84 *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

85 In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

86 The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

87 Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] 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 729185's interest in any of the [funds] — 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 the affairs regarding those to whom the [funds] were paid.

88 With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

89 Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

90 Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.

- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.), at para. 75.

• Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.

• Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

91 An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried;[5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership order is purely interlocutory and ancillary to the pursuit of other relief claimed — where it is, in effect, execution before judgment.

92 Although the application judge applied the test at the time of the Comeback Hearing — concluding that it had been met here — I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

The Investigative Receivership in This Case

93 In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The Procedural Issues

94 Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.[6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List — carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights — not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

95 *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *CanaSea PetroGas Group Holdings Ltd., Re*,, 2014 ONSC 6116 (Ont. S.C.J.), at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

96 At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

97 Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that

the CRA had discontinued its investigation — on the particulars of which the applicant relied — in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

98 There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this — despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation — the application judge "was satisfied there was no lack of full disclosure."

99 The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

The Substantive Issues

The "Roving Receivership"

100 The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry — the civil equivalent of a criminal investigation or public inquiry — for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

101 Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para 6.

102 Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose — as the Receiver submits it was — that Order must also be vacated.

103 That the receivership was intended from the beginning to be — and certainly became — an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

> 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 *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

104 As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The Initial Order of June 14, 2013

105 Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

106 It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets — and, in this case, not only the debtors' assets but the assets of others as well — was needed to protect his ability to recover on the debt.

107 However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

108 The Initial Order must be set aside on this basis as well.

The Certificates of Pending Litigation

109 The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

110 There are at least two problems with this aspect of the Order.

111 First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (Ont. C.A.), at p. 714; *Erdman, Re*, 2012 ONSC 3268 (Ont. S.C.J.), at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

112 Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities — such as the "freezing" orders otherwise attacked in these proceedings — a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

113 For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

Disposition

114 For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

115 If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

***Janet Simmons J.A.*:**

I agree

***R.G. Juriansz J.A.*:**

I agree

Appeal allowed.

Footnotes

1 The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

2 The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

3 Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (Ont. H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993 (Ont. S.C.J. [Commercial List]), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

4 That is, an order providing for discovery of a non-party prior to trial.

5 It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

6 I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

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