceeds had been transferred from one trust account at Cassels Brock into another.

85 Mr. Bhaloo deposed that of the $931,212.97 remaining in the Cassels Brock trust account, Coram was entitled to $333,226.09, and most of the balance was earmarked to pay legal accounts rendered by Cassels Brock. (Coram already had received $4.5 million from the Royalton Proceeds on May 26, 2011.) Mr. Bhaloo reiterated that 729285 "has no beneficial interest in the proceeds of the Royalton sales and received none of the proceeds."

86 The Trustee stated that it was not aware of any documentary evidence offered by the Liberty Group Respondents to support Mr. Bhaloo's assertion that the $1.5 million paid to the dissolved company, 1424800, was done so at the direction of the 800 Series Companies "out of proceeds to which they were entitled for use in other projects." The Trustee also observed that this assertion was inconsistent with the evidence given by Mr. Bhaloo on his April 21 Examination that he was not a director of any company with an investment interest in the Royalton Residences. The Trustee further noted that Mr. Bhaloo's explanation did not address the issue of how funds could be disbursed to a dissolved corporation.

87 The Trustee takes the position that this apparent confusion over the dispersal of the Royalton Proceeds, together with the late appearance of the 800 Series Companies and 1424800 as recipients of Royalton Proceeds, requires a better understanding before any potential claim of the Bankrupt Companies to the Royalton Proceeds could be evaluated and quantified.

IV. Legal principles governing the appointment of investigative receivers

88 Last year, in his decision in *Anderson v. Hunking*,[5] Strathy J. comprehensively summarized the principles concerning the appointment of a receiver. I can do no better than to reproduce his summary in its entirety:

15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

(a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy. ... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

89 In that case Strathy J. declined to appoint a receiver, concluding that the plaintiffs had not demonstrated a strong case that the defendant had misappropriated certain funds, that other defendants might be liable to the plaintiff, and that the plaintiff enjoyed some existing protection by reason of the registration of a certificate of pending litigation against property.

90 Counsel drew my attention to several cases where this Court had appointed a receiver, in part for the purposes of investigating the affairs of a company or reviewing certain transactions. In one such case, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*,[6] Pepall J. described some of the key principles applicable to the appointment of a receiver:

> 37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Limited and I King West Inc. v. Stinson Hospitality Inc. et al.* That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O. W. Waste Inc. v. EX-L Sweeping and Flushing Ltd.*

In that case Pepall J. appointed a receiver of all the rights of an entity to certain contracts in order to break a deadlock amongst stakeholders and thereby facilitate the work of another receiver in realizing on a resort development.

91 In *Stroh v. Millers Cove Resources Inc.* [7] , Farley J. appointed a receiver in the context of an oppression proceeding under section 248 of the *OBCA* on the basis that evidence existed of self-dealing transactions by the major shareholder of a company, of which the Board members were not aware, and that the appointment of a receiver was necessary to protect the interests of the minority shareholders: "A continuation of the pattern of self-dealing without adequate shareholder protection cannot continue to be tolerated." [8] The Divisional Court upheld the appointment stating:

> 7 On the basis of our review of the evidence and the submissions made by counsel, we are not persuaded that he was wrong to appoint a receiver. We can find no error in principle or any injustice to a party. *We do not consider the remedy to be as drastic as suggested by counsel for the appellants in the circumstances of this case. In the first place, the company is not an operating company and the impact of the receivership will not be the same as it would be if it was engaged in active business. In the second place, the main thrust of the order is to make sure, as far as it will be possible to do so, that the assets of the company and the various arrangements can be fully examined and considered so that future actions can be then planned.* This should not, in our view, be any matter that Mr. Keady or his colleagues should fear based on the submissions that they made to us in this hearing.
>
> (emphasis added)

92 Finally, in *Loblaw Brands Ltd. v. Thornton*, [9] I appointed an investigatory receiver holding:

> 14 An interim receiver may be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in cases where the plaintiff can demonstrate a strong case that the defendant has engaged in fraud and that without the appointment of a receiver the plaintiff's right to recovery would be in serious jeopardy...
>
> 15 This court has appointed receivers whose main function was to monitor and investigate the assets and affairs of a defendant: *Century Services Inc. v. New World Engineering Corporation* (unreported decision of Morawetz J., July 28, 2006; File 06-CL-6558); *Udayan Pandya v. Courtney Wallis Simpson* (unreported decision of Ground J., November 17, 2005; File 05-CL-6159). In his endorsement in *Century Services* Morawetz J. concluded that the plaintiff had satisfied the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) and that the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation can be undertaken".

16 In my endorsement of March 6, 2009, I found that Loblaw had demonstrated a very strong *prima facie* case of fraud against Paul Thornton. The evidence filed by Loblaw on this motion only reinforces the strength of its case. Given the huge disparity between the amount of money that Loblaw has discovered was diverted to IBL and the value of the known assets of the defendants, as well as the failure of Paul Thornton to respond to these proceedings, I am satisfied that without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized. The balance of convenience overwhelmingly favours granting the appointment of a receiver.

V. Analysis

A. Motion to appoint investigative receiver over 729285

93 As Strathy J. observed in *Anderson v. Hunking* , *supra.*, in deciding whether to appoint a receiver the court must have regard to all the circumstances of the case. Let me consider first the request of the Trustee to appoint an investigative receiver over 729285.

94 The Trustee alleges that it has preference or debt claims against 729285 and that an investigative receiver is required for two basic reasons: (i) to review the financial records of 729285 in respect of transactions the Bankrupt Companies had with it, and (ii) to gain a clearer, more accurate understanding about whether 729285 enjoys any beneficial interest in the Royalton Proceeds which could be available to satisfy any claim by the Trustee against 729285.

95 Turning first to consider the strength of the Trustee's case against 729285, the Trustee has established that as of the date of bankruptcy two of the Bankrupt Companies, Beach Arms and Liberty Place, were creditors of 729285 and that during the preceding year all three Bankrupt Companies had made numerous payments to 729285. The Trustee points to section 95(1)(b) of the *BIA* to argue that such payments had the effect of giving 729285 preference over other creditors — realty taxes and wages were in arrears — thereby rendering such payments void against the Trustee as preferences.

96 In response the Liberty Group Respondents took the position that any presumption of a preferential intention under *BIA* section 95 was rebutted by extensive evidence to the contrary — i.e. that the Bankrupt Companies had made such payments as ordinary course transactions. [10] The Trustee took issue with the availability of such a defence, pointing to the following portion of the transcript of the examination of Mr. Bhaloo as showing there was nothing "ordinary course" about the way in which intercompany transactions were made between 729285 and the Bankrupt Companies:

> Q. 271: Liberty. Why then start 729285 for that?
>
> A. I don't know what the rationale was, to be honest. I can tell you that in trying to make ends meet, monies were flowing from — you know, these companies were needing funds. So we would advance monies to cover items, and that's why you have transfers —
>
> Q. 281: Well, it went all around the group of companies. I think we can safely assume that, right?
>
> A. Yes.
>
> Q. 219: Absolutely.
>
> A. It needed cash. People needed to get paid and whoever had money would, you know, try to make ends meet.

Q. 220: I'm going to borrow a phrase I used with Mr. Kassam. You borrowed from Peter to pay Paul frequently?

A. Yes.

Q. 221. And vice versa at times?

A. Yes. We always advanced — yes.

97 The Liberty Group Respondents further argued that the evidence provided by Mr. Goutis that no monies passing from the Bankrupt Companies to 729285 ever found their way into investments in the Royalton Projects stands uncontradicted, thereby removing any basis to appoint a receiver to preserve some notional entitlement on the part of the Bankrupt Companies to any of the Royalton Proceeds.

98 I think the simple answer to these arguments by the Liberty Group Respondents is that their own failure to provide straight answers to simple questions raises serious concerns about the accuracy of any information which they have provided, in their affidavits or on section 163 examinations, about the flows of money between the Bankrupt Companies and 729285, as well as the use the latter company made of those funds.

99 There is no doubt that monies flowed around the Liberty Group of companies on a regular basis. There is no doubt that in the year prior to the date of bankruptcy the Bankrupt Companies made payments to a non-arm's length company, 729285. A strong case exists that some of those payments were made at times when the Bankrupt Companies were insolvent, although the Liberty Group Respondents dispute that the insolvent period reached back to January 1, 2010. There is evidence that such inter-company payments were made at times when the Bankrupt Companies were not paying other creditors, such as municipalities to whom they owed taxes. Certainly the evidence demonstrates the existence of a serious question to be tried that such payments constituted preferences under section 95 of the *BIA*.

100 To accept the Liberty Group Respondents' assertion that they have provided full explanations about these transactions as ones occurring in the ordinary course would require accepting the reliability of the evidence they have proffered about the affairs of 729285 and the other Liberty Group of companies. However, I do not accept that such information necessarily is reliable. In their first batch of undertaking responses the Liberty Group Respondents purported to provide a complete list of investors in the Royalton Companies for whom 729285 was acting as trustee. Then, following my order of June 14 putting in place a mechanism to require the answering of questions taken under advisement or refusals, it turns out that four additional "investors" existed for whom 729285 acted as trustee — the three 800 Series Companies and the dissolved company, 1424800 Ontario Inc., paid as the nominee of one of the 800 Series Companies. All these companies were linked to the principals of the Bankrupt Companies.

101 As this information was slowly trickling out, under the pressure of orders of this court, the Royalton Proceeds were dissipating, with $4.5 million flowing out to those four related companies on May 26 and June 6, 2011. Whether those payments infringed the April 26 order of Mesbur J. is not a matter I need to decide and would require a better understanding of the actual facts. Suffice it to say that the non-disclosure of such related-party recipients — one of which was dissolved! — until after the funds had been disbursed raises more questions than answers.

102 Further, the Liberty Group Respondents were less than candid with me when on June 14 they informed me that the Royalton net sales proceeds had been released from Cassels Brock. That representation to the court was incorrect. I do not accept Mr. Bahloo's explanation in his June 23 affidavit that he "did not

realize that counsel and the court could take 'disbursed' to mean 'paid out of Cassels Brock'. That statement makes no sense whatsoever.

103 In sum, what tips the scales in the circumstances of this case is the combination of (i) the inconsistent information put forth by the Liberty Group Respondents during *BIA* section 163 examinations about the affairs of 729285, including its role in investments in the Royalton Residences, (ii) the incremental manner in which they disclosed information about what was actually happening to the Royalton Proceeds, *after* those proceeds had been disbursed to companies in which the principals of the Bankrupt Companies have an interest, and (iii) the misrepresentations made to me about the true state of the Royalton Proceeds held in the Cassels Brock trust accounts. Those factors point to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729285's interest in any of the Royalton Proceeds — whether they were in trust for others or whether the company enjoyed a beneficial interest in them — and, (c) to figure out the true state of affairs regarding those to whom the Royalton Proceeds were paid. Where a party has provided inconsistent information on *BIA* section 163 examinations and then misrepresents matters to the court, it is very difficult for that party to argue that the factors of irreparable harm and balance of convenience should be decided in its favour.

104 Accordingly, I grant the Trustee's motion to appoint an investigative receiver into the affairs of 729285.

B. Motion to appoint an investigative receiver over Liberty Assisted Living

105 I do not grant the Trustee's motion to appoint an investigative receiver over Liberty Assisted Living for two reasons. First, the evidence disclosed that Liberty Assisted acted as manager for the Bankrupt Companies. Accordingly some contract-based reason for the payments to and from the Bankrupt Companies might exist. Second, apart from placing before me evidence about the flows of money between Liberty Assisted and the Bankrupt Companies, the Trustee really focused its evidentiary attention on the affairs of 729285 and the confusion surrounding the Royalton Proceeds, not on Liberty Assisted. Whereas the Trustee adduced evidence about the Liberty Group Respondents providing inconsistent information about the affairs of 729285 and misstatements to the court about what was happening with the Royalton Proceeds, no similar evidence was placed before me about Liberty Assisted. Consequently, I am not satisfied on the evidence adduced that the Trustee has satisfied the *RJR-MacDonald Inc. v. Canada (Attorney General)*[1994 CarswellQue 120 (S.C.C.)] criteria in respect of its request to appoint an investigative receiver over Liberty Assisted.

VI. Conclusion

106 By way of summary, I grant the motion of the Trustee to appoint Albert Gelman Inc. as the investigative receiver, without security, into the affairs of 729285 Ontario Limited. I dismiss the motion of the Trustee to appoint such a receiver over Liberty Assisted Living Inc., but without prejudice to its right to re-apply for such relief on better evidence.

107 At the hearing Trustee's counsel provided me with a draft form of order. Mr. Pinos had not seen it before, so I afforded him an opportunity following the hearing to review it and email me his comments, which he did. Mr. Prophet then responded by email stating that the differences between the parties about the form of order were so significant that an attendance before me would be required.

108 I am out of town on vacation for the next three weeks. I will resume sitting on July 25. I therefore propose to provide the following guidance to counsel for drafting the appropriate order:

1/ The order shall refer to 729285 Ontario Limited by its corporate name, not by the term "debtor";

2/ The term of appointment of Albert Gelman Inc. shall be for 120 days. The receiver shall report to the court about its investigation prior to the expiry of its term of appointment. Its appointment is quite focused — to monitor and to obtain information about the affairs of 729285. Given that focused mandate, I see no need to make the appointment an indefinite one;

3/ The language of appointment must reflect the investigative and monitoring nature of the receiver's role. The receiver must have full access to, and control over, all the books, records, and business documents of 729285, but must exercise that access and control in such a way that the company can continue to carry on its business with minimal interference;

4/ While the powers enumerated in paragraphs 6(a), (b) and (c) of the Trustee's draft order are reasonable, the receiver shall not have the power to file an assignment in bankruptcy on behalf of 729285;

5/ I do not accept the comments made by Mr. Pinos about paragraphs 7 and 8 of the draft order. I regard those provisions as necessarily incidental to the receiver's investigative role;

6/ Draft paragraph 10 is reasonable. I do not accept Mr. Pinos' submission that access by the receiver should be limited to business hours;

7/ I reject Mr. Pinos' criticism of draft paragraph 11. I regard it as a necessary provision to ensure that the receiver obtains the information it has been appointed to secure;

8/ I accept Mr. Pinos' criticism of paragraph 13. It risks intruding into solicitor-client privileged communications. That said, as the client 729285 is entitled to such information and must produce it;

9/ I accept Mr. Pinos' criticism of paragraphs 15, 16, 18, and 19. They should be deleted;

10/ I do not accept the revision proposed by Mr. Pinos to paragraph 20. The proposed language is consistent with that contained in the Commercial List Model Receiver Order;

11/ I do not accept Mr. Pinos' criticism of paragraphs 21 through to 25. Although the receiver is not a possessory receiver, it is entitled to the same charge to secure its fees and disbursements as a standard receiver; and,

12/ I accept Mr. Pinos' criticism of paragraph 27.

I trust with these directions the parties can settle the form of the order.

109 If they cannot, then by next Wednesday, July 6, 2011, they shall email me their proposed forms of order, together with reasons supporting their versions. The attachments containing the proposed orders must be in Word format, not in PDF. I will review the orders and inform counsel of the final form. I strongly encourage counsel to attempt to settle the order without resorting to further submissions.

110 One additional paragraph should be included in the order. At the present time the sum of $931,212.97 from the Royalton Proceeds remains held in the trust accounts of Cassels Brock. That amount is close to the Trustee's current understanding of the amount of potential preference and debt claims it may have against 729285. In view of the inconsistent information provided by the Liberty Group Respondents about those entitled to the Royalton Proceeds, and its misrepresentation to me about whether all funds had been disbursed, I order that Cassels Brock not disburse or otherwise deal with such remaining Royalton Proceeds until further order of this court following the report of the receiver which I have directed.

VII. Costs

111 I would encourage the parties to try to settle the costs of this motion. If they cannot, the Trustee and GE may serve and file with my office written cost submissions, together with a Bill of Costs, by July 13, 2011. The Liberty Group Respondents may serve and file with my office responding written cost submissions by July 22, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

Motion granted in part.

Footnotes

* Additional reasons at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 10375 (Ont. S.C.J. [Commercial List]).

** Leave to appeal refused *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.).

1 Transcript, May 27 examination of Goutis, Q. 649.

2 *Ibid.*, QQ. 663-664.

3 *Ibid.*, Q. 660.

4 In his April 13 affidavit Mr. Goutis had deposed: "I can categorically state that from January 2010 to the end of March 2011 no money was transferred from any of the bankrupt or non-bankrupt retirement residences, or Liberty Assisted Living or 729285 to any of the Royalton residences, directly or indirectly.

5 2010 ONSC 4008 (Ont. S.C.J.).

6 (Ont. S.C.J. [Commercial List])

7 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) ; affirmed (1995), 85 O.A.C. 26 (Ont. Div. Ct.).

8 *Ibid.*, Gen. Div., para. 9.

9 (Ont. S.C.J.) .

10 Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Press, 2009), p. 195.

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Tab 3

2015 ONCA 368
Ontario Court of Appeal

Akagi v. Synergy Group (2000) Inc.

2015 CarswellOnt 7407, 2015 ONCA 368, 125 O.R. (3d) 401, 254 A.C.W.S. (3d) 186, 25 C.B.R. (6th) 260, 334 O.A.C. 279, 74 C.P.C. (7th) 45

Trent Akagi, Applicant (Respondent) and Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc., Respondents (Appellants)

Janet Simmons, R.A. Blair, R.G. Juriansz JJ.A.

Heard: December 12, 2014
Judgment: May 22, 2015
Docket: CA C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Counsel: J. Lisus, J. Renihan for Appellants, Student Housing Canada and R.V. Inc.
J. Spotswood and W. McDowell for Appellants, Integrated Business Concepts Inc. and Vincent Villanti
D. Magisano, S. Puddister for Appellant, Ravendra Chaudhary
M. Katzman for Appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.
J. Leon, R. Promislow for Respondent, J.P. Graci & Associates (the court appointed receiver)
T. Corsianos for Respondent, Trent Akagi

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

Related Abridgment Classifications

Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

Applicant contributed funds to tax program marketed and sold by respondents — Tax program did not generate tax loss allocations for applicant — Applicant sued respondents for fraud and obtained default judgment — Applicant obtained ex parte order appointing receiver over all assets, undertakings and property of respondent — Receivership order morphed into wide-ranging investigative receivership, freezing and otherwise reaching assets of 43 additional individuals and entities — Respondents' application to set aside receivership orders was dismissed — Respondents appealed — Appeal allowed — Initial order and subsequent orders were set aside — All of contested orders were set aside — Receivership orders stood on fundamentally flawed premise and were unjustifiably overreaching in powers they granted — Procedural concerns arose out of ex parte nature of extraordinary orders, casual manner in which they were processed, and failure to make full disclosure — Fact judgment was based on fraud was insufficient by itself to support order — Applicant was required to show that receivership order freezing and otherwise interfering with debtors' assets and assets of others was needed to protect his ability to recover on debt — Record reflected no evidence of any attempt by applicant to collect on judgment other than to apply for appointment of receiver — There was no evidence that respondents had insufficient assets to satisfy judgment — There

was no evidence of urgency or of any reason to believe that, if given notice, respondents would take steps to frustrate legal process or undermine applicant's prospects of recovery — Order authorizing issuance of certificates of pending litigation had to be set aside — There was no action or application commenced by applicant asserting claim to interest in land or requesting certificate of pending litigation — There was no indication that either applicant's claim or claims sought to be protected on behalf of 3800 unnamed investors gave rise to any claims to interest in land.

Table of Authorities

Cases considered by *R.A. Blair J.A.*:

Baker v. Paddock Inn Peterborough Ltd. (1977), 16 O.R. (2d) 38, 2 B.L.R. 101, 1977 CarswellOnt 44 (Ont. H.C.) — referred to

CanaSea PetroGas Group Holdings Ltd., Re (2014), 2014 CarswellOnt 14845, 2014 ONSC 6116, 18 C.B.R. (6th) 283 (Ont. S.C.J.) — considered

Century Services Inc. v. New World Engineering Corp. (2007), 2007 CarswellOnt 9945 (Ont. S.C.J.) — referred to

Chilian v. Augdome Corp. (1991), 78 D.L.R. (4th) 129, 44 O.A.C. 263, 2 O.R. (3d) 696, 49 C.P.C. (2d) 1, 1991 CarswellOnt 422 (Ont. C.A.) — referred to

DeGroote v. DC Entertainment Corp. (2013), 7 C.B.R. (6th) 232, 2013 CarswellOnt 15647, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]) — referred to

East Guardian SPC v. Mazur (2014), 19 C.B.R. (6th) 317, 2014 ONSC 6403, 2014 CarswellOnt 15935, 64 C.P.C. (7th) 90 (Ont. S.C.J.) — referred to

Erdman, Re (2012), 91 C.B.R. (5th) 82, 2012 CarswellOnt 6945, 2012 ONSC 3268 (Ont. S.C.J.) — referred to

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) — considered

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265, 282 O.A.C. 345 (Ont. Div. Ct.) — referred to

Illidge (Trustee of) v. St. James Securities Inc. (2002), 2002 CarswellOnt 1829, 34 C.B.R. (4th) 227, (sub nom. *Illidge (Bankrupt) v. St. James Securities Inc.)* 159 O.A.C. 311, 60 O.R. (3d) 155 (Ont. C.A.) — referred to

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 49 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — referred to

Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd. (2007), 2007 CarswellOnt 1567, 27 B.L.R. (4th) 299 (Ont. S.C.J. [Commercial List]) — referred to

Pandya v. Simpson (2005), 2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List]) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

Stroh v. Millers Cove Resources Inc. (1995), 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) — considered

Stroh v. Millers Cove Resources Inc. (1995), 85 O.A.C. 26, 1995 CarswellOnt 275 (Ont. Div. Ct.) — referred to

236523 Ontario Inc. v. Nowack (2013), 2013 ONSC 7479, 2013 CarswellOnt 16986 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 163 — considered

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 161 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 229 — referred to

s. 230 — referred to

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

s. 101 — considered

s. 103 — considered

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Rules considered:

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

Generally — referred to

APPEAL by respondents from judgment dismissing application to set aside receivership orders.

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

Overview

1 The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

2 Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

3 The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 — some four months before Mr. Agaki brought the *ex parte* application.

4 Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against

their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

5 On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

6 All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

7 Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi — although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

8 For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

Factual Background

The Tax Loss Allocation Scheme

9 Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

10 Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

11 In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

12 Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association ("IBCA") enclosing a cheque in the amount of $248.78, purportedly representing his share of IBCA's profits for the 2007 year.

13 The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

14 In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

The Underlying Proceedings: The Akagi Action

15 In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it — Shane Smith, David Prentice, Sandra Delahaye, and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

16 In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

17 Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

18 The defendants complied with these conditions.

19 Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice. [1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

20 The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

21 Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 — on the basis of the fraud and conspiracy to defraud claims in the Akagi action — awarded Mr. Akagi $116,575.98 in compensatory damages, $30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

22 I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately $182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

23 It is this claim that spawned the sprawling receivership outlined below.

The Initial Ex Parte Receivership Application

24 No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 — less than two months after the judgment was granted — Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

25 In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

26 In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

27 The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

> In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.
>
> The net result of the Alleged Offenders' activities is that:

> a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.
>
> b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and
>
> c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.
>
> As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

28 The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

29 As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the Receiver — then or at any time during the subsequent *ex parte* applications discussed below — disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

30 On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

31 Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

32 What follows is a brief description of how the receivership evolved.

The Subsequent Ex Parte Expansions of the Receiver's Powers

June 24, 2013

33 Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by

or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

34 The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

35 As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

36 Still, the Receiver was not content.

37 Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

August 2, 2013

38 On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were — and are — Synergy, Smith and Prentice. The only respondents on the initial application — and the only entities made subject to the Initial Order — were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

39 Here is what happened leading up to August 2.

40 On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

41 Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

42 The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a

complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

43 What makes the reach of the August 2 Order breathtakingly broad is the following:

- It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

- The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.

- The Order contained sweeping injunctive provisions — operating on a worldwide scale — enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".

- The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief. [2] The Court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which requires the commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

- Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

44 All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors — Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application — or thereafter for that matter — indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

45 I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

The September 16, 2013 "Come-back Hearing"

46 Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

47 At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

48 The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

49 Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim receivers) set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

50 Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

51 Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

Final or Interlocutory Order

52 Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

53 First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

54 The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

55 Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

56 In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]).

57 Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

58 For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

Discussion and Analysis

59 It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant. Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

60 I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" — so named for the powers the receiver is granted — as it begins to stride across the commercial law landscape.

The Framework of This Proceeding

61 The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act*. Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

62 This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances). As noted earlier, it is not a class proceeding or other form of representative action.

63 This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own

interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

64 This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>
> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>
> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.
>
> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "Investigatory" Receiverships

65 The idea of appointing a receiver or monitor with investigative powers — and sometimes, with only those powers — has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

66 Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view — when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions — including even, in proper circumstances, the affairs of and transactions concerning related non-parties — will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.); *Pandya v. Simpson* [2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List])] (17 November 2005), Toronto, 05-CL-6159; *Century Services Inc. v. New World Engineering Corp.* [2007 CarswellOnt 9945 (Ont. S.C.J.)] (28 July 2006), Toronto, 06-CL-6558; *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]); *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.); *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (Ont. S.C.J. [Commercial List]) (relief denied); *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.).

67 It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive

remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

68 A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

69 The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option. [3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

70 It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

71 In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation

72 A decade later, Ground J. made a similar order in *Pandya v. Simpson* (17 November 2005), Toronto, 05-CL-6159, as did Morawetz J. in *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558. Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

73 As Morawetz J. reasoned in *Century Services*, the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

74 In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

75 It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian,

American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.), are the first to have recognized such a receiver as, in effect, a specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

76 *Loblaw Brands* — a decision upon which the application judge relied — is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

77 Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

78 Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

79 In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

80 First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

81 Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

82 Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned — if not entirely concerned — with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

83 Nor does Brown J.'s decision in *General Electric* — a bankruptcy proceeding — provide a basis for justifying the orders here.

Tab 4

2009 CarswellOnt 6182
Ontario Superior Court of Justice [Commercial List]

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.

2009 CarswellOnt 6182, [2009] O.J. No. 4285, 181 A.C.W.S. (3d) 472, 59 C.B.R. (5th) 303

WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.

S.E. Pepall J.

Judgment: September 1, 2009
Docket: CV-09-8201-00CL

Counsel: J. Carhart, A. Sambasivan for Unit Owners, Other Unit Purchasers
R. Shayne Kukulowicz, J. Dietrich for Receiver of RRDI
P. Hugg for WestLB AG
G. Moffat for Marriott Hotels of Canada, Ltd.
D.G. Cohen for Fortress Credit Corp.
D. Byers, M. Konyukhova for Rosseau Resort Management Services Inc.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
R Inc. was ordered into receivership — At time of receivership, it was developing and constructing hotel and condominium complex and several units had been sold but transaction had not closed — Hotel Management Agreement ("HMA") governed management and operations of hotel — RR Inc. was shell corporation and was related to and owned by same shareholder group as R Inc. — RR Inc. assigned to W all its right, title and benefit in HMA — Rental Pool Management Agreement ("RPMA") was agreement between unit owners and purchasers whose agreements of purchase and sale had not yet closed — All unit owners were required to enter into RPMA — Obligations and entitlements of parties to various agreements were intricately connected, intertwined, and inter-dependent — RR Inc. owed obligations to unit owners that it was unable to perform — Having delegated responsibilities to others, it was dependent on agreements with R Inc. — RPMAs could not be performed independently of HMA — Receiver of R Inc. and representative counsel for unit owners and unit purchasers whose transactions had not yet closed brought motion for appointment of receiver of all right, title and interest of RR Inc. in various agreements relating to resort property and sought approval of sixth report of receiver — Motion granted — It was just and convenient to appoint receiver of all right, title and interest of RR Inc. in and to HMA, RPMAs and other agreements and arrangements requested by moving parties — In six month period, receiver was obliged to record all fees that would have been received by RR Inc. as result of RPMAs it entered into with unit owners and purchasers — Once RR Inc. receiver was appointed, it should be in position to consider binding nature of any agreement relating to contribution and indemnity with respect to HMA and whether amounts were owed by RR Inc. and R Inc. and were improperly appropriated — Record would enable court to consider whether RR Inc. had any real entitlements — R Inc. and RR Inc. had joint obligations under HMA to fund operating losses and working capital deficiencies — There was deadlock amongst various stakeholders — Unit holders were stranded in RMPAs that were incapable of performance.

Table of Authorities

Cases considered by *S.E. Pepall J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc. (2007), 2007 CarswellOnt 7332 (Ont. S.C.J. [Commercial List]) — referred to

O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd. (2003), 2003 CarswellOnt 3598 (Ont. S.C.J.) — referred to

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), 1972 CarswellOnt 1010, 25 D.L.R. (3d) 386, [1972] 2 O.R. 280 (Ont. C.A.) — considered

Statutes considered:

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

s. 47(2)(c) — referred to

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

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

s. 101 — considered

MOTION by related corporation and representative counsel for unit owners for appointment of receiver.

***S.E. Pepall J.*:**

Relief Requested

1 The Receiver of Rosseau Resort Developments Inc. ("RRDI") and Representative Counsel for unit owners and unit purchasers whose transactions have not yet closed request the appointment of a receiver of all right, title and interest of Rosseau Resort Management Services Inc. (RRMSI) in various agreements relating to the property known as the Rosseau Resort and seek approval of the sixth report of the Receiver. RRMSI moves to amend paragraph 6 of my order of August 18, 2009. No one supports RRMSI's motion and all those appearing support the motion of the Receiver and Representative Counsel. [1]

Backround Facts

2 Rosseau Resort Development Inc. (RRDI) is the registered owner of property on Lake Rosseau in Muskoka. When it was ordered into receivership on May 22, 2009, RRDI had been developing and constructing a first class hotel and condominium complex (the "Hotel"), the construction of which was incomplete. RRDI's property consists of about 40 acres plus the land on which the Hotel is situate. At the time of the receivership, 72 of a total of 221 units had been sold and closed, 65 had been sold but the sale transactions had not closed, and 84 remained to be sold. The terms of the agreements of purchase and sale required that the units be included in a rental pool and then be made available for rent by guests of the Hotel. The court appointed receivership was initiated by the first secured creditor, WestLB AG ("WestLB"). The construction of the Hotel has now been substantially completed.

3 To understand the nature of the motions before me, one must examine various inter-related agreements.

4 Firstly, there is a hotel management agreement ("HMA") that governs the management and operations of the Hotel. It is between the operator of the Hotel, Marriot Hotels of Canada, Ltd., RRDI and RRMSI. The receivership of RRDI is an event of default under the HMA that permits Marriott Hotels to terminate the HMA.

5 RRMSI is a shell corporation. RRMSI is related to and owned by the same shareholder group as RRDI. Mr. Ken Fowler holds the principal equity interest in both RRDI and RRMSI. RRMSI assigned to WestLB all its right, title and benefit in the HMA, including all monies or other benefits which may be claimed under it and the right to surrender, cancel or terminate the HMA.

6 Amongst other things, the HMA provides that:

- It is for a term of 25 years renewable for 4 successive periods of 10 years.

- RRDI and RRMSI are collectively defined as the "Owner". The obligations of RRDI and RRMSI under the HMA are joint and several. The rights of either RRDI or RRMSI as Owner may be exercised by either RRDI or RRMSI and any act or failure to act by either of them is treated as an act or failure to act by each of them.

- The Owner is obliged to require that all unit owners execute a rental pool management agreement ("RPMA") as a condition of purchase. RRMSI is described in the HMA as the rental pool manager. Under the HMA, RRMSI as the rental pool manager delegated all of its obligations under the RPMAs to Marriott Hotels except the obligation to provide periodic financial statements to unit owners and to make distributions to them. As a result of this delegation, Marriott Hotels is in essence responsible for the rentals and employs all staff necessary for the management and operation of the Hotel.

- The operation of the Hotel is placed under the exclusive supervision and control of Marriott Hotels. Marriott Hotels undertakes responsibility for all aspects of the Hotel operations, from employing staff, to booking the facilities, to marketing and promotion. It is not required to fund expenses of the Hotel and is not obliged to incur any liability or obligation. It collects all revenue of the Hotel and is responsible for applying and distributing it in accordance with the HMA. If it does incur any liability or obligation, it may deduct this amount from future distributions to the Owner.

- Generally speaking, Marriott Hotels may deduct its Hotel and management expenses from gross revenues. The remaining operating profit, if any, may be distributed to the Owner but the HMA does not specify which one. Marriott Hotels may treat either RRDI or RRMSI as the Owner under the HMA.

- To the extent that expenses exceed gross revenue, there is an operating loss. The Owner must fund operating losses within 30 days of request by Marriott Hotels. In addition, the Owner must provide Marriott Hotels with sufficient working capital to carry on Hotel operations if gross revenues are insufficient to do so. According to the Receiver's second report dated July 3, 2009, operating losses had been consecutively incurred at the Hotel since it opened in December, 2008 and, while the Hotel was forecast to generate modest operating profits from July to September, 2009, the operating profits will be insufficient to offset the actual and forecasted operating losses for the pre July, 2009 and post September, 2009 periods respectively. In April, WestLB funded the sum of $1.9 million to RRDI to reimburse Marriott Hotels and in June, the Receiver funded an additional sum of $550,000.

7 The second relevant agreement to consider is the RPMA. It is between the unit owners or purchasers whose agreements of purchase and sale have not yet closed and RRMSI. It governs the lease and occupation of the units. As mentioned, the units must be included in the rental pool and all unit owners must enter into a RPMA. Unit owners are prohibited from leasing or permitting occupation of their units except as permitted by the RPMAs. In the RPMAs, RRMSI is appointed as the exclusive rental pool manager.

8 In the disclosure documents provided to each potential unit purchaser, RRMSI was described as a single purpose newly incorporated entity that had no assets and that had no prior history of managing rentals or rental pools. The documents stated that its ability to fulfill its obligations to fund the ongoing operations of the rental pool may depend on its ability to arrange other sources of funding. Prior to the receivership, RRMSI had no employees of its own and all of the functions of RRMSI under the agreements were performed by employees of RRDI.

9 The disclosure documents state that RRDI arranged for RRMSI to act as the exclusive rental pool manager. There is no written agreement between the two companies. Mr. Fowler states that RRMSI was appointed as the exclusive rental pool manager by verbal agreement with RRDI. The disclosure documents describe RRMSI as the initial rental pool

manager. This seems to contemplate that another entity could be a successor rental pool manager. Mr. Fowler states further that there was also a verbal agreement between RRDI and RRMSI that RRDI would fund all amounts required to be funded by the HMA. This is not reflected in the disclosure documentation. Mr. Fowler states that this is because the verbal agreement it had with RRDI related to RRDI's obligations to Marriott Hotels and was not material to the obligations as between RRMSI and the unit owners. The verbal agreement is not referenced in the HMA.

10 In spite of the fact that, according to Mr. Fowler, RRMSI had no obligations to Marriott Hotels because they had been assumed by RRDI, in January, 2009, RRMSI delivered to Marriott Hotels funds in the amount of $435,000 on account of operating losses. Mr. Fowler states that this payment was made by way of an inter-company transfer between RRMSI and RRDI. There was another inter-company transfer from RRMSI to RRDI in the amount of $54,000. Mr. Fowler states that this transfer was to have been made to Red Leaves Development Inc., a company related to RRDI and RRMSI.

11 The rental pool manager's ability to pay revenue to unit owners arises from the payment of operating profit by Marriott Hotels of which there has been none. According to the Receiver, the distribution of operating profit does not match the expectation of distributable profit to unit owners under the RMPAs. The Court has ordered that any payments under the HMA be paid to the Receiver but to date there have been none given the lack of any operating profit. According to the Receiver, under the existing structure, the calculation of amounts owing to unit owners under the RPMAs could result in there being amounts owing to unit owners even when the Hotel incurs an operating loss.

12 Amongst other things, the RPMAs provide for the following:

- The term is 25 years renewable for 4 successive periods of 10 years.

- It addresses periods of personal use by the unit owner and availability of the unit for rent to the public.

- RRMSI is to provide cleaning, rental and management services to the units. These responsibilities have been delegated to Marriott Hotels.

- If in a fiscal year, certain costs exceed the gross rental pool revenue, the rental pool manager guarantees to pay the deficiency to unit owners. This is regardless of whether any operating profits are payable to the Owner by Marriott Hotels under the HMA. The Receiver is of the view that RRMSI does not have the resources to meet this obligation.

- Marriott Hotels is granted the right to enforce all rights and privileges of the rental pool manager against the unit owners.

- The rental pool manager may terminate its appointment on 180 days notice. The unit owner may terminate if, amongst other things, the rental pool manager fails to observe any material covenant that materially adversely affects the owner and the default continues for 45 days following written notice and if more than $^3/_4$ of the owners approve the termination provided that the rental pool manager will be given not less than 120 days prior written notice of the termination. Disputes are to be settled by arbitration although both the unit owner and RRMSI may commence legal proceedings for mandatory, declaratory or injunctive relief as may be necessary to define or protect the rights and enforce the obligations contained in the RPMA pending the settlement of the dispute.

- The rental pool manager is entitled to a management fee.

- The rental pool manager is to deposit all gross rental pool revenue into an operating account. This revenue is defined as all amounts collected by the rental pool manager as charges for the rental of all of the units. The gross rental pool revenue is adjusted as a result of various deductions such as marketing and royalty fees. An owner is entitled to net rental revenue that reflects a calculation based on factors including the adjusted gross revenue and the days the subject unit was in the rental pool. The obligations imposed by the RPMA are conditional upon sufficient

funds being available in that account from the gross rental pool revenue or from the owner's resources. Owner refers to the unit owner, not RRMSI.

13 There are also other agreements executed with Marriott Hotels and/or its affiliates. These consist of a License Royalty Agreement, an International Services Agreement, a Technical Services Agreement and a Marketing License Agreement. RRDI is a party to all of these agreements and RRMSI is a party to the first two of these agreements. Marriott Hotels is entitled to certain fees under these agreements.

14 In its second report, which was approved by Cumming J., the Receiver reported that in light of the assignment of the HMA to WestLB and the delegation of RRMSI's responsibilities to Marriott Hotels, it appeared that RRMSI had no practical ability to perform any services as rental pool manager under the RPMAs and that the Receiver understood that RRMSI had no ability to fund any distributions to unit owners under the RPMAs in respect of the calculation of net rental revenue. At least since the beginning of June, 2009, efforts have been made to address these and other problems with Mr. Fowler on behalf of his various companies without success. On July 8, 2009, Cumming J. authorized the Receiver to undertake a sales and marketing process which included the sale and marketing of the 84 unsold condominium units and the residual interest of RRDI in the Hotel and other assets. On July 24, 2009, the price list proposed by the Receiver for a "One-Day Only Sale" on August 22, 2009 was approved by Campbell J. He stated that it was opposed by RRDI and in his endorsement, he noted that given the nature of the resort and its location, time was of the essence. He fixed costs in the amount of $2000 to reflect the failed opposition but stated that the amount would be payable at the discretion of any judge dealing with the matter if so minded and who concluded on a further attendance that there was no foundation to the opposition.

15 On August 17, 2009, the Receiver brought a motion requesting a variety of relief including: an order authorizing the Receiver to repudiate the HMA and to enter a new HMA on behalf of RRDI with Marriott Hotels; authorizing the Receiver to repudiate the arrangements between RRDI and RRMSI whereby RRMSI was appointed rental pool manager; and approving the Receiver's fourth report.

16 In its fourth report, the Receiver expressed its conclusion that the financial and legal structure underlying the Hotel's rental pool and the form of RPMAs entered into between RRMSI and the unit owners were not viable in their current form, that the HMA could not be assumed nor adopted by the Receiver on behalf of RRDI, and that it had to implement a restructuring of the various agreements and arrangements to which RRDI was a party. The Receiver outlined the steps it proposed to take including entering into new RPMAs with unit owners, purchasers of units whose agreements of purchase and sale had not yet closed, and new unit purchasers including those buying at the "one day only" sale so as to restructure the rental pool and enable it to be financially viable. The Receiver could then sell the unsold units to purchasers and sell the residual interest of RRDI in the Hotel. The Receiver was of the view that the steps outlined were necessary to preserve the value of the assets, maintain the operations of the Hotel and successfully carry out the sales and marketing process. Absent same, the Receiver stated that the operations of the Hotel would be jeopardized. The Receiver stated that in order to undertake sales of units to prospective new unit purchasers, the Receiver had to have in place for the one day sale the necessary arrangements with Marriott Hotels, an appropriate and workable RPMA, and the requisite disclosure documentation to facilitate sales pursuant to the retail sales programme.

17 The Receiver noted that the RMPAs require the payment of revenue by the rental pool manager to the unit owners but the rental pool manager's ability to do this arises from the payment of operating profit by Marriott Hotels under the HMA. RRMSI does not have an ownership interest in the Hotel or an exclusive right to receive distributions from Marriott Hotels. The Receiver stated that it cannot continue the structure of the RPMAs. The calculation of amounts owing to the unit owners could result in there being an amount owing to the unit owners even when the operations of the Hotel incur an operating loss. The structure appears to have been developed on the premise that RRDI would have the financial resources to backstop the obligations of RRMSI to unit owners and the Receiver was of the view that it was inappropriate to continue in this manner with new unit purchasers. I agree. The Receiver also determined that it was desirable to continue with Marriott Hotels as the Hotel operator. It negotiated a new HMA in which RRDI's obligations would be secured by a court ordered charge in the amount of $5 million subordinate only to the Receiver's charge and

borrowing charge and priority construction lien claimants and it also negotiated a charge in favour of unit owners in the amount of $5.3 million.

18 Following extensive negotiations with stakeholders, the Receiver was successful in reaching a resolution of outstanding issues relating to the August 17, 2009 motion with all but RRMSI. The secured creditors, WestLB and Fortress Credit Corp., represented unit owners, purchasers with agreements of purchase and sale that had not yet closed, lien claimants and Marriott Hotels all consented or were unopposed to the Receiver's proposals. The Receiver had negotiated terms of settlement with a committee of unit owners, a key element of which was a new RPMA to be entered into with RRDI as the rental pool manager.

19 On August 13, 2009, Mr. Fowler on behalf of RRMSI wrote to the Receiver and its counsel. He stated amongst other things, that having reviewed the proposed new RPMAs, he considered the financial terms to be reasonable but felt they were prejudicial to RRMSI and without legal authority. He stated that the purpose of the letter was to register RRMSI's objection to the order sought and that RRMSI did not consent to the order. He requested that the Receiver provide a copy of its letter to the Court and said that RRMSI did not intend to file additional material or to instruct counsel to attend at Court. The Receiver confirmed that it would file the letter in Court which it did.

20 Thus, although served, RRMSI opted not to oppose the motion in court on August 17, 2009. Faced with this peculiar position, and the pending one day only court ordered sale of units a few days later, I granted the order requested but somewhat amended on August 18, 2009. Although already provided for in the initial receivership order, I specifically authorized the Receiver to repudiate the HMA and the verbal agreement appointing RRMSI as the rental pool manager and approved a new form of RPMA for execution by new purchasers of units as well as existing unit owners and purchasers. Marriott Hotels had previously expressed its intention to terminate the HMA upon repudiation by the Receiver and the need to negotiate a new HMA.

21 I also indicated that the relief set forth in paragraph 6 of the order dealing with termination of the RPMAs between RRMSI and unit owners was subject to any motion to vary or amend returnable August 20, 2009. Paragraph 6 stated:

> THIS COURT ORDERS AND DECLARES that as a result of the repudiation by the Receiver and termination by Marriott of the Current Hotel Management Agreement, and the repudiation by the Receiver on behalf of RRDI of any agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the Existing Rental Pool Management Agreements between RRMSI and Unit Owners and Existing Purchasers are not capable of performance and may be terminated by Unit Owners and Existing Unit Purchasers. The execution by a Unit Owner or Existing Unit Purchaser of the New Rental Pool Management Agreement shall be deemed to be notice of the termination by the Unit Owner or Existing Unit Purchaser of their Existing Rental Pool Management Agreement; provided further that any action against a Unit Owner or Existing Unit Purchaser by RRMSI by reason of the execution of a New Rental Pool Management Agreement by a Unit Owner or Existing Unit Purchaser is stayed pending further Order of this Court.

22 Paragraph 6 provided protection and certainty for the affected unit owners and purchasers. Absent a mechanism to facilitate the unit owners entering into viable rental pool contracts without the threat of litigation from RRMSI, a gap would be created whereby unit owners and purchasers would continue to be party to their RPMAs while RRMSI was not in a position to perform. The time required to terminate the RPMAs would create an unworkable scenario in which there would be an overlap of two rental pool regimes. 59 unit owners have closed their transactions and paid for their units for an aggregate gross purchase price of approximately $26 million.

23 I also granted an order appointing Miller Thomson LLP as representative counsel for the unit holders and purchasers whose agreements had not yet closed but all of whom had executed RPMAs with RRMSI ("Representative Counsel") but reserved the right to any such party to opt out of the representation. None has.

24 RRMSI brought a motion to vary and the Receiver and Representative Counsel brought the within motion returnable August 20, 2009. A timetable that recognized the urgency of the matter was established and I also arranged for a settlement conference on August 26, 2009 before Campbell J.

25 On August 21, 2009, Marriott Hotels wrote to the Receiver expressing the need for certainty with respect to paragraph 6 of my order and indicating that it is not prepared to remain a party to the HMA with only RRMSI as owner. Marriott requires certainty that the party fulfilling the obligations of the owner under any hotel management agreement has the necessary funds and resources to satisfy the owner's obligations thereunder. It reiterated its intention to terminate the HMA with RRDI and RRMSI.

26 At the sale on August 22, 2009 which continued into August 23, 2009, agreements of purchase and sale were entered into with respect to 76 of the remaining units available for sale (subject to a 10 day rescission period). These new unit purchasers will be presented with the new RPMAs for execution with RRDI by its Receiver. According to the Receiver, to complete those sales, it is imperative that the RRDI Receiver establish a new HMA and a certain and stable rental pool.

27 The Receiver has been advised by some unit owners that they understood they would receive distributions under the RPMA even if there were no funds in the operating account. Indeed, in circumstances where there were no funds paid by Marriott Hotels into the operating account, RRMSI made payments to unit holders. Mr. Fowler states that since the opening of the Hotel in December, 2008, unit owners were delivering funds to RRMSI with respect to the interim occupancy of their units and RRMSI deposited those funds into the operating account. As evidenced by correspondence dated November 5, 2008, sent on letterhead of Red Leaves to Gordon and Judy Jacobs, unit purchasers whose transaction had not yet closed, the Jacobs were to pay interim occupancy fees which were described in the letter as representing a combination of interest on the balance of the purchase price, common expenses and property taxes. The letter stated that "The receipt of rental revenue and use of your suite will unfortunately be withheld if RRMSI is not in receipt of your Interim Occupancy fees on or before December 5, 2008 due date." In his affidavit, Mr. Fowler states that these funds belonged to RRMSI but the moving parties submit that this was not the case given that all of these payments would be for the account of RRDI in that it was the registered owner to whom common element and taxes would be paid and was the one who had entered into the agreements of purchase and sale with the Jacobs and who therefore would be entitled to the interest payment. Mr. Carhart as Representative Counsel submits that this was akin to a Ponzi scheme in that RRMSI was funding payments to the unit purchasers out of money paid by the unit purchasers that should have been paid to satisfy their obligations to RRDI.

28 The aforementioned 59 unit owners have signed a settlement agreement with the Receiver which calls for the execution of a new RPMA. As stated in the moving parties' factum, "They are the ones most directly put at risk by the allegations of RRMSI that it can still perform the current RPMAs (suggesting a cause of action against them if they execute a new RPMA) and that RRMSI can prevent Marriott Hotels from renting their units to guests of the Hotel (thereby depriving them of revenue from their unit)."

29 Since the commencement of Hotel operations in December, 2008, Marriott Hotels has made no distributions of operating profit or any other funds to either RRDI or RRMSI as owners under the HMA nor has it paid any distributions to the Receiver.

30 The settlement conference on August 26, 2009 was unsuccessful and the motions were argued on August 28, 2009.

Positions of Parties

31 The Receiver and Representative Counsel submit that it is just and convenient for the RRMSI Receiver to be appointed given the intertwined contractual relationships and obligations of RRDI and RRMSI. The moving parties submit that RRDI and RRMSI are inextricably linked and the position of RRMSI creates a deadlock stranding unit owners in RPMAs that RRMSI cannot perform and stalling the ability of the Receiver to regularize the rental pool arrangements, complete a new HMA with Marriott Hotels, and close transactions with existing and new unit purchasers.

A receivership addresses this deadlock. There is no real prejudice to RRMSI. It has no ownership interest in the Hotel and has paid no consideration or contribution for the value it now seeks to obtain. Both RRDI and RRMSI are owned primarily by Mr. Fowler. RRMSI is holding the unit holders hostage in circumstances where RRDI was unable to complete construction of the Hotel, unable to fund operating expenses to Marriott Hotels, did not maintain the construction holdbacks required by the *Construction Lien Act*, owes approximately $5 million to its construction trades who built the Hotel, and is unable to meet the payments under incentives it offered to purchasers to induce them to buy units. The requested receivership is just and convenient in these circumstances.

32 The moving parties also submit that a receiver is merited given RRMSI's suspicious and questionable conduct. Noting the Jacobs' experience, Representative Counsel argues that RRMSI has played fast and loose with the unit purchasers, paying them a rental pool distribution under the RPMA with their own money with a view to inducing the closure of purchase agreements. In addition, RRMSI appropriated funds in the nature of interest, common expense and property tax payments that belonged to RRDI and is a creditor of RRDI for those amounts.

33 Furthermore, the RMPAs are so obviously incapable of performance as a result of the repudiations that have been authorized and the termination of the HMA by Marriott Hotels when effective. RRMSI cannot fund payments to unit owners and purchasers and cannot fulfill the operational obligations that were delegated to Marriott Hotels. Furthermore, without the HMA, the RPMAs are orphaned and incapable of performance. RRDI's receivership is an event of default under the HMA and treated as an event of default of RRMSI that entitles Marriott Hotels to terminate. The moving parties submit that the RMPAs have been frustrated and there has been an anticipatory breach in that RRMSI has made it impossible to perform the RMPAs. No damages could be recovered by RRMSI against unit owners for having executed new RPMAs. Paragraph 6 should be sustained as it permits the unit owners to participate in new RMPAs without threat of action by RMSI.

34 RRMSI states that it is not in default of any obligations and has valuable contractual choses of action. It submits that the structure developed for the project was not unique and reflects the business deal that was negotiated. It is not indebted to RRDI or the Receiver and is not a guarantor of RRDI's debts. It is also not in breach of any obligations under the RMPAs for failure to make payments to the unit owners because the obligation is conditional upon sufficient funds being available in the operating account from the gross rental pool revenue and there are none. The appointment is sought to benefit RRDI and its stakeholders and the Receiver should be disqualified to be the receiver of RRMSI as well as RRDI. WestLB did not obtain an assignment of the contractual choses in action and it, Fortress, Marriott Hotels and the unit owners were aware of RRMSI's status and limited assets prior to entering into their respective agreements with RRDI and RRMSI. The parties should be left to negotiate their differences. Under the RPMAs, the unit owners agreed to resolve disputes by good faith negotiations and arbitration. Under the HMA, all parties are required to cooperate upon request in good faith to amend the HMA or substitute it provided that the parties' rights and obligations are not materially changed. Furthermore, there could be two rental property managers.

35 RRMSI submits that none of RRMSI, Marriott Hotels or the unit owners is in receivership and Canadian courts have often expressed unease with unduly interfering with the rights of third parties in an insolvency context. The moving parties are asking the Court to circumvent the termination provisions of the HMA and the RMPAs under the guise of the receivership of RRDI and paragraph 6 of the order should be deleted.

36 There is no basis for a receiver to be appointed and in any event, the Receiver of RRDI would have a conflict relating to its duties to RRDI and to RRMSI.

Discussion

37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*[2], as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may

include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])] [3]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.* [4].

38 RRMSI is a shell company. It is owned by the same shareholder group as RRDI. Mr. Fowler holds the principal equity interest of both RRDI and RRMSI. Prior to the receivership of RRDI, RRMSI had no employees and its functions were performed by employees of RRDI. It has no ownership interest in the Hotel and no exclusive right to receive distributions under the HMA. In any event, RRMSI assigned its rights relating to the HMA to WestLB. As noted in RRMSI's factum, under the HMA, RRMSI delegated to Marriott Hotels most of its obligations under the RPMAs including collection of all hotel rental payments, paying expenses, and accounting functions. The exceptions were the obligation to provide periodic financial statements to unit owners and to make distributions to unit owners. Although the RPMAs seem to render RRMSI liable to unit owners, nothing is payable unless funds are in the operating account.

39 The obligations and entitlements of the parties to the various agreements are intricately connected, intertwined, and inter-dependent. RRMSI owes obligations to the unit owners that it is unable to perform. Having delegated its responsibilities to others, it is dependent on agreements with RRDI. The RPMAs cannot be performed independently of the HMA. The Receiver recommended and was authorized to repudiate the HMA. Marriott Hotels has expressed its termination intentions with respect to the HMA. Paragraphs 9.01 and 11.30 of the HMA entitle Marriott Hotels to terminate based on the event of default of the receivership of RRDI. An event of default by either of RRDI or RRMSI is treated as an event of default of the other. Section 11.28 of that agreement cannot be read as a bar in these circumstances.

40 While a party need not be a creditor to seek the appointment of a section 101 receiver, RRDI and RRMSI have joint obligations under the HMA to fund operating losses and working capital deficiencies to Marriott Hotels. Joint and several debtors have a restitutionary right of contribution among themselves: *Chitty on Contracts* [5]. While Mr. Fowler states that RRDI orally agreed to fund all amounts required to be funded by the HMA, no particulars of when that agreement was made were forthcoming and RRMSI did pay $435,000 to Marriott Hotels although Mr. Fowler suggests that the transfer was to have been made to Red Leaves Development Inc. There is also the issue of the other payments and distributions made by RRMSI.

41 Even if one accepts Mr. Fowler's evidence however, there clearly is a deadlock amongst the various stakeholders. The unit holders are stranded in RPMAs that are incapable of performance. For obvious reasons, the development did not contemplate and should not encompass two property managers and two RPMAs. The $26 million value invested by the unit owners is at risk as is the residual value of the Hotel.

42 As noted by the moving parties in their factum, even if there is no current default of RRMSI under the RPMAs (which it denies), such a default will arise through the passage of time such as on the repudiation or termination of the HMA. The receivership will permit the implementation of the settlement agreements with unit owners and unit purchasers, a key element of which is their agreement to enter into a new RPMA; the continued operation of the Hotel in an orderly manner; the establishment of a working rental pool and the execution of a sustainable new HMA; and the resolution of the deadlock and wasting of value if the status quo is allowed to continue. Counsel for RRMSI submits that the parties should negotiate these problems but the parties have already engaged in extensive negotiations including a settlement conference with Justice Campbell. They have come to Court seeking a just resolution. I am also not persuaded that the Receiver is obliged to attend at arbitration and am satisfied that it may seek the relief it requests.

43 In all of the circumstances outlined, it is both just and convenient to appoint a receiver of all right, title and interest of RRMSI in and to the HMA, the RPMAs and the other agreements and arrangements requested by the moving parties. That said, it seems to me just that for the period commencing September 1, 2009 and continuing for 6 months, the receiver be obliged to record all fees, if any, that would have been received by RRMSI as a result of the RPMAs it entered into

with unit owners and purchasers. This time period reflects in an approximate way the termination provisions contained in the RPMAs. In submissions, counsel for the Receiver indicated that it would be possible to track those amounts. Once the RRMSI receiver is appointed, it should be in a position to consider the binding nature of any agreement relating to contribution and indemnity with respect to the HMA and whether amounts are owed by RRMSI to RRDI and were improperly appropriated. The record would also enable the Court to consider whether RRMSI has any real entitlements. In all of these circumstances, paragraph 6 of my order also should be sustained without prejudice to claims that may be made by either the Receiver or RRMSI to the subject matter of the aforementioned record. For greater certainty, this would not detract from the ability of the unit owners and unit purchasers to terminate by entering new RPMAs, my intention being to provide them with full protection and at the same time preserving the possibility of a claim by RRMSI to the fees, if any, reflected in the record.

44 While this outcome may not be perfect from the viewpoint of all stakeholders, as Farley J. commented in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* [6], the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. Although he was dealing with the broad powers under section 47(2)(c) of the *Bankruptcy and Insolvency Act*, he stated that the Court could enlist the services of an interim receiver to do not only what justice dictates but also what practicality demands. His observations apply equally to this case.

45 RRMSI also complains that Alvarez & Marsal Canada ULC should not be appointed receiver of RRMSI as its duties will conflict with those relating to RRDI. The appointment of a different receiver would be very costly for a project that already faces serious challenges. In addition, it would be inefficient. Alvarez & Marsal Canada ULC has already indicated its proposed course of action should it be appointed receiver of RRMSI and may attend to seek the Court's approval of its actions. A receiver is a Court appointed officer and acts under the Court's supervision. In my view, it is impractical, unnecessary and undesirable to appoint a receiver other than Alvarez & Marsal Canada ULC.

46 In conclusion, the motion of the moving parties is granted and the motion of RRMSI is dismissed subject to the need of Alvarez & Marsal Canada ULC to maintain a record as discussed. It seems to me appropriate that there be no order for costs.

Motion granted.

Footnotes

1 Any relief granted is without prejudice to the rights and obligations of 18 unit purchasers whose transactions have not closed and who wish to get out of their agreements.

2 [1972] 2 O.R. 280 (Ont. C.A.)

3 (07-CL-6913)

4 [2003] O.J. No. 3766 (Ont. S.C.J.).

5 30th ed. (London: Sweet & Maxwell, 2008) para. 17-027.

6 (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]).

Tab 5

1987 CarswellOnt 383
Ontario Supreme Court, In Bankruptcy

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)

1987 CarswellOnt 383, [1987] O.J. No. 2315, 16 C.P.C. (2d) 130, 3 A.C.W.S. (3d) 426

RYDER TRUCK RENTAL CANADA LTD. v. THORNE, ERNEST & WHINNEY, INC. TRUSTEE IN BANKRUPTCY FOR 568907 ONTARIO LTD. et al.

Salhany L.J.S.C.

Judgment: February 19, 1987
Docket: No. 1751

Counsel: *Thomas F. Delorey*, for plaintiff (moving party).
Ross Earnshaw, for 658273 Ontario Limited, defendant responding party.
No one appearing for the other defendants.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor

Headnote

Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor

Receivership — Motion to appoint a receiver to collect accounts or to restrain debtor from disposing of any of its assets — Debtor corporation winding down its affairs — No dispute that money owed by debtor to plaintiff — No evidence that debt will not be paid — Ontario Courts of Justice Act, S.O. 1984, c. 11, s. 114(1).

The debtor corporation was in the process of winding down its affairs. The plaintiff creditor moved for the appointment of a receiver for the purpose of calling in, collecting and retaining the accounts receivable of the defendant corporation or in the alternative for an injunction restraining disposition of its assets. There was no evidence that the debts would not be paid.

Held:

The motion was dismissed.

It could probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief,

which is, in effect, an execution before judgment unless there is strong evidence that the creditor's right to recovery is in serious jeopardy. In this case, there was no such evidence.

Table of Authorities

Cases considered:

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

Cdn. Commercial Bank v. Gemcraft Ltd. (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) — *referred to*

Cantamar Holdings Ltd. v. Tru-View Aluminum Products (1979), 23 O.R. (2d) 572, 6 B.L.R. 209 (Ont. H.C.) — *referred to*

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (Ont. C.A.) — *considered*

Simon v. Simon (1984), 45 O.R. (2d) 534, 38 R.F.L. (2d) 198, 42 C.P.C. 133, 50 C.B.R. (N.S.) 161, C.E.B. & P.G.R. 8166, 7 D.L.R. (4th) 128, 2 O.A.C. 299 (Ont. Div. Ct.) — *referred to*

Statutes considered:

Courts of Justice Act, S.O. 1984, c. 11 —

s. 114(1)

MOTION for the appointment of a receiver or for an interlocutory injunction prohibiting the defendant from disposing of any of its assets.

Salhany L.J.S.C.:

1 This motion is for an order appointing a receiver to call in, collect and retain the accounts receivable of the defendant 658273 Ontario Limited or, alternatively, for an interlocutory injunction prohibiting that defendant from disposing of any of its assets.

2 The factual background leading up to this application is this. On January 30, 1986, the plaintiff entered a truck lease and service agreement with a numbered company operating as Mid Industries under which the plaintiff leased 1986 Mack trucks, trailers and equipment to Mid. That agreement was dated December 19, 1985. To secure faithful performance of its obligations under that agreement, Mid was required to sign a security deposit agreement dated December 19, 1985, which it did and deposited $20,000. On January 13, 1986, Mid signed a second security deposit agreement and deposited $15,000 with the plaintiff. On February 2, 1986, a third security deposit agreement was signed by Mid [which] deposited $15,000 with the plaintiff as security for the performance of its obligations.

3 On May 4, 1986, Mid assigned to Marlic Car Rentals Limited its rights and obligations under the truck lease and service agreement and the plaintiff consented to the transfer. Marlic also entered into a fourth security deposit agreement dated September 18, 1986 and paid to the plaintiff $10,000. On November 10, 1986, Marlic assigned to the defendant 658273 Ontario Limited, operating as Continental Systems, all of its right, title and interest in the truck lease and service agreement and the plaintiff consented to the assignment.

4 On January 12, 1987, the plaintiff received a letter from Thorne, Ernst & Whinney Inc. confirming that a receiving order had been made on January 5, 1987 adjudging Mid Industries as bankrupt and appointing Thorne, Ernst & Whinney Inc. as trustee. The letter went on to put the plaintiff on notice that the security deposit of $50,000 paid by Mid Industries was not to be paid out without their written authorization. The plaintiff, naturally, was concerned that $50,000 of its $60,000 security deposit was now in jeopardy and contacted Continental with a view to obtaining a new security deposit of $50,000. The plaintiff's position is that an agreement was reached whereby Continental would deposit $48,000 in three payments but subsequently refused to honour its commitment. Continental's position is that no such agreement was reached. In any event, nothing turns on whether an agreement was or was not reached because on January

26, 1987, Continental decided to wind down [its] business operations and returned the leased vehicles and trailers to the plaintiff. Continental is now in the process of collecting its receivables and paying its outstanding accounts. Continental says that it has received invoices from the plaintiff of $30,000 which it has paid. It is conceded by Continental that it has received an "open invoice" from the plaintiff indicating a total estimated indebtedness of $72,413.90 (which includes the $30,000 paid), part of which is disputed. It is also common ground that the plaintiff intends to assert a claim for general damages because of the early termination of the lease agreement.

5 Section 114(1) of the Courts of Justice Act, S.O. 1984, c. 11, authorizes the Court to grant an interlocutory injunction or appoint a receiver "where it appears to a judge of the court to be just or convenient to do so". Mr. Delorey's submission, simply put, is that it is "just or convenient" to appoint a receiver to collect the accounts receivable because there is no dispute that Continental owes the plaintiff money and that there is a risk that the plaintiff may not be paid. He relied upon *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. S.C.); *Cdn. Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) and *Cantamar Holdings Ltd. v. Tru-View Aluminum Products* (1979), 23 O.R. (2d) 572, 6 B.L.R. 209 (Ont. H.C.). It was submitted that those authorities suggest that where the appointment of a receiver is sought, it is not necessary for the applicant to demonstrate that there are some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. It need only be established that it is "just or convenient" to grant the order.

6 There is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy. As was pointed out by MacKinnon A.C.J.O. in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (Ont. C.A.):

> The courts must be careful to ensure that the 'new' Mareva is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial.

7 Mr. Delorey argued that this is not a situation where Continental would be unable to carry on its operations because it has, in fact, ceased to operate. By appointing a receiver or, at least, granting an interlocutory Mareva injunction preventing the defendant from disposing of its assets, the plaintiff will be ensured recovery. Mr. Earnshaw, on the other hand, pointed out that there is no need to appoint a receiver which will result in added costs to Continental when it is perfectly capable of collecting the receivables itself. Nor should an injunction be issued restraining disposition of assets because Continental has paid every invoice submitted to date and disputes the balance claimed to be due and owing. He also points out that the plaintiff is secured for the balance of its account from the deposit held and also has a right to look to previous lessees of the truck lease and service agreement on their covenant to pay.

8 I do not think that the authorities relied upon by Mr. Delorey support the general proposition that the test to support the appointment of a receiver is less stringent than that where a Mareva injunction is sought. For example, in *Bank of Montreal v. Appcon Ltd.*, supra, Anderson J. appointed a receiver even though there was no evidence or real risk that the defendant was removing his assets from the jurisdiction, because the applicant had the right to appoint a receiver under a debenture but had taken the more conservative course of applying to the Court. In *Cdn. Commercial Bank v. Gemcraft Ltd.*, supra, a receiver and manager was appointed because the acceleration clause in one of the debentures had been triggered and the applicant's security was in jeopardy.

9 It was not suggested that the plaintiff's security was in serious jeopardy. More importantly, there is no evidence of a real risk that any judgment awarded to the plaintiff may not be realized. Although it may be "convenient" to have Continental's assets tied up until the amount owing to Ryder is established, it would not be, in my view, "just" to do so. I recognize, of course, that the two criteria are disjunctive but I think that the authorities are clear that they are to be read and interpreted conjunctively: see *Simon v. Simon* (1984), 45 O.R. (2d) 534, 38 R.F.L. (2d) 198, 42 C.P.C. 133, 50 C.B.R. (N.S.) 161, C.E.B. & P.G.R. 8166, 7 D.L.R. (4th) 128, 2 O.A.C. 299 (Ont. Div. Ct.).

10 For these reasons, the application will be dismissed.

11 Mr. Delorey argued that while normally costs would follow the successful party, cl. 11(c) of the truck lease and service agreement obligates the customer to pay for all legal expenses incurred in enforcing any of the plaintiff's rights under that agreement. The specific words are "customer agrees to pay Ryder all Ryder's 'costs and expenses, including reasonable attorney's fees, incurred in collecting amounts due from customer or in enforcing any rights of Ryder hereunder' ". I do not interpret those words as obligating the customer to pay costs for an unsuccessful application such as this. However, in the circumstances I do not think that any costs should be awarded to either party.

Motion dismissed.

Tab 6

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.
Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court*[1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario[2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*.[3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re*[4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by

the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*, [8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms* [9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*, [10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act* [11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available." [12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne*

Table of Authorities

Cases considered by *Romaine J.*:

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

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.)— referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

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

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or

misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

End of Document

Tab 7

2015 ABQB 646
Alberta Court of Queen's Bench

Maximum Financial Services Inc. v. 1144517 Alberta Ltd.

2015 CarswellAlta 1934, 2015 ABQB 646, [2016] 5 W.W.R. 801, [2016] A.W.L.D. 61, [2016] A.W.L.D. 75, [2016] A.W.L.D. 76, 259 A.C.W.S. (3d) 384, 28 Alta. L.R. (6th) 161, 31 C.B.R. (6th) 146, 5 P.P.S.A.C. (4th) 133

Maximum Financial Services Inc., Plaintiff and 1144517 Alberta Ltd., Defendant

B.E. Romaine J.

Judgment: October 14, 2015
Docket: Calgary 1301-08922

Counsel: Alexis Teasdale, for Applicants, Maximum Financial Services Inc., Hudson & Company Insolvency Trustees Inc. in their capacity as Receiver of 1144517 Alberta Ltd.
David LeGeyt, for for the Respondent, Total Health Pharmacies Ltd. carrying on business as Rideau Pharmacy
William W. Shores Q.C., for Alberta College of Pharmacists

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Public; Restitution; Torts
Related Abridgment Classifications
Health law
III Provincial matters
III.2 Regulation of health professionals
III.2.n Pharmacists
III.2.n.v Miscellaneous
Professions and occupations
I Nature of profession or occupation
Professions and occupations
XX Miscellaneous
Headnote
Professions and occupations --- Nature of profession or occupation
In August, 2012, plaintiff MFS agreed to lend money to defendant MCP and MCP executed promissory note and general security agreement — On October 31, 2012, MCP purchased pharmacy business which included goodwill associated with business and customer and prescription files, which included prescription and patient files, sales records, and other assets — MCP operated business until June, 2013 when MCP transferred its narcotics, patient records, and computer storing patient records to RP, but did not ask RP to pay for prescriptions and patient files — MCP advised MFS that it closed pharmacy and would be filing for bankruptcy — Alberta College of Pharmacists was satisfied that MCP and RP complied with requirements and appropriate legislation — MFS and receiver of MCP applied for orders directing RP to pay receiver fair market value of prescriptions that they submitted were wrongly conveyed to RP on eve of MCP's insolvency — Applications dismissed — Patient files and records were able to be pledged as long as pledge could be accomplished in manner compatible with professional responsibilities — MFS's interest in pledged assets were subject to same limitation with respect to professional responsibilities of pharmacist when practice closes — Given regulatory regime and interests of patients involved in transfer of records and prescription, application to have RP transfer patient records and prescriptions, even if such transfer were made to custodian pharmacist, was not feasible — RP's acceptance of transfer of patient records and files in order to facilitate compliance with MCP's statutory and regulatory obligations and to ensure continuity of care for patients involved fell within one of established categories of juristic reasons to deny recovery in unjust enrichment — Given that there may be mechanisms to prevent transfer of patient records and

prescriptions without transferee pharmacist becoming aware of creditor's claim, while continuity of patient care could not be easily protected other than by regulatory regime, public policy of patient care had to prevail — Remedy of constructive trust was not appropriate because it was only available where monetary damages were inadequate and where there was link between contribution that found action and property in which constructive trust is claimed — There was no conversion or any right to claim damages or disgorgement of profit against RP by virtue of civil wrong — There was no evidence that RP knew that any party other than MCP owned patient records and files — It was not MCP's intention to defeat creditors but intentions were to fulfill professional obligations.

Professions and occupations --- Miscellaneous

In August, 2012, plaintiff MFS agreed to lend money to defendant MCP and MCP executed promissory note and general security agreement — On October 31, 2012, MCP purchased pharmacy business which included goodwill associated with business and customer and prescription files, which included prescription and patient files, sales records, and other assets — MCP operated business until June, 2013 when MCP transferred its narcotics, patient records, and computer storing patient records to RP, but did not ask RP to pay for prescriptions and patient files — MCP advised MFS that it closed pharmacy and would be filing for bankruptcy — Alberta College of Pharmacists was satisfied that MCP and RP complied with requirements and appropriate legislation — MFS and receiver of MCP applied for orders directing RP to pay receiver fair market value of prescriptions that they submitted were wrongly conveyed to RP on eve of MCP's insolvency — Applications dismissed — Patient files and records were able to be pledged as long as pledge could be accomplished in manner compatible with professional responsibilities — MFS's interest in pledged assets were subject to same limitation with respect to professional responsibilities of pharmacist when practice closes — Given regulatory regime and interests of patients involved in transfer of records and prescription, application to have RP transfer patient records and prescriptions, even if such transfer were made to custodian pharmacist, was not feasible — RP's acceptance of transfer of patient records and files in order to facilitate compliance with MCP's statutory and regulatory obligations and to ensure continuity of care for patients involved fell within one of established categories of juristic reasons to deny recovery in unjust enrichment — Given that there may be mechanisms to prevent transfer of patient records and prescriptions without transferee pharmacist becoming aware of creditor's claim, while continuity of patient care could not be easily protected other than by regulatory regime, public policy of patient care had to prevail — Remedy of constructive trust was not appropriate because it was only available where monetary damages were inadequate and where there was link between contribution that found action and property in which constructive trust is claimed — There was no conversion or any right to claim damages or disgorgement of profit against RP by virtue of civil wrong — There was no evidence that RP knew that any party other than MCP owned patient records and files — It was not MCP's intention to defeat creditors but intentions were to fulfill professional obligations.

Health law --- Provincial matters — Regulation of health professionals — Pharmacists — Miscellaneous

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s. 1(1)(x) "intangible" — considered

s. 4(d) — considered

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Generally — referred to

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p. 1640 — referred to

APPLICATIONS by plaintiff and receiver of defendant for orders directing Rideau Pharmacy pay to receiver fair market value of prescriptions that were wrongly conveyed on the eve of defendant's insolvency.

***B.E. Romaine J.*:**

I. Introduction

1 Maximum Financial Services ("Maximum") and the Receiver of 1144517 Alberta Ltd., operating as Mission Community Pharmacy ("Mission") apply for an order directing Total Health Pharmacies Ltd., operating as Rideau Pharmacy ("Rideau") to pay to the Receiver the fair market value of prescriptions that they submit were wrongly conveyed to Rideau on the eve of Mission's insolvency.

2 In the alternative, they apply for an order directing Rideau to transfer all medical records or files relating to the prescriptions to the Receiver or Maximum, appointing a pharmacist as custodian for the records and prescriptions and providing a process for the custodian to contact the Mission patients now served by Rideau to obtain consent to a transfer of their records and prescriptions to the custodian. They also apply for an order preventing Rideau or its pharmacists from making use of the records and prescriptions except as necessary to comply with their professional obligations, directing Rideau to pay to the Receiver or Maximum any proceeds obtained from previous dealings with the prescriptions and permitting the Receiver or Maximum to dispose of the prescriptions.

3 In the further alternative, they apply for an order declaring the transfer of the prescriptions and other collateral to Rideau void pursuant to the *Fraudulent Preferences Act* and directing Rideau to transfer the prescriptions and collateral to the Receiver.

4 The Alberta College of Pharmacists is a respondent in the application. It takes no position in the commercial dispute, but asks the Court to have regard to the regulatory system governing pharmacists and the best interests of patients if I make any order with respect to patient records or communications with patients in this matter.

5 Rideau opposes the application and cross-applies for an order compelling Maximum to discharge the Alberta Personal Property Registry registration it has filed against the property of Rideau.

II. Facts

History

6 In August 2012, Brett Wikjord, a pharmacist and the principal of Mission, approached an affiliate of Maximum in order to obtain financing for the purchase of a pharmacy business. Maximum's affiliate agreed to provide financing if Mission would agree to grant a first priority general security agreement ("GSA") over Mission and a first priority security interest in all assets being financed. The assets to be financed were to include patient prescriptions or files. Mr. Wikjord acknowledges that Mission agreed to give Maximum a security interest in all of the assets it was financing, and that those assets included patient prescriptions and files. He also acknowledges that goodwill was to be was included in the purchase.

7 Maximum agreed to lend Mission up to a principal amount of $660,450 and Mission executed a promissory note and a GSA dated October 31, 2012. The GSA was registered in the Alberta Personal Property Registry on September 17, 2012.

8 The GSA provides that Mission grants Maximum "a continuing security interest in all of your Assets and Undertakings...". "Assets and Undertakings" are defined to include "all of [Mission's] present and after acquired personal property and undertakings including without limitation ... all intangible and intellectual property...". The definition does not specifically reference patient files, records, or prescriptions. The GSA was prepared by Maximum, and its terms were not negotiated with Mr. Wikjord.

9 Mission purchased the pharmacy business by agreement dated October 31, 2012. The purchase included the goodwill associated with the business and "Customer and Prescription Files", which included prescription files, patient record files and sales records, among other assets. The agreement allocated $410,000 of the $585,000 purchase price to Customer and Prescription Files, goodwill, telephone numbers for the business, certain intellectual property and contracts and a lease.

10 Mission operated the business until early June, 2013. Mr. Wikjord alleges that the financial information relating to Mission had been over-stated by the vendor. He advised Maximum of this. Maximum knew that Mr. Wikjord had been investigating a sale of the pharmacy to major pharmacy chains but had been unsuccessful in obtaining any offers. Mission made its regular loan payment to Maximum on June 1, 2013.

11 On June 6, 2013, Mr. Wikjord contacted Tim Heaton, a pharmacist he knew slightly who owned and operated the nearby Rideau pharmacy, and told him that he was closing the Mission pharmacy. On June 7, 2013, after brief discussions with Mr. Heaton, he transferred Mission's narcotics, its patient records and the computer on which the patient records were stored to Rideau. The narcotics, a blister packing machine and various computer supplies were transferred for $15,000. The patient files were transferred for $1.00.

12 Mr. Wikjord did not ask Rideau to pay for the prescriptions and patient files. Discussions between Mr. Wikjord and Mr. Heaton focused on pharmacy regulations and the continuity of care for patients. Mr. Wikjord says that his primary concern was continuity of care. Mr. Wikjord says he chose Mr. Heaton for the transfer on the basis of his reputation in the community and the geographic proximity of Rideau to Mission.

13 Before contacting Mr. Heaton, Mr. Wikjord contacted the Alberta College of Pharmacists to ask advice about closing the Mission pharmacy, specifically about the College's requirements in connection with continuity of patient care. He understood from the College that it was his responsibility to arrange for the transfer of patient files and their prescriptions and care to another licensed pharmacy.

14 After being contacted by Mr. Wikjord and prior to accepting the transfer of patient records, Mr. Heaton also contacted the Registrar of the College to discuss the requirements for closure of a pharmacy. The Registrar was aware of the impending closure of the Mission pharmacy and advised Mr. Heaton of the College's view that the patients of Mission should have uninterrupted care and access to their prescription files and that narcotics should be secured.

15 Signs were posted on Mission's doors and windows indicating that the pharmacy was closed and patient files had been transferred to Rideau pharmacy, giving an address and telephone number. The doctors of those patients who

would be most impacted were contacted and advised of the transfer. Mission's phone and fax lines, its computer server and its paper records were transferred to Rideau.

16 Mr. Wikjord then closed the Mission pharmacy. He did not disclose these events to Maximum until June 28, 2013, when a representative of Maximum called him after hearing a rumor of the closure.

17 On the same day, Mr. Wikjord emailed a letter to Maximum advising that he had closed the pharmacy and would be filing for bankruptcy. Maximum also learned on June 28, 2013 of the transfer of the prescription lists and computer to Rideau.

18 On July 1, 2013, Mission failed to make its regular loan payment. Mr. Wikjord consented to a receivership and an order appointing a Receiver of Mission was granted on July 25, 2013.

19 When former patients of Mission contacted Rideau, they were asked whether they consented to Rideau fulfilling their pharmaceutical needs or whether they wanted their care transferred to another pharmacist. Most patients stayed with Rideau. If patients agreed to remain with Rideau, Rideau generated a transfer report and the consenting patient's records were individually entered into Rideau's files. If the patient wished his or her records to be forwarded elsewhere, a transfer report was also prepared. In either case, the process inactivated the specific patient files on the Mission computer. If a patient has not contacted Rideau since the transfer, his or her records remain unchanged on the Mission computer hard drive.

20 Mr. Heaton deposes that most of the patients who transferred to Rideau have had their prescriptions changed since they were patients of Mission, such that the Mission records are now outdated and the Rideau records contain notes, changes and inclusions made by Rideau through its course of care given to patients.

21 In September, 2013, a representative of the College attended at Rideau to review the transfer of patient files. His subsequent report indicates that, as of the date of the report, 1007 prescriptions involving 226 patients had been filled by Rideau and 71 prescriptions involving 21 patients were transferred to other pharmacies. Rideau continues to care for 185 patients that once filled their prescriptions at Mission.

22 The College's representative advised the Registrar that he was satisfied with respect to the transfer and that Mission and Rideau had complied with the College's requirements and the appropriate legislation.

23 In January, 2014, Maximum amended its PPSA registration to include Rideau as a debtor.

Regulatory Issues

24 Pharmacies and pharmacists are regulated both federally and provincially under the *Health Professions Act*, the *Pharmacy and Drug Act*, the *Controlled Substances Act*, the *Food and Drugs Act* and the *Health Information Act*. The College is the professional governing body that regulates pharmacists and their professional practice in a manner that must protect and serve the public interest.

25 The College has established standards of practice and operation and a Code of Ethics. It enforces its regulatory system through a disciplinary process.

26 A community pharmacy can only provide services to the public if it is licensed by the College. Only a registered pharmacist who holds a current practice permit can hold a pharmacy license.

27 The College's regulatory system imposes record keeping obligations on pharmacists for the purpose of patient care. Patient records must document all material interactions with patients. As described by the Registrar of the College, patients records are living and dynamic documents that change as pharmacists interact with a patient.

28 The primary obligation of pharmacists with respect to managing records, as in all other matters, is the well-being of patients. The Code of Ethics prohibits a pharmacist's professional judgment from being impaired by commercial benefits. Pharmacy records are health records and their confidentiality must be preserved under the Code of Ethics and the *Health Information Act*.

29 When a pharmacy closes, the College imposes specific rules on licensees through regulations and Standards of Operation in order to protect the public. These rules include the licensee's obligation to either arrange to transfer patient records to another licensed pharmacy or to give each patient access to a copy of the patient's record. The licensee of a closed pharmacy must advise the College of the location of the patient records.

30 Standards of Practice 2.7 to 2.10 require pharmacists to comply with a patient request to transfer his or her care to another pharmacy or pharmacist. Under standard 2.10, if termination of care is a result of a pharmacist leaving practice because of illness or other urgent circumstance, the pharmacist must provide for continuity of care. In any case, the complete patient record must be transferred.

31 The College raised the following concerns about Maximum's application:

a) Patient records should only be transferred to, handled or disposed of by a pharmacy licensee or pharmacist. Maximum has addressed this concern by suggesting that a licenced pharmacist of its choosing be appointed as custodian of the records;

b) Maximum's application includes a request that it or the Receiver be permitted to dispose of the prescriptions. The College submits that allowing a Receiver to dispose of prescriptions would be contrary to the requirements of the regulatory system;

c) The College is concerned that the principle of patient autonomy should be respected in relation to whether patients wish to have their pharmaceutical care handled by Rideau or the proposed custodian or an unrelated pharmacy or pharmacist. Maximum addressed this by suggesting that a process be provided for the custodian to contact the patients being served by Rideau to obtain consent to the transfer to the custodian. However, the application attempts to limit Rideau's ability to contact patients except as required to comply with its obligations under the regulatory regime (an ambiguous exception);

d) If the patient records as they existed at the time of transfer to Rideau were provided to the custodian, they may now be out of date and could be a health risk to patients.

32 The College also points out that, in the normal course, a patient's consent is required to transfer patient prescriptions or records from one pharmacy to another. Notice of this application has not been given to any patients involved in the transfer.

III. Issues

33

a) Can the patient records and prescriptions be pledged?

b) If so, were they pledged in this case?

c) Can patient records be seized from Rideau and sold?

d) Is Maximum or the Receiver entitled to damages from Rideau?

e) Is the transfer of patient records and prescriptions a fraudulent preference?

IV. Analysis

A. Can the patient records and prescriptions be pledged?

34 Rideau submits that Mission did not have an interest in the prescriptions and patient records that could be pledged as security.

35 With respect to the nature of Mission's interest, it is clear that the physical medical records of patients belong to a physician: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (S.C.C.). It is also clear from subsequent case law that the principles with respect to this issue apply likewise to other health care professionals, including, in this case, pharmacists: *Axelrod, Re* (1994), 20 O.R. (3d) 133 (Ont. C.A.) at para 15.

36 While a physician (or pharmacist) is the owner of the actual record, the information contained in the record is held in a fashion akin to a trust and is to be used by the physician or pharmacist for the benefit of the patient: *McInerney* at 150-151.

37 As noted by Picard, J. in *Lodwig v. Mather* (1995), 168 A.R. 390 (Alta. Q.B.) at para 26, a dentist (or pharmacist) has no proprietary interest in a patient and a patient is free to choose a different health care provider. Picard, J cited *Bacher v. Obar* (1989), 28 C.C.E.L. 160 (Ont. H.C.) where Saunders, J. said at page 174:

> Patients have a right to choose their dentist. They are not property to be bought and sold like inventory.

38 In *Axelrod*, the Ontario Court of Appeal considered two apparently conflicting cases that dealt with the issue of whether the fiduciary obligations of a health care provider vis-à-vis his patients (in that case, a dentist) prevented him from pledging patient lists and files as security.

39 The debt of the dentist in *Axelrod* was secured by a GSA granting the creditor a general security interest in all the debtor's equipment, book debt, records, files, patient lists and patient files. The creditor considered the patient lists and files as the most valuable part of the dentist's practice.

40 After the dentist's bankruptcy, the creditor applied to enforce its security, including against patient lists and files, and applied for an order restraining the dentist from entering the leased premises where he operated. The dentist denied that the GSA entitled the creditor to take possession of the patient records.

41 The Court noted that the "best interests" of patients are not limited to medical needs but also encompass privacy and confidentiality. Thus, the case presented an apparent conflict between a dentist's commercial obligations under the GSA and his fiduciary professional obligations. The issue was whether a dentist could pledge his proprietary interest in patient medical records while concurrently respecting the patient's right of confidentiality.

42 Arbour, J.A. found that the dentist was entitled to dispose of his assets while at the same time respecting his professional obligation to fully protect confidential information. She saw no difference between a dentist's entitlement to sell his or her practice and his or her entitlement to pledge records, that "(b)oth can be accomplished in a manner compatible with a dentist's professional responsibilities, as long as the dentist acts with the utmost good faith and loyalty in protecting the patient's confidence": *Axelrod* para 17.

43 In other words, a health care provider may use records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests: *Axelrod* at para 18.

44 Arbour, J.A. made the following comment at para 23:

> When a dentist sells or pledges his patient list, as the appellant did in this case, I think that he or she should be held to have parted with his or her own interest in the patient list, subject to his or her patients' rights to confidentiality

> and access. In my view, the patient's right to access to his or her record includes a right of access for the purpose of determining which dentist the patient wishes to consult in the future. The interest of the patient in having access to a dentist of his or her choice is adequately protected in this case, by the letter that the incoming dentist would send to the patients notifying them of the change. That letter contains no indication of whether the appellant was continuing to practice at another location. However, it invites patients to obtain their records if they wish to retain a dentist other that the one who has taken over the appellant's practice. Should patients inquire about the possibility of a continued relationship with the appellant, the incoming dentist would have to assist them by providing them with whatever information was available to him or her about the appellant's whereabouts.

45 This decision effectively over-ruled the decision in *Josephine V. Wilson Family Trust v. Swartz* (1993), 16 O.R. (3d) 268 (Ont. Gen. Div.), where Blair, J. reached a contrary view on the ability to pledge patient files.

46 Thus, Mission and Mr. Wikjord held an interest in patient files and records that they were able to pledge as long as a pledge could be accomplished in a manner compatible with Mr. Wikjord's professional responsibilities. Maximum's interest in the pledged assets can be no greater than that of Mission and Mr. Wikjord, and thus must be subject to the same limitations with respect to the professional responsibilities of a pharmacist when a practice closes.

B. Were the patient records and prescriptions pledged in this case?

47 Rideau submits that the charging language in the GSA is insufficient to cover the patient records and prescriptions.

48 The charging language in this case is not as specific as it was in *Axelrod*, where the charging language included patient files and lists. The only reference in the GSA in this case that could be construed to apply to patient files and records is the reference to "all ... present and after acquired personal property ... including ... intangible and intellectual property...".

49 *The Pharmacy and Drug Act*, RSA 2000, c. P-13 includes prescription records within the definition of property of a licensed pharmacy: ss 1(1)(x), 1(1)(zii)(iii) and 1(1) (Z.1) (iv).

50 "Personal Property' as defined in the *Alberta Personal Property Security Act*, RSA 2000, C.P. 7 includes "intangibles" as defined in the PPSA. An "intangible" means personal property, other than goods, chattel paper, investment property, a document of title, an instrument or money. "Personal property "means goods, chattel paper, investment property, a document of title, an instrument, money or an intangible." Thus, an intangible is a subset of personal property, and arguably includes all personal property that is not specifically described in the definition of personal property.

51 However, according to the Black's Law Dictionary, intangible property means property that has no intrinsic and marketable value, but is merely evidence of value, such as share certificates, bonds or promissory notes. It is a non-physical asset that is usually illiquid. Goodwill is the primary intangible asset of a company.

52 Are patient records intangibles, and thus personal property?

53 Maximum submits that, since the definition of intangible includes goodwill, the goodwill of a pharmacy is "encapsulated" in the list of patients, and the patient lists are therefore also intangibles: *Swartz* at para 21.

54 This connection of goodwill and patient records and the argument that, since prescriptions do not fall into any other category, they must be intangibles falters on the consideration that prescriptions or a patient records are not evidence of value in the same way as share certificates, bonds or promissory notes. They may be property for the purpose of the *Pharmacy and Drug Act*, but they have no value unless and until a patient choses to fill or renew a prescription, at which point, the pharmacist must provide services to earn value. I also note that Section 4(d) of the PPSA indicates that the PPSA does not apply to a transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract. That appears to be a good description of a prescription.

55 Rideau submits that an interpretation of the Maximum GSA that would include the patient's records as collateral would be inconsistent with several clauses of the Maximum GSA:

a) Clause 7 states that the collateral must be free and clear from any claim, including a proprietary or trust interest, of any other person. The patient records, no matter how they are characterized, are subject to the rights and interests of the patient.

b) Clause 14(c) states that Mission Community Pharmacy will not transfer its interest or change the location of the collateral without Maximum's prior written consent. Maximum cannot purport to limit a patient's right to direct Mission Community Pharmacy to transfer the patient's file to another pharmacy.

c) Clause 15(g) creates an event of default if anyone claims to have rights in the collateral superior to those of Maximum, and clause 15(l) creates an event of default where any interest or claim, including any proprietary or trust interest claimed by a third party with respect to the collateral, is permitted to continue. This implies that anytime a patient moves his or her prescription to another pharmacy, it would create an event of default.

56 Rideau submits that these provisions demonstrate that patient files and prescriptions are not intended to be collateral under the Maximum GSA. If they were, they could have been charged with specific language, as they were in *Axelrod*.

57 Rideau submits that any ambiguity in the GSA must be interpreted against Maximum under the rule of *contra proferentem*, since the GSA was not negotiated, but imposed on Mission. However, Mr. Wikjord has admitted that it was the mutual intention of the parties that the assets to be charged would include patient prescriptions and files. The GSA's charging language is ambiguous and it is unclear whether the patient files and records are included in the charged interest.

58 However, given the conclusion I have reached on other issues, it is not necessary that I decide this issue with finality.

C. Can patient records be seized from Rideau and sold?

59 The issue is not whether the records could be seized from Mission, but whether they could be seized from Rideau.

60 Given the regulatory regime as described by the College, and the interests of patients involved in the transfer of records and prescriptions from Mission to Rideau, the application to have Rideau transfer patient records and prescriptions to the Receiver or Maximum, even if such transfer were made to a custodian pharmacist, is not feasible for the following reasons:

a) None of the patients involved have been given notice of this application, and there is no evidence that any of them have consented or would give their consent to the transfers. As this is not an emergency situation where a pharmacist is ceasing to carry on business, patient consent to a transfer is a live issue that cannot be addressed in the absence of notice.

b) The patient records may, and probably have, changed since the original records were transferred to Rideau. The transfer of the original records to a new custodian would create confusion and risk to patients that cannot be justified in the circumstances.

c) The restrictions on Rideau with respect to contacting patients or making use of prescriptions in their possession suggested by the applicants would interfere with the rights of patients to choose their pharmacist.

61 The Receiver and Maximum appear to have recognized the problems involved in seizing patient files after they have been altered and in the absence of notice to patients, and describe damages as their preferred form of relief.

62 Given my conclusion on this issue, it is not be necessary for me to address Maximum's standing to make an application to appoint a custodian, or whether the appropriate statutory requirements have been followed.

D. Is Maximum or the Receiver entitled to damages from Rideau?

63 In this case, Mr. Wikjord complied with his professional responsibilities on closing the pharmacy, but, if patient records and prescriptions have been pledged in the GSA, he may have failed to comply with his contractual ones. At issue, however, is not Mr. Wikjord's liability for any breach of contract, but whether any liability for a failure of contractual obligations to Maximum can be passed on to Rideau as the essentially pro bono recipient of the files transferred in compliance with the College's rules.

1. Unjust Enrichment

64 Maximum submits that Rideau should be liable to pay the Receiver an amount equal to the fair value of the prescriptions because Rideau was unjustly enriched by the wrongful transfer of the prescriptions. In that regard, Maximum claims damages or an order that Rideau holds the prescriptions as constructive trustee for Maximum.

65 A cause of action of unjust enrichment has three elements: (1) an enrichments of the respondent; (2) a corresponding deprivation of the applicant; and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at 645.

66 In this case, the respondent Rideau received a benefit from a third party, Mission, rather than directly from the applicant Maximum. As noted by Professor Mitchell McInnes, there likely is no need for proof of a direct nexus between the parties to the cause of action, although this is not entirely free from controversy: M McInnes, The Canadian Law of Unjust Enrichment and Restitution (Toronto: LexisNexis 2014) at 1640. Other than with respect to this issue, there would be no real argument that the first two elements of the test would be satisfied if the prescriptions had been pledged.

67 The more difficult issue in this case is whether there would be an absence of juristic reason for the enrichment.

68 The approach to the juristic reason analysis has two parts. The applicant must show that no juristic reason exists under any established category of such reasons that would deny recovery. The established categories include contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If there is no juristic reason that can be identified from an established category, the applicant has made out a *prima facie* case. This *prima facie* case is rebuttable, however, where the respondent can show that there is another reason to deny recovery. At this point, the court should have regard to two factors: the reasonable expectations of the parties and public policy consideration: *Garland* at 651.

69 The Supreme Court in *Garland* noted that the test for unjust enrichment, being relatively new to Canadian jurisprudence, requires flexibility. It allows for the expansion of the categories of juristic reasons as circumstances require, and allows a court to deny recovery where to allow it would be inequitable: *Garland* at 650.

70 In an action in unjust enrichment, as opposed to an action based on a civil wrong, the respondent is liable, not because it wrongfully received a benefit from the applicant, but because it received a benefit that ought not to have occurred: McInnes at 24. A respondent may be innocent of wrong-doing but still liable.

71 The first part of the jurisdic reasons test would require Maximum and the Receiver to disprove the existence of an established category of jurisdic reason for the enrichment. Rideau submits that it received the prescriptions and patient records from Mission in accordance with the regulatory scheme governing pharmacists when a pharmacy shuts down. It submits, therefore, that it accepted the prescriptions in accordance with valid statutory and regulatory obligations and thus has a juristic reason for any benefit.

72 The College's Standard of Practice 210(d) provides that a pharmacist may terminate a relationship with a patient without providing advance notice if the pharmacist is leaving practice because of personal illness or other urgent circumstances and the pharmacist provides for continuity of care by offering to provide information to another pharmacist.

73 It is clear that the transfer of records and prescriptions between Mission and Rideau was in accordance with the College's standards. In addition, the Pharmacy and Drug Regulation established under the *Alberta Pharmacy and Drug Act*, AR 204/2006, s. 27 provides that if a licensed pharmacist ceases to engage in the practice of pharmacy, he or she must arrange to transfer patient records to another licensed pharmacy or give each patient access to a copy of the patient's record. The transfer was done in accordance with this Regulation.

74 Maximum submits, however, that the transfer of patient records to another licensed pharmacy was only one of two options, and that nothing in the regulatory regime requires that the transfer be made for no consideration. This is true, and there is no doubt that Maximum may have had a cause of action against Mission and Mr. Wikjord, if the prescriptions were validly pledged under the GSA, but the issue is whether Rideau's acceptance of a transfer made in compliance with the regulatory regime would fail to constitute a jurisdic reason for an enrichment because Mission could have taken a different approach to compliance.

75 Rideau's statutory and regulatory obligations in accepting the transfer of records are based on a public policy obligation owed to the public. While statutory obligation as a jurisdic reason is sometimes characterized as being owed directly to the defendant or respondent, the concept should not be limited to that extent, given that the public policy in issue must necessarily involve another pharmacist.

76 I find that Rideau's acceptance of the transfer of patient records and files in order to facilitate compliance with Mission's statutory and regulatory obligations and to ensure continuity of care for the patients involved falls within one of the established categories of jurisdic reasons to deny recovery in unjust enrichment.

77 If I am wrong in that determination, the onus would shift to Rideau to establish that there was another reason to deny recovery. The same public policy reasons that would lead me to conclude that the transfer was effected pursuant to a valid statutory obligation would lead me to conclude that this was a sufficient reason to deny recovery from Rideau in unjust enrichment.

78 Maximum submits that there is no public policy reason to allow Rideau to be enriched, that requiring payment of fair consideration for a valuable asset does not conflict with the goals of the regulatory regime governing pharmacies, and allowing Rideau to be enriched would have a detrimental effect on health care financing.

79 There are thus competing public policy considerations in this case: the public policy of ensuring continuity of care and record-keeping of pharmaceutical patients and the public policy of facilitating the financing of pharmacies where the principal assets of such businesses are the prescription records of their patients.

80 However, this is not a question of whether Maximum has a cause of action against its debtor, Mission, but whether it also has a right of recovery against a third party. Given that there may be mechanisms to prevent the transfer of patient records and prescriptions without a transferee pharmacist becoming aware of a creditor's claim, while continuity of patient care cannot be easily protected other than by the regulatory regime in place, the public policy of patient care must prevail.

81 It would certainly be the case that Maximum expected that it had security in the prescriptions pursuant to the GSA, and its reasonable expectation would be that Mission would have consulted with it to fashion a method of transferring the records and prescriptions that would satisfy both Mission's obligations to Maximum and Mr. Wikjord's professional obligations. However, I cannot agree, as submitted by Maximum, that Mr. Heaton would have reasonably expected to give value for the records and prescriptions in the situation in which he accepted them. I accept that, in the circumstances, Mr. Heaton viewed the transaction as helping a fellow pharmacist comply with his professional obligations when the pharmacy closed. While he may reasonably have expected that he would profit from continuing to provide service to the transferred patients, he had not sought to buy the records from Mr. Wikjord and he could not have reasonably expected that he would be obligated to a third party as a result of assuming the obligations of patient care.

82 If damages were appropriate in this case, there was no evidence with respect to what the value of the records and prescriptions would be, except that Mr. Wikjord was unable to find a purchaser for the business. Maximum submits that the Court could direct expert evidence on the issue upon finding that damages are an appropriate remedy. Given my decision on these issues, I do not need to address the issue of quantification of damages.

2. Constructive Trust

83 Maximum submits that, while damages are the preferred remedy, an alternative remedy is a constructive trust. Such a remedy is not appropriate in these circumstances since a constructive trust is only available where monetary damages are inadequate and where there is a link between a contribution that founds the action and the property in which the constructive trust is claimed: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.). There is no such contribution in this case.

3. Disgorgement

84 Maximum also applies for an order directing Rideau to account for and pay over to the Receiver or Maximum any proceeds derived from dealing with the prescriptions since they were transferred; in other words, an order of disgorgement of profits. Such relief is not available in an action in unjust enrichment, but only if Rideau is liable for a civil wrong, and an order requiring it to give up its wrongfully-obtained gains is appropriate.

85 Maximum submits that Rideau is liable for the civil wrong of conversion. The tort of conversion involves a wrongful interference with the goods of another, including taking and using a chattel in a manner inconsistent with the owner's right of possession, with the intention or effect of denying or negating the title the owner to such chattel.

86 The factors to be considered in determining whether the interference is sufficient to constitute conversion include: (i) the extent and duration of the exercise of control; (ii) the intent to assert a right inconsistent with the possessor's rights; (iii) the good faith or bad intentions of the defendant; (iv) the extent and duration of the resulting interference with the right of control; (v) the harm done to the chattel; and (vi) the expense and inconvenience caused: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2007 ABQB 353 (Alta. Q.B.) at para 149.

87 There is no evidence that Mr. Heaton knew that any party other than Mission owned the patient records and files. If the patient records and prescriptions were validly pledged, it may be argued that ownership of the records had passed to Maximum as a result of Mission's breach of the GSA. There is no evidence that Mr. Heaton was aware of the GSA. Even if he had checked the PPSA Registry, or must be considered to have had constructive notice of the GSA by virtue of it being filed, the ambiguity of the charging language would provide a defence to an allegation that Mr. Heaton intended to assert a right inconsistent with Maximum's rights.

88 I cannot find conversion or any right to claim damages or disgorgement of profit against Rideau by virtue of a civil wrong.

E. Is the transfer of patient records and prescriptions a fraudulent preference?

89 Maximum submits that the transfer to Rideau was a fraudulent transfer pursuant to section 1 of the *Fraudulent Preferences Act*, Revised Statutes of Alberta 2000, Chapter F-24.

90 Section 1 of the Act provides that every transfer of any property, real or personal, made at a time when a person is in insolvent circumstances or knows that he is on the eve of insolvency "with intent to defeat, hinder, delay or prejudice" the person's creditors is void against any creditor injured, delayed or prejudiced.

91 There is no doubt that Mr. Wikjord knew that Mission was on the eve of insolvency. The issue is whether he intended to defeat, hinder, delay or prejudice his creditors by the transfer.

92 Maximum submits that I should infer fraudulent intent in the circumstances, noting that the motive of a person usually should be inferred from the common sense proposition that he or she intended the natural consequences of his or her actions: *Moody v. Ashton*, 2004 SKQB 488 (Sask. Q.B.) at para 139. Maximum also points out that Mr. Wikjord did not disclose the transfer to Maximum until 20 days after it had taken place, the consideration for the transfer was $1.00 and the transfer substantially reduced the property of Mission that would otherwise be available to its creditors.

93 However, Mr. Wikjord's evidence is that he had concluded that there were no viable purchasers for the business and that he had to close. At that point, his primary concern was for the patients of Mission pharmacy, many of whom were elderly and who suffered from significant health challenges. He was aware that the closure of the pharmacy was potentially dangerous for these patients and he wanted to ensure competent, continuous care for his patients. He sought the advice of the College and followed his professional obligations in arranging for the transfer of the patient records to Rideau.

94 The undisputed evidence of Mr. Wikjord as to why he transferred the records to Mr. Heaton without any discussion of payment, at a time when he had given up on the prospect of a sale, satisfies me that it was not his intention to defeat, hinder, delay or prejudice his creditors, but merely to ensure the well-being of his patients and their continuous care. I accept his evidence that it was a time of crisis for him, and that his first thoughts were of his professional obligations. As previously noted, ownership of the records and prescriptions comes with professional obligations, and Mr. Wikjord's transfer of the records and prescriptions for nominal consideration was not to defeat the creditors but to satisfy those obligations.

95 The application to find this transaction to be a fraudulent transfer must fail.

V. Conclusion

96 For the reasons given, I find that, although Mission's patient records and prescriptions could be, and may have been, pledged by Maximum or the Receiver, they cannot now be seized and sold. I find no basis on which Rideau would be liable for damages to the Receiver or Maximum, whether by reason of unjust enrichment, a constructive trust or in conversion. I do not find the transaction to be a fraudulent preference.

97 Therefore, the applications of Maximum and the Receiver are dismissed. It follows from my conclusion that Rideau is entitled to an order compelling Maximum to discharge the PPSA registration it has filed against Rideau.

98 If the parties are unable to agree to costs, they may make written submissions on the issue.

Applications dismissed.

Court File No. CV-18-597922-00CL

CWB MAXIUM FINANCIAL INC. v. **1970636 ONTARIO LTD. o/a MT. CROSS PHARMACY et al.**
Plaintiff Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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