Court File No. CV-17-11827-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

- and -

2203284 ONTARIO INC.

Respondent

BRIEF OF AUTHORITIES
OF THE RECEIVER, MSI SPERGEL INC.

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Farley J.

Heard: April 8, 1992
Judgment: April 9, 1992
Docket: Docs. 77328/91Q, 91-CQ-72; Commercial List Nos. B255/91, B254/91

Counsel: *Paul S.A. Lamek, Q.C.* and *Angus T. McKinnon*, for receiver Deloitte & Touche Inc.
J.B. Berkow and *R. Sokoloff*, for Canada Trustco.
D. Boudreau, for Municipality of Metropolitan Toronto.
M. Steiner, for lien claimants.
B.L. Grossman, for Confederation Life.
Timothy Pinos and *Julie Thorburn*, for Double Y Holdings Inc. et al.

***Farley J.*:**

1 The defendants moved to replace Deloitte & Touche Inc. ("DT") as receiver-manager ("receiver") of the York Mills Centre ("YMC"). The grounds alleged were:

(a) The receiver DT has allowed itself to be placed in a position of conflict regarding the *Planning Act* problems of the mortgagees, Confederation Life and Canada Trust ('lenders');

(b) DT has shown a lack of neutrality in its manner of negotiating a settlement in the Cantel litigation and in attempting to implement an Indemnity Agreement respecting the Metro lands; and

(c) DT has not properly and prudently managed the project.

2 The parties were all agreed as to the general law obligations of a receiver:

(a) it is a fiduciary as to all interests of concerned parties and as such it is to act as an appointee of the Court in good faith; with candour; disclosing all relevant material facts affecting the parties; avoiding any real or objectively perceived conflicts of interest: and

(b) it has a general duty to exercise its obligations with prudence, diligence, due care and skill.

3 Similarly they were all agreed that my order of September 3, 1991 appointing DT as receiver required DT to:

(a) preserve the asset and maximize its value;

(b) finish the construction;

(c) lease out the project as much as possible;

(d) make arrangements to get the transit facilities finished and operational;

(e) deal with the outstanding litigation, particularly the Cantel litigation.

4 There has been an extensive wrangling amongst the parties and other interested entities leading up to the appointment of DT; this is unfortunately continued to date. Counsel for the defendants acknowledged that his clients were not happy about the situation generally. The project is a large complex one and the receivership is a compound of that. The receiver must be involved with multiple facets of matters at the same time. Economic conditions have not made its job any easier.

5 There is a heavy onus on the party seeking to remove a receiver. It is heavier than on a party seeking to oppose the court appointment in the first place (*Royal Bank v. Vista Homes Ltd.* (1985), 57 C.B.R. (N.S.) 80, 63 B.C.L.R. 366 (S.C.) at p. 90 [C.B.R.]). It seems to me that if the receiver is engaged in blatant intentional action contrary to the interests of one involved group, this would be a situation where the court would readily step in to replace the receiver notwithstanding that such replacement may have cost and other dislocation repercussions. If such were the case why should the receiver not be obliged to show why it should not compensate the parties suffering a loss because of its "wrongdoing"? On the other hand if it is shown that the receiver inadvertently caused a problem, then I would think the court would be more concerned about weighing the balance for removal. By this I do not advocate any policy of allowing a receiver to turn a blind eye to matters or the receiver to engage in relaxed negligence. The receiver owes a duty to exercise its responsibilities in a careful manner considering the circumstances. However the measuring of the action of the receiver is one that must take place as of the events as they unfold — not with the benefit of the ever perfect hindsight.

6 The defendants were very quick off the mark — I assume they felt that they had to be. We have motion record a week ago, a supplementary motion record and a second supplementary motion record within five days thereafter. The quality of the defendants' material has suffered it would appear from such haste. For example, (i) an opinion letter was wrongly assumed from docket entries which do not mention same; (ii) it was suggested that the TTC facilities should have been physically completed in six weeks versus my September 3, 1991 reasons mentioning that it was indicated it would take seven weeks with a 20 man crew (whereas two to six men had been the previous norm) — I do not find the November 29 substantial completion situation out of line when one considers that the receiver had to get up to speed; and (iii) it was alleged that Canada Trustco's counsel was retained by the receiver to draft the Cantel settlement lease whereas it appears that Cantel merely turned back an earlier draft from days in which Canada Trustco was in negotiation with it. Where a moving party alleges conflict of interest or impartiality the court should be concerned that such allegations are well founded after a reasonable investigation as opposed to being part of a scattergun smear — even if parts of the allegations have been "checked out" in some reasonable manner.

7 Counsel for the defendants indicated that the *Planning Act* [R.S.O. 1990, c. P.13] issue was of the greatest concern, followed by the lack of neutrality concerning the Cantel litigation and the rest was supplemental to these points. I think that his submission that I consider the cumulative effect of the complaints is correct if the complaints are found to be valid. However if any of them are not found to be validly founded, I am of the view that they should not be considered for cumulative weight. Rather only those validly proved should be considered to see if on a cumulative basis the receiver should be removed. Depending on the gravity of the infraction, this is not a general situation of "one strike and you are out".

Planning Act Issue

8 It appears that work on the title to the YMC property suggested to the receiver's counsel that there may be a *Planning Act* problem — but not for the receiver's ongoing work or appointment, rather it may have affected the lenders' security. This issue did not affect the covenant aspect of the loan. On February 12, 1992 the receiver's counsel advised

the lenders' counsel of same and asked for their views (and information, I assume) before the receiver took a position. Within a reasonable time on February 25, 1992 Confederation Life's counsel responded, raised certain items, suggested that a curative approach under what is now s. 57 of the *Planning Act* might be in order after further inquiry. Pending such inquiries the letter went on to say:

> In these circumstances, we trust that the receiver will take no precipitate steps to bring any question as to the validity of our client's security to the attention of parties adverse in interest, or before the court for adjudication.

A court adjudication would cause a problem in invoking s. 57 at a later date. The receiver did not signify that it would not advise "parties adverse in interest" (the defendants, one would presume); rather it did not do anything for a month except indicate that it would take no position re a curative order. The lenders decided to institute the curative order process on their own. At virtually the same time the receiver determined what was happening, the defendants also found out.

9 The defendants charge conflict of interest. When asked what disadvantage they suffered as a result of the receiver not advising them as it had the lenders on February 12, their counsel was only able to point to the inability to make representations. But representations to what end? It would be repugnant to their covenants to try to impugn the lenders' security. See *Ontario Potato Distributing Inc. & Harzuz Holdings v. Confederation Life Insurance Company*, unreported decision of Henry J., released March 4, 1991 [Docs. RE 1740/90, 2435/90 (Ont. Gen. Div.)].

10 While in my view it would have been better to have made disclosure to the defendants at the same time as to the lenders, that is with the benefit of feeling the defendants' present outrage. No doubt the receiver will be more sensitive in the future if not for anything but to avoid a repeat performance. Yet the receiver should not be expected to perpetually walk on eggshells — such would only slow down the process and increase costs beyond their already high level. I pause to note that the receiver did not attempt to hide from the defendants such issue; if they had, would it have presented the dockets to the court (and therefore the defendants) before the cure was effected?

Cantel Litigation

11 Unfortunately the wrangling in this case resulted in my order of November 27, 1991 concerning the Cantel litigation monitoring the defendants Cantel lawyers not being "resolved" until March 2, 1992, at which time I addressed and revised a letter of proposed terms by the defendants Cantel lawyers. I am given to understand that even as yet all parties have not yet consented to the form of order. (If necessary I will finally resolve same; one would trust that this would be the exceptional situation.) Until that time it was apparently unclear as to whether the monitoring should extend to being informed of settlement negotiations. The Cantel settlement proposal came shortly after. Given that I had already given a confidentiality order at close to that time I do not think that the settlement proposal coming would have been too much of a surprise. In any event the defendants Cantel counsel had the settlement proposal by March 13. While it may seem narrow on first impression, I conclude that until March 2, it was not established that the defendants had any access to settlement information and that there apparently was no settlement negotiation during the intervening period to March 13 except the receipt of the settlement proposal. I do not therefore see that the defendants have cause for complaint — especially as claimed as to a lack of neutrality. (As to the question of communication — bad communication is better than no communication but not, of course, as good as good (and timely) communication.)

Other Areas

12 As to the lack of neutrality in the negotiation of the indemnity agreement with Metro concerning the lien claims (versus bonding of these claims), how can there be a lack of neutrality in favour of the lenders when the lenders oppose the giving of such?

13 I have previously commented on the physical completion of the transit facilities. It appears that the delayed opening of same was caused by difficult and lengthy negotiations with Metro/TTC.

14 As to the conclusion of proper and prudent management, the defendants protest the hiring of Baylys and its charges — apparently forgetting that the defendants were among those consenting to such hiring on November 27. I think it adds little as well to suggest that landscaping should have been completed during the winter months.

15 In conclusion I do not find that the receiver is the handmaiden of the lenders nor would it appear to be so to an objective observer after a reasonable investigation. The defendants' motion is dismissed. I do however remain concerned about the question of effective communication amongst the parties. It would be wrong to suggest a hook-up that delivers "a stream of consciousness" — such would be too onerous on the receiver and completely worthless to any party. I am also mindful that there is the natural psychological reluctance to export lead if one has the uneasy feeling it will come back in the form of bullets.

16 Costs against the defendants jointly and severally payable forthwith to the receiver for $6,500, the lenders $2,500 each, the lien claimants collectively $1,000 and Metro $1,000.

Motion dismissed.

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