Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROSEJACK INVESTMENTS LTD.

Applicant

- and -

DAVIDS FOOTWEAR LTD.

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, c. C.43, AS AMENDED

BRIEF OF AUTHORITIES

(Re: Application returnable August 2, 2019)

July 31, 2019

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Index

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I N D E X

Tab 1

1988 CarswellSask 27
Saskatchewan Court of Queen's Bench

Standard Trust Co. v. Pendygrasse Holdings Ltd.

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

STANDARD TRUST COMPANY v. PENDYGRASSE HOLDINGS LTD.

Grotsky J.

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

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

***Grotsky J.*:**

Background

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

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

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

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

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

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

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

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

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

Conclusion

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

The facts

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

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

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

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

The law

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

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

12 Whatever may have been the situation prior to the annual meeting of 29th June 1988, that situation has now undergone a significant change. While, under its mortgage security, the applicant does not possess the power to appoint a receiver-manager, since 29th June 1988 it, through its members on the condominium association board of directors, now has significant control of the security. It, through its dominated board, has access to the records of the association; the board will now be in a position to determine how the complex ought to be managed; any previously complained

of non-compliance by the mortgagor can be effectively addressed and dealt with. If the security is, or has been, in any danger or jeopardy, that concern too can now be addressed and dealt with.

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

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

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

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

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

Disposition

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

17 Standard and Pendygrasse each have their own legal counsel. It is for their counsel to read, consider, interpret and thereafter to advise them of their legal duties, obligations and responsibilities arising under their various agreements with

each other or others party to and/or affected thereby. If, under the existing contractual, or other relationship between them, the right exists to terminate Pine Hill Management Ltd. as the complex manager, then, whether or not that right can now, or should in the circumstances, be exercised by Standard, is a matter for its decision based upon the advice it receives from its own solicitors. If the advice it receives and acts upon is called into question by Pine Hill Management Ltd., and/or Pendygrasse on its behalf, if indeed Pendygrasse is able so to do, or others entitled so to do on its behalf, and legal action follows, then, and only then, in the context of the nature of the proceedings brought for determination, will this court, if required so to do, be required to determine the issues then raised thereby.

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

Costs

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

Application dismissed.

Tab 2

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

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

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

Newbould J.

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

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

***Newbould J.*:**

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

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

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

Events leading to demand for payment

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

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

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

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

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

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

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

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

the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

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

Issues

(a) Right to enforce payment

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

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

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

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

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

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

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

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

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

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

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

(b) Court appointed receiver

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

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

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

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

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

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

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

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

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

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

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
>
> . . .

> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

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

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

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

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

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

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat

different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

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

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

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

Application granted.

Tab 3

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

Bank of Nova Scotia v. Freure Village on Clair Creek

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

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

Blair J.

Judgment: May 31, 1996
Docket: none given

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

***Blair J.*:**

1 There are two companion motions here, namely:

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

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

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

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

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

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

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

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

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

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

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

Receiver/Manager

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

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

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

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

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination

of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

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

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

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

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

Motions granted.

Tab 4

2011 ONSC 5612
Ontario Superior Court of Justice [Commercial List]

Central 1 Credit Union v. UM Financial Inc.

2011 CarswellOnt 11979, 2011 ONSC 5612, 208 A.C.W.S. (3d) 690, 84 C.B.R. (5th) 315

Central 1 Credit Union (Applicant) and UM Financial Inc. and UM Capital Inc. (Respondents)

D.M. Brown J.

Heard: September 23, 2011
Judgment: September 26, 2011
Docket: CV-11-9144-00CL

Counsel: D. Smith, R. Jaipargas for Applicant
R. Slattery for Respondents
S. Siddiqui for Proposed Intervenor, Multicultural Consultancy Canada Inc.

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

I. Motion by Shari'a Board of Scholars to intervene in contested application to appoint a receiver over a debtor's assets and undertakings

1 A Shari'a advisory board for mortgage-like products, Multicultural Consultancy Canada Inc., moves under Rule 13.01(1) of the *Rules of Civil Procedure* to intervene in this contested application by a creditor, Central 1 Credit Union, to appoint a receiver and manager over all the property, assets and undertaking of the debtors, UM Financial Inc. and UM Capital Inc. (collectively "UM").

2 For the reasons set out below, I do not grant the motion.

II. The receivership application

A. The credit facility and its performance

3 Central 1 made available certain credit facilities to UM. The funds loaned by Central 1 to UM were used by the latter to make mortgage loans to their customers which complied with Shari'a law.

4 UM offers mortgage and financial products to the Muslim community throughout Canada. According to UM's affiant, Mr. Omar Kalair, the company offers:

> Shariah compliant mortgages which adapt traditional security and lending arrangements into recognized Islamic lending instruments. These instruments accommodate, among other things the Islamic prohibition against charging or paying interest, and allow for the lender and the borrower to enter into a partnership instead of a strict debtor creditor relationship.
>
> Although the security and lending arrangements between Central and UM may be, on their face, ordinary loan and security documents, the underlying collateral, being the mortgage agreements entered into between the clients and UM, are not.

> As Central is aware, the Shariah complaint mortgages are different lending products with different risks and fees associated with them. Central has been fully involved in the development and application of these documents.
>
> UM is the only corporate entity in Canada who provides this service...
>
> This is an important growth market. With the Canadian Muslim community expected to double to 2.6 million by 2030, it is anticipated that close to 20 percent of new bank accounts opening by 2030 will be from this community.

5 Mr. Kalair described in some detail the elements of a Shariah-compliant mudarabhah, or partnership, between parties to a commercial enterprise, a key aspect of which is a predetermined agreement between the partners for the distribution of profits from the enterprise. In his affidavit he reviewed the structure and process of the mushakarah residential real estate mortgage UM entered into with its customers and appended to his affidavit a copy of the standard Mushakarah Mortgage Loan Agreement utilized by UM.

6 As security for its borrowings UM granted Central 1 general security agreements charging all of their personal property and assigned to Central 1 the real property residential mortgages made by UM to its customers. The commitment letters stated that they were governed by the laws of the Province of Ontario; neither referred to the principles of Shari'a law. Schedules to the commitment letters contained representations and warranties by UM that each mortgage it assigned to Central 1 as security "contains all standard terms and conditions generally contained in residential first mortgages and contains no restrictions on the assignability by [UM]".

7 Similarly, neither the Business Loan General Security Agreements nor the Master Mortgage Assignment Security Agreement between the parties contained any reference to Shari'a law; both stated that they were governed by the laws of the Province of Ontario. The GSAs contained a right for Central 1 to appoint a private receiver in the event of default.

8 In his affidavit Mr. Kalair stated that UM created an independent board of scholars who reviewed the on-going compliance of UM's lending with Shari'a principles:

> Its independent overview functions akin to the function performed by Kashruth or Halal food certification organizations.

UM's Board of Scholars consisted of five members, one of whom — Mufti Panchbaya — is Chair of the proposed intervenor, Multicultural Consultancy Canada Inc. ("MCC"). In 2005 the Board issued an opinion that the relationship created by the documents entered into between UM and Central 1's predecessor on the loans was Shariah compliant.

9 Central 1 alleges that as of March, 2011, UM owed it approximately $31.5 million and was in default. Central 1 delivered to UM notices of default and, on November 23, 2010, it sent UM demands for payment and notices of intention to enforce security under s. 244(1) of the *Bankruptcy and Insolvency Act*. Mr. Dirk Haack, in an affidavit in support of the application, deposed:

> Both before and after the delivery of these notices and demands Central 1 has afforded time to the Companies to repay the amounts owing to Central 1. Central 1 offered to enter into a forbearance arrangement with the Companies to afford them more time to see Central 1 repaid. Despite the efforts of Central 1, the Companies have not repaid Central 1, have not put forward a plan acceptable to Central 1 and have not accepted Central 1's offer to negotiate a short term forbearance agreement.

10 On March 16, 2011, Central 1 commenced this application seeking the appointment under section 243 of the *BIA* and section 101 of the *Courts of Justice Act* of a receiver and manager over all the property, assets and undertakings of UM.

B. The issues on the application to appoint a receiver

11 UM has advanced several arguments in opposition to the application of Central 1 to appoint a receiver, including:

(i) At the time Central 1 made its demand all payments owing by UM to Central were paid in full;

(ii) UM was not in default of any monetary obligations under the security lending agreements;

(iii) The termination by Central 1 of the Master Mortgage Assignment Security Agreement was done without notice and without proper resort to that agreement's arbitration provisions; and,

(iv) Central 1 has breached its contract with UM by making its demand and bringing its application.

12 In his affidavit Mr. Kalair spent some time conveying the views of UM's Board of Scholars about the enforcement proceedings initiated by Central 1:

> The Board is strongly opposed to Central's recent enforcement actions on religious grounds.
>
> In order for the contracts to be recognized as enforceable by the clients of UM, the party enforcing must be a risk sharing partner of those clients. The agreement attached as Exhibit "A" above [the Musharakah Home Financing Agreement] reflects this intention. Any enforcement of these 'mortgages' must be done in accordance with this agreement. It does not appear as though Mr. Haack recognizes this and I do not believe that Central is prepared to abide by this based on a review of the Haack Affidavit.
>
> The Board has released a fatawa (a religious ruling) that if [UM is] put into receivership, it will result in our partnership contracts with the clients being null and void. This is because partnership contracts are only valid if both parties are active partners and share the risks. In the opinion of the Shariah board, the clients are to be advised that if UM is put into receivership the clients are not obliged to meet the obligations under their mortgages with Central.

13 In light of that evidence I would observe that the Musharakah Home Financing Agreement appended by Mr. Kalair to his affidavit provides that the "purchaser" (i.e. mortgagor) agrees that his obligations under the Declining Balance Real Estate Purchase Financing Agreement are secured by an Encumbrance, executed by the purchaser in favour of UM, and that on default UM may exercise any and all remedies under the Encumbrance. Those remedies include "proceeding under a power of sale or other expedited foreclosure process pursuant to Governing Law", which is defined as Ontario law. In the Master Mortgage Assignment Security Agreement UM warranted that each of the mortgages contains "all standard terms and conditions generally contained in a residential first mortgage" (Article 5.2(f)).

14 Nevertheless, in paragraphs 100 to 115 of his first affidavit Mr. Kalair explains, at some length, why the appointment of a receiver might have "dire religious consequences" and "likely will lead to the majority of the clients being directed by their religious scholars to immediately sell their homes, regardless of the loss and personal dislocation they will suffer, because they cannot be in a non-Shariah compliant lending arrangement..."

III. The Shari'a Board: Multicultural Consultancy Canada Inc.

A. The purpose of MCC

15 Recently the UM's Board of Scholars incorporated MCC, and it wishes leave to intervene, pursuant to Rule 13.01, in the receivership application scheduled for October 7, 2011. Mufti Panchbaya swore affidavits in support of MCC's motion. They did not attach MCC's articles of incorporation, so I have no evidence of MCC's corporate purposes. However, Mufti Panchbaya did describe the efforts made to date by the Board to participate in these proceedings and, as well, he provided some general background information on Islamic financial transactions, in particular the diminishing musharakah, or declining balance co-ownership transaction model used by UM with its customers.

B. Previous attempts by MCC to participate in this proceeding

16 This past May and June Mufti Panchbaya wrote to Central 1 expressing the Board's concerns about the applicant's enforcement proceedings. In an endorsement dated June 14, 2011 Mesbur J. noted that the Board might be seeking leave to intervene in the proceeding. Mesbur J. set July 25 as the date for a settlement conference between the parties. That day the Board's counsel, Mr. Siddiqui, appeared and sought leave to participate in the settlement conference conducted by Mesbur J. She refused his request. A 9:30 case conference was held before Morawetz J. on September 15. He noted that Mr. Siddiqui again appeared, wishing to participate in the conference on behalf of the Board. Morawetz J. followed the reasoning of Mesbur J. in refusing that request.

C. Why MCC wants to participate in this proceeding

17 After reading the materials filed by MCC and hearing submissions from its counsel, I confess to a lingering confusion about the purpose and scope of MCC's desired intervention in this proceeding. Nonetheless, let me reproduce those portions of the affidavit of Mufti Panchbaya which touch upon this issue:

> [20] The Shari'a advisory board has communicated some of its concerns about the receivership application to the Credit Union but has not had an occasion to do so in open court.
>
> [21] While Omar Kalair has attempted to communicate our concerns to the court through his affidavit evidence, he is not a Shari'a expert.

Later in his affidavit he continued:

> [26] I did not decide to intervene in the proceedings until I got notice of a potential class action lawsuit by clients of UM Financial against the Credit Union. Attached...is a true copy of an undated, signed letter from Adekusibe Fola. I am advised by my counsel and do verily believe that he received a copy of this letter on September 14, 2011.
>
> [27] Initially, I wanted to participate in the court proceedings in order to ensure that the Shari'a concerns were aired in court by a Shari'a expert. However, now I am concerned that myself and members of the board may be exposed to litgation on the basis that we have certified the Shari'a compliance of products offered by the Credit Union in partnership with UM Financial and the Credit Union...
>
> [28] If Credit Union succeeds in its application for receivership...the board and myself personally face considerable reputational risk and may never be able to sit on another advisory board for an Islamic finance company in Canada in the future.

18 The recent letter of Ms. Fola to Central 1 stated that should the applicant discontinue the Sharia Compliant Financing Scheme:

> Our clients will be filing a class action to redress the wrongs your action will cause them. In the meantime, they are considering filing a complaint with the Financial Services Commission of Ontario and the Office of The Superintendent of Financial Institutions.

C. The scope of participation rights sought by MCC

19 During oral argument MCC's counsel confirmed that his client wished to be added as a party intervenor with the right to file evidence, which would be limited to the affidavits of Mufti Panchbaya filed on the motion to intervene. In addition counsel confirmed that MCC:

> (i) would not ask to cross-examine on any of the affidavits filed by the parties;
>
> (ii) wished to file a factum for the October 7 hearing;
>
> (iii) wished to make oral submissions of up to one hour at the hearing;

(iv) was not seeking an adjournment of the October 7 hearing;

(v) was not asking for any right to appeal the ruling made on the October 7 hearing;

(vi) wished to participate in subsequent hearings in this proceeding should the court appoint a receiver; and,

(vii) would not seek its costs of participation but, at the same time, did not want to be responsible for the costs of any party.

IV. Analysis

A. The general principles governing requests to intervene

20 In *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824 (Ont. S.C.J.), I attempted to summarize the key elements of the approach to considering a request for leave to intervene brought under Rule 13.01(1) of the *Rules of Civil Procedure*:

> 7 A person may move for leave to intervene as an added party if the person claims (a) an interest in the subject matter of the proceeding, (b) that the person may be adversely affected by a judgment in the proceeding, or (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding: Rule 13.01(1). A court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding "and may make such order as is just": Rule 13.01(2).
>
> 8 As has been noted in the jurisprudence, cases in which intervention requests are made fall along a continuum ranging from constitutional and public interest cases at one end, to strictly private litigation at the other: *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2001] O.J. No. 2768 (C.A.), para. 9. Where the intervention is in a *Charter* case, usually at least one of three criteria must be met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or, it is a well recognized group with a special expertise and a broadly identifiable membership base: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.
>
> 9 By contrast, Ontario courts have interpreted Rule 13 more narrowly in conventional, non-constitutional litigation, and the Court of Appeal has cautioned that the "intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of litigation, regardless of an agreement to restrict submissions": *Authorson*, *supra*, para. 8.
>
> 10 The over-arching principle guiding any court considering a request to intervene was stated by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.) as follows, at p. 167:
>
> > Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parlies.

21 Counsel were unable to point me to any prior decision of this court where a stranger to the creditor-debtor relationship was granted status as a party intervention on a contested application to appoint a receiver over the assets and undertaking of the debtor.

B. Application of the general principles to the facts of this case

22 The application in which MCC seeks to intervene as a party involves a request by Central 1 for the appointment of a receiver over the assets and undertaking of UM. Typically the issues for a court to determine on such an application include: (i) the existence of a debt and default; (ii) the quality of the creditor's security; and (iii) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to preserve the property pending realization. [1] Those issues normally require an adjudication of private rights as between the applicant secured creditor and the debtor respondent with, as well, some consideration of the potential effect of the order sought on other creditors, whether secured or otherwise, and other stakeholders of the debtor corporation who might be affected by a receivership order. [2]

23 Given those issues, I fail to see from the evidence filed by MCC what interest it might have in the subject matter of this application. It does not put itself forward as a possible creditor of UM, and the material does not disclose that any contractual relationship existed between it and UM.

24 Mufti Panchbaya deposed that he could provide assistance to the court in explaining Shari'a law. He might well be able to do so, but such an ability does not rise to the level of having an interest in this proceeding for several reasons:

(i) as I noted above, the credit facility and security documents between Central 1 and UM are governed by Ontario law, as are the financing documents between UM and its borrowers. It is not apparent from those documents that any need exists for a court to seek assistance on points of Shari'a law;

(ii) Shari'a law stands as non-domestic law within the Canadian legal system. As such, the principles of Shari'a law must be proved by expert evidence. [3] Although the timing aspects of Rule 53.03 require some modification in the context of applications, its requirements concerning the contents of experts' reports do not. The affidavit filed by Mufti Panchbaya does not comply with Rule 53.03(2.1) and he did not provide the required acknowledgement of his Rule 4.1 duties to the court as an independent expert witness. Indeed, given his stated concern about exposure to personal liability for advice he gave to UM, Mufti Panchbaya could not offer independent expert opinion evidence. Consequently, Mufti Panchbaya's affidavit holds little possible probative value in respect of proving any principle of Shari'a law; and,

(iii) the debtor, UM, has filed responding evidence raising and discussing the issue of Shari'a law, and it was open to UM to file the report of an expert in Shari'a law and Islamic financing if it thought such evidence material to its opposition to the appointment of a receiver. UM has not filed such expert evidence, so it is not open to a stranger to the litigation to attempt to gain entry into the proceeding to do so.

25 In its factum and oral argument MCC submitted that this proceeding possesses a constitutional dimension, bringing into play the freedom of religion and the right to equality without discrimination. I see no merit in such an argument. The parties have not raised any constitutional issues. Neither party is "government" within the meaning of section 32(1) of the *Canadian Charter of Rights and Freedom*, and MCC failed to articulate any common law principle whose development should be informed by the rights and freedoms contained in the *Charter*. Finally, MCC did not give notice under section 109 of the *Courts of Justice Act* to either Attorney General.

26 Next, the evidence does not disclose that MCC might be adversely affected by a judgment in this proceeding. First, MCC did not file its articles of incorporation, so the record is silent on its corporate purpose and how its corporate objects might be affected by an order. Second, there is no evidence that MCC is a creditor of UM. Third, the concern about some possible reputational impact deposed to by Mufti Panchbaya relates to a possible effect on a personal, not a corporate, interest. Fourth, Mufti Panchbaya's reference to possible litigation-exposure for himself and the other members of the Board of Scholars is speculative. Ms. Fola's recent letter to Central 1 threatened litigation against the creditor/applicant, not against the Board of Scholars. Finally, if a receiver is appointed, it would have to administer UM's assets, including its contracts, in accordance with the terms of those contracts, subject to any approval by the

court of contrary conduct. The suggestion that the appointment of a receiver would transform radically the rights and obligations of the parties under the debtor's Musharakah Home Financing Agreements strikes me as highly speculative and based on a misunderstanding of the powers and duties of a court-appointed receiver.

27 This is not a case where the third branch of the intervention rule — Rule 13.01(1)(c) is engaged.

28 Finally, I do not accept MCC's submission that its participation as an added party is necessary for the Court to appreciate the potential impact of a receivership order on the Muslim purchasers, or mortgagors, who entered into Musharakah Home Financing Agreements with UM. As I noted above, in his responding affidavit Mr. Kalair dealt with that issue at some length. As I see the matter, MCC's participation on that point would only duplicate evidence already placed into the record by the respondent.

29 Although no delay in the hearing of the application would result from granting intervention status to MCC, there would be additional costs imposed on both parties (although UM supports MCC's motion). While those costs might not be substantial, they are nonetheless real, and I do not see MCC making any useful contribution to the hearing of the application which would justify the imposition of such costs on the parties.

30 I should note that in the event the court appoints a receiver (and I make no comment one way or the other whether such an order should issue), it would be open to MCC to communicate any concerns directly to the receiver who, as I tried to emphasize numerous times during the hearing of this motion, would be acting as an officer of this court with all the attendants duties of such an office.

V. Conclusion

31 For the reasons set out above, I am not persuaded that MCC has an interest in the subject-matter of this application, would be adversely affected by a judgment, or otherwise would make a useful contribution to the hearing of the application. Accordingly, I dismiss its motion under Rule 13 for leave to intervene as an added party.

32 I do wish to add one final comment. During the course of its written and oral arguments MCC emphasized the religious dimension of its activities and ils desire to participate in this proceeding. Freedom of religion is one of the most precious of our constitutional freedoms. I have written at great length, both as a lawyer and as a judge, about the cardinal position enjoyed by that freedom in our political and legal community — religious belief plays a central role in the lives of a very large number of Canadians. At the same time, arguments about religious freedom can assume a strong emotional dimension. I wish to say, with respect, that counsel who advance freedom of religion arguments must take great care about how they cast their arguments and should avoid the temptation to personalize or emotionalize their submissions. I raise this point somewhat reluctantly, but I think necessarily, given the dramatic closing submission by MCC's counsel who, picking up the copy of the Koran kept by the court registrar, suggested that if leave to intervene was not granted to his client, then the Koran would not have a place in Canadian culture or its court system. Such a style of argumentation is inflammatory, even before a judge alone, and, in my view, improper in a forensic submission to a Canadian court by professional counsel on such an important constitutional right as freedom of religion.

VI. Costs

33 I would encourage the parties to try to settle the costs of this motion. My inclination would be not to award any costs. However, if any party wishes to seek costs, it may serve and file with my office (c/o Judges' Reception, 361 University Avenue) written cost submissions, together with a Bill of Costs, by Wednesday, October 5, 2011. Any party against whom costs is sought may serve and file with my office responding written cost submissions by Friday, October 14, 2011. The costs submissions shall not exceed three pages m length, excluding the Bill of Costs.

Motion dismissed.

Footnotes

1 Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009), p. 481 and Frank Bennett, *Bennett on Receiverships, Second Edition* (Toronto: Carswell, 1999), pp. 22-23.

2 Kevin P. McElcheran, *Commercial Insolvency in Canada* (Toronto: LexisNexis, 2011), p. 186.

3 See, for example, the decision of the High Court of Justice, Chancery Division, in *Investment Dar Co KSCC v. Blom Developments Bank Sal*, [2009] EWHC 3545 (Eng. Ch.), at para. 7, where one issue on a motion tor summary judgment involved whether certain transactions were Shari'a-compliant and within the powers of a Kuwait-incorporated party to the transactions or *ultra vires* by reason of non-compliance with Shari'a law principles.

Tab 5

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

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

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

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

Ground J.

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

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

***Ground J.*:**

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

Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> If:
>
> > (a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;
> >
> > (b) any payment required under Section 2.20 shall not be made when due;
> >
> > (c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or
> >
> > (d) by 5 p.m. on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,
>
> this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

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

Submissions

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

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

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

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the *Bank Act* , S.C. 1980-81-82-83, c. 40 (the "*Bank Act* ") in that the loan could not be made by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

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

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

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

Reasons

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

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

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

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

28 The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the

authorities seem to support the proposition that irreparable harm need not be demonstrated (see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (S.C.)).

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion allowed.

Tab 6

1989 CarswellAlta 343
Alberta Court of Queen's Bench

Citibank Canada v. Calgary Auto Centre

1989 CarswellAlta 343, [1989] A.W.L.D. 622, [1989] C.L.D. 813, [1989] A.J. No. 347, 15 A.C.W.S. (3d) 229, 58 D.L.R. (4th) 447, 75 C.B.R. (N.S.) 74, 98 A.R. 250

CITIBANK CANADA v. CALGARY AUTO CENTRE; CITIBANK CANADA v. WESTERN SECURITIES LIMITED

D.C. McDonald J.

Judgment: April 26, 1989
Docket: Calgary Nos. 8801-12922, 8801-12923

Counsel: *L.R. Duncan*, for plaintiff.
B.R. Crump, for defendants.

***D.C. McDonald J.*:**

1 This is an appeal from a decision of Master Alberstat who granted a receivership order in favour of a mortgagee, in regard to rents to be received by the mortgagors on several commercial premises.

2 There are two actions. In each the plaintiff is Citibank ("the bank"). The defendant in one action is Calgary Auto Centre Ltd. ("Auto Centre"). It borrowed money from the bank to finance the purchase of certain land in Calgary. The land consisted of about a dozen commercial building sites. On one of these, Auto Centre built a commercial building. As security it granted the bank a debenture (which may be described as a mortgage) as well as general and specific assignment of rents. It leases that building to a Mercedes-Benz car dealership. That land is referred to as the "Mercedes land". Auto Centre also granted the bank a second mortgage on the other commercial sites in the proximity of the Mercedes land. All these sites were subject to a fixed mortgage in favour of Burnco, which had sold the lands to Auto Centre.

3 The defendant in the other action is Western Securities Limited ("Western"). It gave Citibank a second mortgage and assignment of rents on a commercial property in Calgary. It gave an assignment of rents on a commercial property in Banff. The buildings on both properties are leased to commercial tenants. Western also gave the bank a general mortgage and assignment of rents on a 100-unit townhouse development in Calgary. These mortgages were given as security for the loan by the bank to Auto Centre.

4 The bank advanced $6,067,749.29 in principal to Auto Centre. Auto Centre also owed the bank $75,000 for letter of credit commission. In May 1988 Auto Centre received a letter from the bank asserting that the Auto Centre was in default under the debenture. It relied on a provision of the loan agreement between the bank and Auto Centre that stated that any default pursuant to *another* specified loan agreement would constitute an event of default for the purposes of the loan agreement between the bank and Auto Centre. That other loan agreement was between the bank and the Renaissance Shopping Centre Ltd. ("Renaissance") in respect of other lands that Renaissance had proposed to develop. The bank had agreed to provide certain financing for that development. There was thus a linkage between securities granted by the Auto Centre and Western to the bank and the lender-borrower relationship between the bank and Renaissance. This linkage is referred to by counsel as "cross-collateralization".

5 In May 1988 the bank wrote to Renaissance alleging default in Renaissance's obligation to repay to the bank all the money (some $21,000,000) which had been advanced by the bank to Renaissance. The bank then sued Renaissance

for judgment for the full amount of principal and interest. Renaissance defended and counter-claimed. It alleged that the relationship that developed between the bank and Renaissance in 1986 to April 1988 went beyond that of lender and borrower, and that the bank and Renaissance were in reality joint venturers. The bank applied to a master for summary judgment. That application was dismissed. The bank appealed. On 31st March 1989, after hearing oral argument, I held that the application for summary judgment should fail, and accordingly I dismissed the appeal. I gave a detailed order designed to expedite the progress of the case to trial.

6 In reaching my conclusion that there should not be summary judgment I held that, on the basis of the evidence placed before me, there was a triable issue. In view of that holding, in the present appeal Mr. Crump, solicitor for Auto Centre and for Western (as well as for Renaissance in the earlier appeal), argued that there has not been default. I need not decide whether the circumstances of disputed default of the Renaissance obligation entail that there has not been default in the obligations of Auto Centre and Western, for, since May 1988, Auto Centre has defaulted in its obligation, pursuant to the security documentation, to pay moneys as they came due under the Burnco mortgage, to pay interest on the bank's mortgage, and not to permit builders' liens to be filed against the Mercedes land.

7 Since the commencement of the bank's actions against Auto Centre and Western, three of the building sites have been sold by Auto Centre to strangers (for use as automobile dealerships). This has resulted in the payment of approximately $6,704,000 to the bank in reduction of the bank's claim. Because of the accrual of interest, the indebtedness claimed by the bank as at 22nd March 1989 was still $3,519,720.43, with per diem interest of $1,390.01 since then.

8 Burnco obtained an order nisi of foreclosure in the fall of 1988. There was a six month period of redemption. That period having since expired, Burnco has the right to proceed to advertise the lands over which it still retains its first mortgage security — that is, the lands (other than the Mercedes land) which remain unsold. The balance owing to Burnco is $3,253,039.62 as of 1st March 1989 (after allowing for payments made to Burnco out of the proceeds of the three sites that were sold).

9 Mr. Crump says that the bank unreasonably refused to permit the sale of a site to Terra Venture Developments Ltd., but I am not persuaded that Auto Centre's proposed distribution of sale proceeds, which would have resulted in no money being paid to the bank, constituted a reasonable proposal on Auto Centre's part.

10 Rents received by Auto Centre have been used to pay obligations of Auto Centre to other parties in regard to construction of improvements concerning building sites sold to purchasers. These expenditures were not expenditures included among the purposes of the bank's loan to Auto Centre.

11 Mr. Crump argues that there was an agreement between the bank and Western that as building sites were sold and the liability to Burnco was decreased so that the bank's equity in the remaining sites increased, the Western securities held by the bank were to be decreased proportionately. This is denied by Mr. Duncan, solicitor for the bank. That is an issue to be resolved at trial. Meantime, for the purposes of this application, I think it proper to treat the obligations of Western as remaining unabated.

12 The monthly rents received by Auto Centre from Mercedes pursuant to a net-net lease amount to $32,122.10. The three Western properties produce monthly gross rents totalling $77,777. After deducting payments due to first mortgages and other prior encumbrances and for reasonable operating expenses and taxes, the balance available, that may be applied to the indebtness to Citibank, is about $20,000. Thus, what is in issue in this application, from the point of view of what the bank might ultimately receive, is about $52,000 a month.

13 The master did not deliver written reasons for granting the receivership order. Mr. Crump says that his oral reasons placed emphasis upon the fact that in their agreements with the bank, Auto Centre and Western had agreed that in the event of default the bank could commence an action for the appointment by the court of a receiver to collect rents. While I do not doubt that that is a factor to be taken into account in deciding what is just or convenient, I do not regard it as the controlling factor.

14 I confirm the order made by the master, subject to certain variations, for the following reasons.

15 The application is made under the provisions of s. 13(2) of the Judicature Act, R.S.A. 1980, c. J-1, and s. 45 of the Law of Property Act, R.S.A. 1980, c. L-8. Section 13(2) of the Judicature Act reads as follows:

> (2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

16 Section 45 of the Law of Property Act (including subs. (1.1) which was added by amendment in 1984) reads as follows:

> 45(1) Notwithstanding section 41, after the commencement of an action on
>
> (*a*) a mortgage of land other than farm land, or
>
> (*b*) an agreement for sale of land other than farm land,
>
> to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:
>
> (*c*) appoint, with or without security, a receiver to collect rents or profits arising from the land;
>
> (*d*) empower the receiver to exercise the powers of a receiver and manager.
>
> (1.1) If
>
> (*a*) a mortgage of land or an agreement for sale referred to in subsection (1) is in default, and
>
> (*b*) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,
>
> the Court shall, on application by the mortgagee or vendor, appoint a receiver where the Court considers it just and equitable to do so.

17 I shall deal first with s. 45 of the Law of Property Act. Subsection (1) is permissive; at the same time, it does not state any criteria upon which the court is to decide whether to appoint a receiver to collect rents. The new subsection (subs. (1.1)) is mandatory, but only "where the Court considers it just and equitable" to appoint a receiver of rents. Mr. Duncan contends that subs. (1.1) was intended to remove any doubts that might previously have been entertained by the courts of Alberta as to the appointment of a receiver of rents where, for example, there is a substantial equity in favour of the mortgagee or the mortgagor debenture gives the lender the power to appoint a receiver privately. He adopted the view expressed in Price and Trussler, Mortgage Actions in Alberta (1985), pp. 308-309, as follows (footnotes omitted):

> The use of the word "may" in both s. 13(2) of the Judicature Act, and in s. 45 of the Law of Property Act as it existed before May 1984, resulted in the Court exercising its discretion and refusing to appoint a receiver if it felt that the appointment was inappropriate. Use of the word "may" in a statute, however, does not absolve the Court from its duty to make the appropriate order if a case is made out for it. This interpretation was reinforced in May 1984, when the word "may" in s. 45 was amended to "shall." However, addition of the words "where the Court considers it just and equitable to do so," has confused the exact intention of the Legislature.
>
> Prior to the amendments, it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured. Where the property was in need of maintenance, or where the application was unopposed or consented to, the Court was more likely to appoint a receiver, notwithstanding

the defendant's equity, but if the application were opposed, the Court preferred to exercise its discretion against such appointment and did not feel constrained to grant the mortgagee's application as of right.

With the new s. 45(1.1), it would appear that the Legislature's intention is to increase the number of occasions in which a receiver will be appointed. The only preconditions stated by the section are (1) that the mortgage or agreement for sale be in default and (2) that the property be producing rent. Since these have always been obvious preconditions, there must have been some reason to recite them in s. 45(1.1). It is suggested that these two conditions are the primary factors to be considered by the Court, and unless there are some extraordinary or unusual circumstances, the Court should consider it "just and equitable" to appoint a receiver if these two conditions are satisfied.

18 With respect to the authors, I would not regard the two facts referred to as being the "primary" factors governing the appointment of a receiver of rents pursuant to s. 45(1). If that had been the intention of the legislature, there would have been no need to add the requirement that the court appoint a receiver if the court "considers it just and equitable to do so". In my view, that additional requirement dictates that the court must consider all circumstances that are relevant to doing justice and equity between the parties.

19 The result is that, in my opinion, the position under s. 45(1) of the Law of Property Act is assimilated with that under s. 13(2) of the Judicature Act. I can see no real difference between searching for what is "just and equitable" and for what is "just or convenient". There may be circumstances (e.g., of emergency) in which it is "convenient" to appoint a receiver in an interlocutory order when it is not clear that to do so is just or equitable, but it is hard to think of any such circumstances when what is convenient would not also be what is just, especially if the intent is only to preserve the rents for ultimate allocation between the parties once their dispute is adjudicated upon.

20 Conversely, it is difficult to imagine circumstances in which it would be just to order the appointment of a receiver unless it were also convenient to do so. A similar observation may be made as to the phrase "just and equitable". In each case it is appropriate to adapt the felicitous approach of Laskin C.J.C. to the phrase "cruel and unusual" as found in s. 2(*b*) of the Canadian Bill of Rights: see *R. v. Miller*, [1977] 2 S.C.R. 680, [1976] 5 W.W.R. 711, 38 C.R. (N.S.) 139, 70 D.L.R. (3d) 324, 31 C.C.C. (2d) 177 at 184 [B.C.]. Adapting what he said there to the two combinations of nouns in s. 13(2) of the Judicature Act and s. 45(1.1) of the Law of Property Act, those combinations of words are not to be treated "as conjunctive in the sense of requiring a rigidly separate assessment of each word", but "rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm".

21 I am further of the view that the following passage at p. 309 of Price and Trussler's work is a correct approach to the matter:

Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgagee out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable," the Court must surely have regard to the mortgage contract, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he had covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

22 Mr. Crump has cited *N.A. Properties Ltd. v. Ronald J. Young Prof. Corp.* (1982), 43 C.B.R. (N.S.) 152, 20 Alta. L.R. (2d) 399 at 400, in which Master Quinn stated:

> In my opinion, a receiver should not be appointed under s. 45 of the Law of Property Act unless it is shown that the equity of the debtor is such that there may be inadequate security afforded to the creditor.

With respect, I do not accept that as an accurate statement, if it was intended as a general statement of the law. I do not doubt that the existence of a substantial equity may, in some circumstances, assume a dominant position among the factors to be taken into account in deciding what is "just and equitable". The same would apply to a decision under s. 13(2) of the Judicature Act. But one cannot go further than that.

23 Master Quinn further said that even if, as in that case, the defendant was in arrears and there were three mortgages against the title, all of which required the defendant to make payments, those facts alone did not constitute "sufficient reason to grant an order for receivership in the absence of evidence that the vendor is in a tenuous position from a security point of view". If Master Quinn meant that a receiver should be appointed only when the vendor "is in a tenuous position from a security point of view", then, with respect, I disagree. That was a case of the appointment of a receiver being sought by an unpaid vendor under an agreement for sale. The view apparently expressed by Master Quinn (if it is to be read as a general proposition) is, in my opinion, not correct either in the case of an unpaid vendor or that of a mortgagee.

24 It is also true that Alberta courts have expressed reluctance to appoint a receiver when the lending instrument gives the lender a power of private appointment. For example, in *C.I.B.C. v. El Dorado Hldg. Ltd.*, Alta. C.A., No. 15672, 14th October 1983 (unreported) (cited in Price and Trussler's book at p. 308n), Laycraft C.J.A., in a memorandum of judgment delivered from the Bench, said:

> We have on the other hand a debenture holder with a power of private appointment who has come to the court to receive a court appointment instead of proceeding on its own. That is something the court is usually loath to do unless there are exceptional circumstances.

Despite the apparent generality of that statement, it will be noted that it is no more than a generalization. The facts of that case themselves were such as to persuade the Court of Appeal to appoint a receiver of rents, the rents to "be applied against the municipal taxes and levies, against the proper insurance of the property, and otherwise to prevent waste", and the "balance of the rents if any" to be held by the receiver. Among the other factors which the court balanced were those militating against the appointment (an allegation that a lease of the property to companies affiliated with the borrower authorized the lessees to cancel the lease if a receiver were appointed, and the fact that the appointment of a receiver might damage the commercial credit of the borrower), and those militating in favour of the appointment (an allegation by the borrower that the debenture had been amended by a third party — not the borrower — lack of precision in another defence as pleaded, the failure of the borrower to make any of the payments due to the lender, and the facts that the land charged by the debenture was the sole asset of the borrower and that there had been no evidence as to where the rents had gone, why the taxes were not paid with the rent, or whether the rents were being paid at all).

25 Another instance of reluctance to appoint a receiver is *Macotta Co. of Can. v. Condor Metal Fabricators Ltd.* (1979), 35 C.B.R. (N.S.) 144 (Alta. Q.B.). Cavanagh J. held that a receiver should not be appointed where there was no evidence that the proposed receiver (already in possession of the property pursuant to a private appointment under debentures) could, if appointed by the court, do something that he could not do or had not already done. The receiver had sought "no help from the court in carrying out its task". Therefore, Cavanagh J. held that it had not been shown that it would be just or convenient to make the appointment. In those circumstances, it was not surprising that Cavanagh J. observed

> One can speculate that the real purpose of such an application [to appoint the same receiver already appointed privately] is to clothe the appointed receiver with the authority of the court, which may tend to dissuade other creditors and dispossessed debtors from looking too deeply into the actions of debenture holders. If that is the aim of the applicants in such a situation, I think it ought to be discouraged.

26 In the present case no mention has been made of the lending documents giving the lender a power to appoint a receiver privately, and in any event that has not been done.

27 In the first of the two passages I have quoted earlier from Price and Trussler's book, two Alberta cases are cited in support of the proposition that before the 1984 amendment to the Law of Property Act "it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured". For that proposition the authors cited two cases. One was *N.A. Properties Ltd. v. Ronald J. Young Prof. Corp.*, a decision of Master Quinn which I have already discussed. The other was *Madison Dev. Corp. v. Mehra* (1981), 40 C.B.R. (N.S.) 180 (Alta. Q.B.), a decision of Master Funduk. Both were really cases in which the evidence fell far short of establishing facts which might support a conclusion that it would be just or convenient to appoint a receiver. In the Madison case, for example, there was no evidence of the value of the land and hence no support for the submission apparently made that the borrower had no equity in the land. That does not make the case authority for the proposition that a receiver will not be appointed where the mortgagee is well secured. Nor is the ratio decidendi of the *N.A. Properties* case authority for that proposition, although it is true that Master Quinn's judgment appears to support it. What I say, as I have said earlier, is that there is no such general rule.

28 As I have said, Mr. Crump submits that a receiver should not be appointed because there is fundamental dispute between the bank and Renaissance as to whether the event of default by Auto Centre occurred, being the non-payment by Renaissance to the bank. He relies upon the following passage in Kerr on Receivers, 7th ed. (1921), p. 7:

> The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver the court will not prejudice the action, or say what view it will take at the trial. *Indeed the court will not appoint a Receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right*, even if the court be satisfied that the person against whom the demand is made is fencing off the claim. (The italicized sentence is emphasized by Mr. Crump.)

29 In my view the sentence emphasized is not authority for the wide proposition advanced by Mr. Crump. As authority for the proposition stated in that sentence Kerr cites *Greville v. Fleming* (1845), 2 Jo. & Lat. 335, and *Marshall v. Charteris*, [1920] 1 Ch. 520 (C.A.). The facts of those cases must be examined in order to understand the precise meaning of Kerr's sentence. *Greville v. Fleming* was a decision of Sugden L.C. of the High Court of Chancery of Ireland. He decided to appoint a receiver of tithe rent-charges upon the application of the son of one G., by then deceased. G. had asserted that he was the lay impropriator of a certain parish and therefore entitled to all tithes or rent-charges in lieu of tithes in respect of lands in the parish, that were payable to whoever was the lay impropriator of the parish for the time being. However, in his lifetime G.'s title to the rights of the lay impropriator was contested, and after his death those opposing the application for the appointment of a receiver continued to contest it. The court refused to appoint a receiver because the appointment of a receiver in a summary proceeding, not subject to appeal, would conclude the question of title for all practical purposes. In that case, therefore, the making of the order sought would have been to conclude the issue for all time. That is not so if the order I am asked to make is made, particularly if the funds collected are not placed at the disposal of the bank until the issues in the litigation are resolved by judgment or settlement.

30 The other case cited by Kerr is *Marshall v. Charteris*, a judgment by Eve J. In an ejectment action in which the title to a house was in dispute, the defendant was in possession. In an interlocutory application the plaintiff sought an order appointing a receiver of the rents and profits of the house and ordering the defendant to give up possession to the receiver. In refusing to make the order, Eve J. gave several reasons, one of which was that to deprive the defendant of possession would prejudice her right to plead her possession as a statutory defence and would thus in substance give the plaintiff judgment in the action. Moreover, there was no real concern about rents because the defendant, being in possession, was not receiving any. That case is distinguishable from the present case, for the making of the order I propose to make, in the form I intend (i.e., not placing the rents collected at the disposal of the bank), would in no way decide the issues in the litigation.

31 I turn now to whether in the present case it is "just or convenient" or "just and equitable" to appoint a receiver of the rents. In my view both those tests are interchangeable and are met in the circumstances. A useful summary of the circumstances that ought to be considered is found in Bennett on Receiverships (1985), p. 91, as follows:

> In determining whether it is "just or convenient" that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others. In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court-appointed receivership if the debtor is in default.

In the present case I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.

32 In assessing the risk to the security holder I have regard to the extent to which Auto Centre and Western have equity in the mortgaged lands vis-à-vis the amount claimed by the bank; if Burnco completes its foreclosure the equity of Auto Centre in its undeveloped lands (now $3.06 million) will be lost, leaving a maximum equity of $2.1 million in the Mercedes land and $2.7 million in Western's properties, for a total of $4.8 million. This is not greatly in excess of the present claim of the bank. The risk to the security holder would, moreover, be increased if the order were not made because there can be no assurance that the defendants will use the rents to pay taxes or Burnco, or that they will not use the money for purposes unrelated to the obligation they incurred at least prima facie by executing the security instruments upon which the bank relies.

33 There is here no question of waste.

34 What I have said already addresses in part the issue of the preservation and protection of the property; in addition, the receiver will be able to use the rents, as provided in the master's order, to insure the property, pay taxes, pay utilities and necessary operating expenses and reasonable management fees to Auto Centre.

35 The balance of convenience, in my view, is in favour of making the order.

36 Finally, by making the order the court is ensuring that if the bank is successful in the litigation, the rent moneys (after making the deductions already mentioned) will be available as a means of enforcing the bank's rights under the security investments when those moneys might otherwise be used for other purposes and be exposed to the claims of other creditors of the borrower. The balance of the rent moneys so held in trust will be held on behalf of the parties to the action alone according to their rights: see Halsbury's Law of England, 4th ed., Vol. 39, p. 408.

37 The master's order is therefore confirmed except for the following:

38 1. The bank by its solicitor will give an undertaking as to damages which will appear in the usual form in the preamble to the order.

39 2. Paragraph 2(c) of the master's order, which provides for payments of the balance to the bank, will be deleted. Instead, the order will provide that the balance be held by the receiver in trust for the parties to the actions according to their rights, to be paid out to whichever of the parties is held to be entitled to them at the conclusion of the actions by judgment.

40 I have questioned counsel as to the master's appointment of Auto Centre and Western as the receivers. This flies in the face of the principle that a receiver appointed by the court should be a disinterested party. Despite my concern,

Mr. Crump has assured me that he is content that Auto Centre and Western should be the receivers of their respective properties, and I am prepared in that circumstance not to disturb the master's order in that respect.

41 Costs may be spoken to.

Appeal dismissed; order confirmed subject to certain variations.

Tab 7

1973 CarswellOnt 325
Ontario High Court of Justice

Ostrander v. Niagara Helicopters Ltd.

1973 CarswellOnt 89, 19 C.B.R. (N.S.) 5, 1 O.R. (2d) 281, 40 D.L.R. (3d) 161

Ostrander v. Niagara Helicopters Ltd. et al.

Stark, J.

Judgment: October 30, 1973

Counsel: *B. B. Papazian*, for plaintiff
A. McN. Austin, for defendant, C. R. Bawden
W. G. Charlton, for defendants, New Unisphere Resources Limited, Baltraco Limited and Toprow Investments Limited
R. M. Loudon, Q.C., for defendants, Roynat Limited, Canada Trust Company and Niagara Helicopters Limited

Headnote
Receivers --- Conduct and liability of receiver — Duties
Debenture holders appointing receiver -- Receiver's duty to protect and enforce security of mortgagee debenture holders -- Receiver only owing fiduciary duty to mortgagee where appointed by Court -- Receiver having duty only to act reasonably and conduct fair sale -- Sale of debtor company's assets made in good faith not capable of being set aside even though receiver having personal interest in company purchasing assets.

Stark, J.:

1 In spite of the lengthy evidence that was taken in these proceedings continuing over many days, I am satisfied that the real questions involved have become quite narrowed and confined. This result was mainly achieved by the very careful and thorough arguments of all counsel and by their careful review of the evidence. Summarily stated the facts are briefly these. The company known as Niagara Helicopters Limited (hereinafter referred to for convenience as "Niagara"), was founded by the plaintiff Paul S. Ostrander who was the owner of 90% of the stock of the company. This company operated out of the City of Niagara Falls providing charter commercial air services, a flight school, tourist operations and various other services using helicopters. While Ostrander was an experienced helicopter pilot he proved to be an inept financial manager and when the company experienced serious financial difficulties the defendant Roynat was approached for a substantial loan by way of bond mortgage. A debenture dated October 1, 1969, (ex. 1) was entered into between Niagara Helicopters Limited and the Canada Trust Company as trustee, as a result of which Roynat became the single debenture holder. An initial advance of $125,000 was made on November 4, 1969. Two or three months later Niagara defaulted on the loan and the insurance on its aircraft was cancelled. On January 16, 1970, the defendant, C. R. Bawden, was appointed as receiver-manager by virtue of the default provisions contained in the deed of trust. It was admitted by counsel for the plaintiff and was placed on the record that all powers of the trustee were properly delegated to Roynat pursuant to s. 9.2 of the debenture and, in effect, Bawden was appointed receiver and manager as the agent of Roynat for the purpose of protecting and enforcing its security. The defendant Bawden was considered by Roynat to be an experienced receiver-manager, having acted in that capacity on many previous occasions. Bawden took immediate steps to reinstate the insurance, came to the conclusion that the company was a viable operation, although it lacked working capital, and a further $15,000 was advanced under the debenture. Bawden's duties as receiver-manager were

then terminated but Roynat insisted that the company retain a financial adviser; and with the consent of Ostrander, indeed it appears with the urging of Ostrander, Bawden acted in this capacity. However, during this period the financial position of Niagara deteriorated mainly because of Ostrander's inability to operate the company efficiently and due also to his frequent absences from the company for various reasons and Roynat became increasingly concerned as to the safety of its security. Thus, ex. 50 indicated that during the year ending December 31, 1970, a loss of $84,000 had been incurred as opposed to a net loss the previous year of $65,000. By February 24, 1971, it was necessary to again call in the loan and once again Bawden was appointed receiver-manager in accordance with the terms of the debenture and was instructed by Roynat to find a buyer for the shares as being the best possibility for all concerned. Bawden had had some previous satisfactory dealings with principals in the defendant company New Unisphere and this company displayed interest in Niagara. Negotiations were opened between New Unisphere and Ostrander, both parties being represented by independent counsel, and an agreement was formalized. The agreement was finally negotiated and signed and appears herein as ex. 20. No evidence was presented to indicate undue influence by Bawden or anyone else with respect to the negotiations and execution of this agreement. Indeed, from Ostrander's standpoint it was a highly desirable agreement in which Ostrander would have received a substantial payment for his shares. It appears from the evidence that Bawden did all he could reasonably do to assist in the completion of this deal and in postponing public sale of the assets as long as this could be done. However, delays occurred, probably caused by both parties in meeting the terms of the agreement, and as the fall of 1971 approached Roynat became increasingly concerned about the position of its security and urged and instructed Bawden to proceed with preparations for the sale of the assets by public tender. Conditions for sale were prepared, advertisements were duly inserted in the newspapers and a closing date fixed for the receipt of bids. The final date for the receipt of bids was September 24, 1971. An attempt was made by one White, a well-known entrepreneur in Niagara Falls resort properties whom 0strander had succeeded in interesting in his company before the hour when the bids were to be opened to persuade Roynat to accept a sum of money which he believed would be sufficient to pay off the debenture indebtedness. The amount mentioned was in the approximate sum of $150,000 but it was quickly explained to White and his advisers that there were other liabilities to be taken care of and that a total amount exceeding $200,000 would be needed. White's suggestion that he make up the difference by providing some form of security on his other holdings did not appeal to Roynat and it was decided to proceed with the tenders.

2 Only two tenders for the working assets of the company as listed in the conditions of sale were received. One of these tenders was a hastily written offer which turned out to be ambiguous in meaning, made by White and prepared in the few moments that preceded the opening. The other tender was the Toprow tender, the benefits of which were later assigned to Baltraco. It was admitted by all parties that since the defendant New Unisphere is the sole owner of its subsidiaries Baltraco Limited and Toprow Investments Limited, that the Toprow bid may fairly be regarded as in fact the bid of New Unisphere Limited. After two or three days' consideration, the Toprow tender was accepted, the decision being made by Roynat's representatives acting on its own views and acting as well on the advice of Bawden. I have considered the details of the Toprow tender, which appears herein as ex. 7, and the White tender, ex. 23. In effect, White tendered for the "complete package and as a going concern of Niagara Helicopters Limited Parcels 1-10 of the conditions of sale inclusive, subject to approval of transfer of licences and lease as per your terms of conditions of sale the sum of $151,000." The Toprow tender offered the sum of $150,000 cash for all of the assets offered with the exception of the accounts receivable. These accounts receivable were variously estimated at from $50,000 to $80,000. Under the Toprow tender, Toprow proposed to assume full responsibility for the pilot school and for the student contracts and these obligations were estimated to represent some $30,000. While the Toprow tender made clear that it desired the transfer of the lease and the licences it expressly made its offer not conditional on these being obtained. The White offer, however, expressly conditioned the offer upon approval of the transfer of licences and lease. There was considerable controversy both in the evidence and in the argument as to which of these two offers was the better. Thus, it was submitted that although the White offer did not expressly mention liabilities, that since the words "as a going concern" were included that White would have to assume all liabilities. It was also contended that since the Toprow offer did not require as a condition the transfer of the licences and the lease that Bawden had improperly acted in arranging for the transfer of the licences and lease or attempting to obtain the transfer without receiving consideration for so doing. For the reasons given later I do not consider it necessary to attempt to interpret the true meaning of each of these tenders or to determine which in

fact was the better offer. That determination was the sole responsibility of Roynat and in the absence of fraud or bad faith its decision is not open to question.

3 Basically this action is brought by Ostrander in an attempt to regain possession of Niagara which he has always regarded as his company. He asks that the agreement to sell to New Unisphere or its subsidiaries following the opening of the bid be declared null and void. He asks that Niagara be permitted to discharge the charge on its assets placed as a result of the deed of trust. In effect he asks that the sale be reopened and that a new receiver-manager be appointed. He asks also for damages. He also claims that the fees paid to the receiver are excessive and he asks for a full accounting. He bases all these claims for relief on his allegations that the defendants have conspired against him, have wrongfully converted assets and have committed fraud and breaches of trust. In my view the evidence convincingly shows that all these charges are unfounded and without merit. On the other hand, certain suspicious circumstances and events occurred which required explanation, which threw an aura of suspicion over the event and which in my view placed a burden upon the defendants to provide appropriate answers. I now turn to a consideration of these circumstances.

4 In the month of August, 1971, Bawden acting as a receiver-manager did three things upon which the plaintiff laid great stress: first, he issued a cheque for $2,000 to New Unisphere on August 3rd which appears to have been cashed later in September. Bawden justified this payment by reason of para. 5 of the agreement between Ostrander and New Unisphere which permitted the receiver-manager to pay the costs of investigation of the assets of the company being conducted by the proposed purchaser up to a maximum of $3,000 subject to certain conditions including a proviso that the purchaser exercise its right to terminate the agreement. This payment appears to have been made prematurely but is justifiable on the grounds that Bawden was doing his best to retain the continued interest of New Unisphere in the agreement. In any event, that deal did abort and in my view this payment then became justifiable. Two other payments were made by Bawden at around this same period of time which in my view were not justifiable, and which should be recredited to Niagara in the final accounting. One was an account in the sum of $307.25 (ex. 102) paid to New Unisphere to reimburse that company for certain aircraft valuations which it had arranged; and the other item which in my view was improper was to relieve New Unisphere of an account receivable of $1,500 for the use of aircraft for experiment with respect to that company's gas and oil operations. In my view these items can be properly adjusted after completion of the sale and the rendering of a final accounting including the fixing of Bawden's own fees and disbursements.

5 The three matters which I have just mentioned above are of relatively minor significance but a fourth incident occurred which has given me much concern. Commencing in June, 1971, and continuing until November of the same year, Bawden began purchasing for his own personal account through his broker shares in New Unisphere. The total of his purchases amounted to 42,000 shares for a total purchase price of approximately $20,000. These shares represented a 2% interest in the total issued shares of New Unisphere. The shares of that company are listed on the public exchanges. Bawden admitted quite frankly in his evidence that under the circumstances this was a "stupid" thing to do. His own counsel admitted to the Court that, "of all the matters brought before this Court by the plaintiff, this was the only one which has any appearance of substance. There is no question, whatever, that Mr. Bawden should not in the circumstances have been purchasing shares in New Unisphere." Bawden in his evidence contended that his decision to purchase New Unisphere shares had no connection whatever with Niagara, that he does speculate in the market to a considerable extent and that he was interested in this company because of its holdings in certain well known oil producing companies. In placing great stress upon these dealings, the plaintiff submits that Bawden, acting as receiver-manager was in a fiduciary position, that even if there was no actual fraud involved there was constructive fraud, that Bawden had created a conflict between his interests and his duty and that these dealings must vitiate the ultimate deal with Toprow. He argues also that Roynat must be responsible for the misdeeds of its agents. I should hasten to point out that there is not one shred of evidence to indicate that Roynat, Canada Trust or New Unisphere or its subsidiaries had any knowledge of these purchases by Bawden. However, because of the suspicious nature of these circumstances it appeared to me that there was an onus thrown upon the defendants to uphold the validity of the Toprow sale and to satisfy the Court that the decision to make that sale was not in any way affected or influenced by Bawden's foolish purchase of these shares.

6 My decision might well be otherwise if I had come to the conclusion that Bawden as receiver-manager was acting in a fiduciary capacity. I am satisfied that he was not. His role was that of agent for a mortgagee in possession. The purpose of his employment was to protect the security of the bondholder. Subsequently his duty was to sell the assets and realize the proceeds for the benefit of the mortgagee. Of course he owed a duty to account in due course to the mortgagor for any surplus; and in order to be sure there would be a surplus he was duty bound to comply with the full terms of the conditions of sale set out in the debenture, to advertise the property and to take reasonable steps to obtain the best offer possible. Certainly he owed a duty to everybody to act in good faith and without fraud. But this is not to say that his relations to Ostrander or to Niagara or to both were fiduciary in nature. A very clear distinction must be drawn between the duties and obligations of a receiver-manager, such as Bawden, appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest. The borrower, in consideration of the receipt by him of the proceeds of the loan agrees in advance to the terms of the trust deed and to the provisions by which the security may be enforced. In this document he accepts in advance the conditions upon which a sale is to be made, the nature of the advertising that is to be done, the fixing of the amount of the reserve bid and all the other provisions contained therein relating to the conduct of the sale. In carrying on the business of the company pending the sale, he acts as agent for the lender and he makes the decisions formerly made by the proprietors of the company. Indeed, in the case at hand, Mr. Bawden found it necessary to require that Ostrander absent himself completely from the operations of the business and this Ostrander consented to do. As long as the receiver-manager acts reasonably in the conduct of the business and of course without any ulterior interest, and as long as he ensures that a fair sale is conducted and that he ultimately makes a proper accounting to the mortgagor, he has fulfilled his role which is chiefly of course to protect the security for the benefit of the bondholder. I can see no evidence of any fiduciary relationship existing between Ostrander and Bawden. Mr. Papazian in his able argument put it very forcibly to the Court that the duties and obligations of a receiver-manager appointed by the Court and a receiver-manager appointed under the terms of a bond mortgage without a Court order, were in precisely the same position, each being under fiduciary obligations to the mortgagor. I do not accept that view and I am satisfied that the cases clearly distinguish between them. A good example of the obligation placed upon the Court-appointed receiver-manager is provided by *Re Newdigate Colliery, Ltd.*, [1912] 1 Ch. 468. That case was authority for the proposition that it is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment. At p. 477 Buckley, L.J., described the duties of the Court-appointed receiver and manager in this way:

> The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business, and has standing behind him — I do not know what word to use that will not create a misapprehension, but I will call them "constituents" — the persons to whom he is responsible in the matter, namely, the mortgagees and the mortgagor, being the persons entitled respectively to the mortgage and the equity of redemption. If we were to accede to the application which is made to us, and to allow the receiver and manager to sell the coal at an enhanced price, the result would be that the enhanced price would fall within the security of the mortgagees and they would have the benefit of it; but, on the other hand, there would be created in favour of the persons who had originally contracted to purchase the coal a right to damages against the mortgagor, the company, with the result that there would be large sums of damages owing.

Lord Justice Buckley then continued with language which further accentuates the difference between the two classes of receiver-managers:

> It has been truly said that in the case of a legal mortgage the legal mortgagee can take possession if he choose of the mortgaged property, and being in possession can say "I have nothing to do with the mortgagor's contracts. I shall deal with this property as seems to me most to my advantage." No doubt that would be so, but he would be a legal mortgagee in possession, with both the advantages and the disadvantages of that position. This appellant is not in

that position. He is an equitable mortgagee who has obtained an order of the Court under which its officer takes possession of assets in which the mortgagee and mortgagor are both interested, with the duty and responsibility of dealing with them fairly in the interest of both parties.

7 It appears to me unfortunate that the same terms "receiver-manager" are customarily applied to both types of offices, when in fact they are quite different. The difference is well pointed out in the case of *Re B. Johnson & Co. (Builders) Ltd.*, [1955] 1 Ch. 634, where it was held that a receiver and manager of a company's property appointed by a debenture holder was not an officer of the company within the meaning of the *Companies Act*. The language of Evershed, M.R., at p. 644 is in point:

> The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager — as it is said, "out of court" — is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment ...

Again, at p. 662, Lord Justice Jenkins stated:

> The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. But the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.
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> .....
>
> The duties of a receiver and manager for debenture holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous.
>
> In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realized.

8 Similar principles are to be found in the case of *Deyes v. Wood et al.*, [1911] 1 K.B. 806.

9 A similar situation to the case at hand arose in the decision in *Farrar v. Farrars, Ltd.* (1889), 40 Ch.D. 395. In that case three mortgagees in possession were selling under powers of sale in their mortgage to a company formed for the purpose of buying the property. This company was to some extent promoted by one of the mortgagees who had a substantial interest as a shareholder. It was held in that case the sale could not be set aside on the simple ground that F. was a shareholder in the company since the sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people. But it was also held that there was such a conflict

of interest and duty in F., of which the company had notice, as to throw upon them the burden of upholding the sale. It was held that the company had discharged themselves of this burden by showing that F. had taken all reasonable pains to secure a purchaser at the best price. Again in that case the rights and duties of a mortgagee in possession, which is our situation, are dealt with. Chitty, J., at p. 398 said this:

> The first question then is, was the sale a dishonest transaction? A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt.... The mortgagor has no right after the power has arisen to insist that the mortgagee shall wait for better times before selling.

That case went to appeal and Lord Lindley, L.J., at p. 410 used this pertinent language:

> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed.

10 While I find that the purchase by Mr. Bawden of the shares in New Unisphere, in the amounts and at the times when he did, were purchases which he should better not have made, I cannot find anything in these transactions to impugn the validity of the final sale by tender. I am satisfied that Mr. Bawden and his principal Roynat did the very best they could to protect their own security but at the same time went out of their way to assist Ostrander in so far as his private negotiations had any hopes of success. Other than the tactless purchase of these shares and the minor misjudgment with respect to certain payments with which I have already dealt, I can find nothing censurable in Mr. Bawden's conduct. I am satisfied that the power of sale was exercised in a fair and proper manner and that in the opinion of Roynat and its advisers the better offer was obtained. I do not consider it necessary to analyse in detail the nature of the offers that were being considered because no evidence has been placed before the Court to show that the Toprow offer was a disadvantageous one or that the White offer was a better one. Certainly as far as New Unisphere and its subsidiaries are concerned there is no evidence to indicate that they had the slightest knowledge of the purchases by Bawden and they are in the position of purchasers in good faith without notice of any such wrongdoing, if such it were, and accordingly the sale must stand. No legal or moral stigma of any kind should be attached to any defendant in this action and the most that can be said against Mr. Bawden is that he was guilty of misjudgment in certain respects. There was an aura of suspicion which had to be dispelled by the defendants and which they have succeeded in doing. I do not think the plaintiff should be further penalized than by dismissing his action against the defendants with costs, except that in the case of the proceedings against Bawden who was separately represented, the action should be dismissed without costs. As already indicated, there should be a reference to pass accounts and to fix the receiver-manager's costs. If any questions arise as to the drawing up of the judgment, I may of course be spoken to.

Court File No.:

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

ROSEJACK INVESTMENTS LTD. **- and -** **DAVIDS FOOTWEAR LTD.**

Applicant **Respondent**

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

BRIEF OF AUTHORITIES

(Re: Application returnable August 2, 2019)

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