File No. CI20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AN SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C.C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC.

Applicant

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., and NYGARD ENTERPRISES LTD.

Respondents

AND

Estate Nos: 31-2627758, 31-2627760, 31-2627764, 31-2627767, and 31-458926

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF NYGARD PROPERTIES LTD., NYGARD ENTERPRISES LTD., NYGARD INTERNATIONAL PARTNERSHIP, 4093879 CANADA LTD., AND 4093887 CANADA LTD.

MOTION BRIEF OF THE RESPONDENTS

LEVENE TADMAN GOLUB LAW CORPORATION
Barristers and Solicitors
700 - 330 St. Mary Avenue
Winnipeg, Manitoba R3C 3Z5
WAYNE M. ONCHUENKO
QB Box no. 105
Telephone No. (204) 957-6402
Facsimile No. (204) 957-1696
File No. 113885/WMO

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MOTION BRIEF OF THE RESPONDENTS

PART I - LIST OF DOCUMENTS AND AUTHORITIES

1. The Receivers' Reports, including the 2nd Report, 7th Report, 8th Report and 9th Report
2. Notice of Motion of the Receiver, filed September 25, 2020
3. Notice of Motion of the Respondents, filed September 29, 2020
4. Notice of Motion of the Respondents, filed November 5, 2020
5. Affidavit of Greg Fenske, affirmed September 29, 2020
6. Affidavit of Greg Fenske, affirmed October 6, 2020
7. Affidavit of Greg Fenske, affirmed November 5, 2020
8. Affidavit of Peter Nygard, affirmed November 12, 2020
9. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953
10. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659
11. *The Clover on Young Inc.* 2002 ONSC 5444
12. Kerr and Hunter on Receivers and Administrators Ch12
13. *Milwaukee & Minnesota R. Co. v. Soutter,* 69 U.S. 510
14. *Ostrander v Niagara Helicopters Ltd., (1973) 40 DLR (3d) 161*
15. *Royal Bank v W. Got & Associates Electric Ltd.*, 1997 ABCA 136, aff'd [1999] 3 S.C.R. 408
16. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508

PART II – POINTS TO BE ARGUED

1. This brief is supplementary to the Motion Brief of the Respondents dated November 5, 2020 (the "**Respondents' First Brief**"), and uses terms defined therein. It is responsive to the Supplementary Motion Brief of the Receiver dated November 10, 2020 (the "**Receiver's Brief**"). The Receiver's arguments are spoken to in the order in which they are made.

THE LENDERS HAVE BEEN PAID IN FULL AND THE RECEIVER SHOULD BE DISCHARGED

2. The logic of the Receiver's Brief proceeds from two insupportable hypotheses, one stated, and one not: firstly, that the Lenders have not been paid in full, and secondly, that even if the Lenders have been paid in full, that payment is without consequence to the Receiver or to these proceedings.

3. The first hypothesis is easily disposed of. In its Ninth Report, the Receiver stated that "*sufficient proceeds have been generated to date to repay the Lenders … with perhaps some "excess" remaining*". The Lenders did qualify that statement by observing that there were certain claims "*still under consideration*",[1] but the Receiver has also reported to this Court such that the net result of those claims would appear to be a USD $300,000 *over-payment* to the Lenders.[2]

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[1] Ninth Report, at paragraph 115, page 35
[2] Richter Advisory Group Inc. Seventh Report of the Receiver, at paragraphs 41-44

4. The Receiver's Brief does not explicitly deny or contest the Receiver's own prior statements to the Court. Rather, it implicitly takes the position that because the Receiver "*continues to review*"[3] those certain claims, it cannot be said that the Lenders have been repaid, and if that cannot be said, then the Receiver is entitled to stay in place and exercise its powers, as the Receiver chooses to interpret them, to the fullest. In short, the fact that the Receiver has declined to complete a task means that the Receiver retains its powers indefinitely. This is not the only time this argument is made in the Receiver's Brief.

5. The Receiver's second hypothesis, (that even if the Lenders have been paid, that payment has no consequences for the Receiver), presents itself in the form of omissions from the Receiver's Brief.

6. The first omission concerns the scope and tenure of the Receiver's mandate. The Receiver repeatedly reminds the Court that the Inkster Property is "Property" pursuant to the Receivership Order, as if that fact answered all questions and stymied all objections.[4] The argument ignores the Court's General Order of April 29, 2020 (the "**General Order**"), which limited the scope of the Receiver's appointment to "***only*** *such property, undertakings and assets of NEL and NPL in which the Applicants have an interest pursuant to the Credit Agreement … and the Loan Documents*."[5] As set out in the Respondent's First Brief, the Lenders do not have an interest in NPL's property *now*, since they have been repaid. The

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[3] Receiver's Brief, at paragraph 38
[4] Receiver's Brief, at paragraphs 36, 47, 48, 49, and 53
[5] General Order dated April 29, 2020 at paragraph 2, emphasis added

Receiver's "Property" argument assumes the General Order does not exist and the repayment had not occurred. Indeed, the argument would apply with just as much force if all the secured and unsecured creditors of all the respondents had been paid in full: despite the manifest absence of any need for a sale of NPL's property in such circumstances, the Inkster Property would still be "Property" for the purposes of the Appointment Order.

7. The second omission is a legal argument in favour of the Receiver's position. Nowhere in the Receiver's Brief is there a *positive case* made for the Receiver retaining its powers and status after the Lenders have been paid. The Receiver's argument on the issue of discharge consists entirely of an attempt to distinguish the authorities relied upon by the Respondents.

8. Without ever saying so clearly, the Receiver is making an astonishing request of the Court: that after the Lenders have been paid, the Receiver should be allowed to retain its status and authority, and indeed to sell an asset owned by one company (NPL) for the benefit of the unsecured creditors of another company (NIP), the debts of which NPL has not guaranteed.[6] In such circumstances, the onus is on the Receiver to explain the legal basis upon which the Court may make the order sought. The Receiver behaves as if this onus did not exist: beyond stating that the Inkster Property is "Property" under the Receivership Order, the Receiver says nothing to support its position. It has not provided this Court with any statutory or judicial authority for the idea that a receiver can retain its

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[6] See Ninth Report at paragraph 120, page 36, and paragraph 184, page 54, and Motion Brief of the

powers and continue to sell assets *after* the secured lender has been paid. This is because no such authority exists.

9. The authority is to the contrary. This case bears key resemblances to that of The Clover on Yonge Inc., a matter pending before the Commercial List of the Superior Court of Justice in Toronto. “The Clover”, “Halo”, and “33 Yorkville” were the names given to three substantial under-construction condominium projects, each owned by a special purpose corporation in turn owned by the Cresford Group. BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation (hereinafter “**BCIMC**”) were the first-ranking secured creditors in respect of each of the condominium projects. There were multiple subordinate secured creditors and approximately two thousand unsecured creditors, mostly individuals who had paid deposits on condominiums in the projects.[7]

10. After default by the borrowers, BCIMC applied to the Court for the appointment of a receiver pursuant to subsection 243(1) of the *BIA*. The borrower companies brought a competing application for protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “***CCAA***””). In 2020 ONSC 1953, Justice Koehnen of the Commercial List dismissed the application for *CCAA* protection and granted the receivership order.[8] However, after the debtor Clover (the most significant and

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Receiver (Inkster Approval and Vesting Order), at paragraph 26(f), page 20

[7] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953 (“Clover I”) at paragraphs 5-27*

[8] *Clover I* at paragraphs 7, 11 and 113-114

advanced of the projects) had arranged for third-party financing that would allow it to pay BCIMC and the receiver in full, (thereby redeeming the property), Justice Koehnen dismissed the Receiver's application for approval of a sales process for the Clover project, (a process supported by most of the unsecured unit-holders), and allowed Clover to pay BCIMC and discharge the receiver.

> *[42] Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.*
>
> *[43] While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.*
>
> *[…]*
>
> *[48] With respect to the history of the proceedings, on the initial receivership application, the debtor proposed a CCAA proceeding. BCIMC opposed because it would end up remaining in the project longer than it wanted to.* ***At the time, BCIMC indicated that it simply wanted its money back*** *and wanted nothing more to do with the project: see the receivership reasons 2020 ONSC 1953 at para. 56.* ***The debtor now proposes to give BCIMC its money back pretty much immediately.***
>
> *[49] My reasons for assigning the project into receivership were driven in large part by the right of BCIMC to be repaid, the absence of any concrete proposal to do so and the unfairness of tying BCIMC to a debtor in whom it no longer had confidence: see for example paras. 64 – 69, 89, 91.* ***The thrust of my reasons, and in particular of the paragraphs just referred, to was to leave open the possibility of the debtor resuming carriage of the projects by paying out BCIMC. The debtor is now able to do so unconditionally with respect to Clover****.*
>
> *[50] Has anything occurred since assigning Clover into receivership on March 27, 2020 that would make it unfair to any other stakeholder to permit the debtor to*

exercise its equity of redemption?

[51] BCIMC submits that it has funded the receivership and has spent time, money and energy into submitting a stalking horse bid.

[52] In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. ***In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC****. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.*

[…]

[56] ***The parties most likely to suffer prejudice by allowing the debtor to redeem are the unit purchasers. They believe they can achieve a better result in the competitive bidding process of a SISP than they can in a CCAA proceeding. To my mind that, however, is not, the real question****.*

[57] ***There is no doubt that the debtor would have had the right to pay out BCIMC on the initial receivership application. Had it done so, the debtor would have had relatively free rein to bring a CCAA proceeding.*** *In those circumstances it is unlikely that unit purchasers could have prevented a CCAA process by arguing that a receivership sale was preferable to CCAA. The unit purchasers have suffered no change of position since March 27 that would make the analysis any different today. To the extent they have, they can still raise those arguments if the debtor moves to convert the receivership into a CCAA proceeding.*

[58] As a result of the foregoing, ***I decline to approve the SISP for Clover and order that the debtor should have the opportunity to pay out the BCIMC debt, the receivership debt, and interest on both within 72 hours of receiving a pay-out statement in respect of those debts.***[9]

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[9] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,* 2020 ONSC 3659 at paragraphs 42-58, emphasis added

11. Justice Koehnen later discharged the receiver in respect of the Clover project and granted Clover's renewed application for protection under the *CCAA*. He continues to oversee Clover's *CCAA* proceeding.[10]

12. The situation is much the same here, although in this case the respondents' position is stronger than Clover's was: the Lenders have already been paid, the Receiver is in funds to pay itself, and rather than the Receiver proposing to sell NPL's Inkster Property for the benefit of NPL's secured creditors (there are none left) and unsecured creditors, (there are none at arm's length), the Receiver is proposing to sell it for the benefit of NIP's unsecured creditors (as if the sale of the Clover project was to fund the unsecured creditors of the Halo project). As in the Clover case, the payment of the applicant secured creditor and the receiver should lead to an immediate discharge of the receiver.

13. The Receiver has attempted to distinguish the Respondents' authorities by suggesting that they establish that a Receiver should be discharged after satisfaction of the secured debtor *only* in the case of a privately-appointed receiver.[11] That is not what the authorities say: the principle of discharge-upon-satisfaction is applied in both Court and privately-appointed receiverships.

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[10] *The Clover on Yonge Inc., 2020 ONSC 5444*

[11] Receiver's Brief, at paragraph 7

a. As the Receiver acknowledges,[12] the passage from *Bennett on Receiverships* comes from Bennett's introduction to his chapter on discharge, and not from his sub-chapter on the discharge of privately-appointed receivers. Accordingly, the principle articulated by Bennett was understood by Bennett to apply to *all* receiverships.

b. The first passage cited by the respondents from *Kerr & Hunter on Receivers and Administrators* ("***Kerr***") comes from section 12-4, *On satisfaction of encumbrance*. Section 12-4 is within that element of *Kerr* which deals with court-appointed receivers, and indeed the passage is clear on this:

> *A receiver is generally continued **until judgments in the action which he has been appointed**; but, if the right of the claimant ceases before that time, the receiver will be discharged at once.*[13]

The Receiver attempts to quibble with this statement of the law by pointing out that Kerr goes on to qualify it. However, the qualifications are irrelevant to the facts before this Court: there is no secondary encumbrancer who has applied to be added as a claimant in these proceedings, and there are no other applicant claimants to satisfy.[14] The Receiver's reliance upon distinctions applicable to facts not before this Court is indicative of the weakness of its legal argument.

c. The second passage in Kerr quoted by the respondents (26-3, Duty to cease to act) is indeed from the section of the textbook respecting administrative receiverships, and in the United Kingdom, administrative receivers are

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[12] Receiver's Brief, at paragraph 10
[13] *Kerr,* at page 260, emphasis added
[14] *Kerr,* at page 260

indeed privately appointed. However, as set out above, the principle is not *limited* to privately-appointed receivers.

d. The Receiver misunderstands the import of the US Supreme Court case (*Milwaukee & Minnesota R. Co. v. Soutter*, 69 U.S. 510) relied upon by the respondents. Contrary to the Receiver's representations, the issue before the Court was not whether a lower court could refuse the discharge of a Receiver, contrary to previous Order made by the Supreme Court, and the case does not stand for "*the proposition that discharge of a court appointed receiver is a matter of the exercise of the court's discretion*". As set out in the excerpt in the Respondents' First Brief, the US Supreme Court instead held that when the sum owing to the claimant creditor has been fixed and made available to that creditor, "*the court below then has **no discretion** to withhold such restoration [i.e. of the property to the debtor] and a refusal to discharge the receiver is judicial error*".[15]

14. Finally, there is no legal or equitable reason that discharge-upon-satisfaction should be restricted to privately-appointed receivers. The Receiver suggests that the principle should apply only to privately-appointed receivers "*because the duty of good faith of a privately-appointed receiver has been considered to be akin to that of the duty of good faith of the mortgagee, as both act as agent for the security holder and therefore assume the same duties and limitations in disposing a property*."[16] The Receiver cites no authority for this supposedly basic tenet of receivership law. Further, the necessary implication of the argument is that a Court-appointed receiver does *not* owe a duty of good faith and does *not* have duties and limitations in its disposition of property. This is incorrect: a Court-appointed

receiver is an officer of the Court and owes a higher, *fiduciary* duty to the Court and to the respondents.[17] A primary aspect of that duty is the duty not to exceed the authority granted the Receiver by the Court.

15. Stated differently, the Receiver had a duty to try to ensure that the Lenders were repaid: it has succeeded in this. The Receiver also had a duty to the respondents to do only that which was necessary and reasonable to ensure repayment of the Lenders, and to not interfere with the respondents' assets in any fashion beyond that. The discharge-upon-satisfaction principle is consistent with both duties. It is for this reason that there is no contradiction between the position taken by the respondents in this motion and the respondents' previous statement that the Receiver was appointed to act "*for the benefit of all stakeholders*": both the Lenders and the respondents are "*stakeholders*".

16. Here we have returned to the Receiver's misapprehension of its role. The Receiver appears to assume that if a power it wishes to exercise is not explicitly denied it by the Receivership Order, then that power exists. The reality is that if the Court's orders do not explicitly articulate a power granted to the Receiver, that power *does not* exist.

17. Similarly, the Receiver is incorrect when it suggests that a receiver acting with the benefit of an appointment order cannot trespass upon a debtor. In addition to the

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[15] *Milwaukee & Minnesota R. Co. v. Soutter*, 69 U.S. 510 at 510-511
[16] Receiver's Brief, at paragraph 12

authorities cited above, there is *Royal Bank v W. Got & Associates Electric Ltd*., 1997 ABCA 136, aff'd [1999] 3 S.C.R. 408. In that case, the Royal Bank obtained a receivership order *ex parte*, and thus without the required notice, and on the strength of a materially misleading affidavit.[18] Although the Court had approved the receiver's sales of the debtor's assets,[19] the trial judge eventually held that due to the bank's misconduct in obtaining the order, it had acted without authority and was guilty of trespass and conversion of the debtor's assets. The trial judge also awarded exemplary damages against the bank.[20] These decisions were upheld by the Court of Appeal for Alberta[21] and the Supreme Court of Canada.[22] The respondents herein do not suggest that the Lenders misconducted themselves in the manner of the Receiver's appointment, but the case is a reminder that receiverships are extraordinary remedies and that the assets of a debtor can be dealt with by a receiver only in tightly-circumscribed ways.

THE MERCANTILE LAW AMENDMENT ACT AND SUBROGATION

18. The Receiver has relied upon federal statutes, Manitoba law, and the common law for its appointment and for all of the actions it has taken to this point in these proceedings. It now seeks to avoid the application of the Manitoba *Act* by relying upon the law of the State of New York, and it provides submissions concerning New York law, without support

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[17] *Ostrander v Niagara Helicopters Ltd.,* (1973) 40 DLR (3d) 161 at paragraph 6
[18] [1999] 3 S.C.R. 408 at paragraphs 11-12
[19] [1999] 3 S.C.R. 408 at paragraph 9
[20] [1999] 3 S.C.R. 408 at paragraph 14
[21] [1999] 3 S.C.R. 408 at paragraph 15
[22] [1999] 3 S.C.R. 408 at paragraph 30

from any authority.[23] If the Receiver wished to have New York law apply to the narrow issue of subrogation (but not to the rest of these proceedings), it would be required to get an expert opinion concerning that law and its application in these circumstances. It has not done so.

19. With respect to the evidence concerning the issue of subrogation, there are two possible scenarios. In neither does NIP have a right of subrogation against NPL, as claimed by the Receiver.

Scenario One

The Receiver is Incorrect about the Identity of the Borrowers

20. The Receiver is of the view that the terms of the Credit Agreement determine the identity of the "Borrowers", and that those borrowers are thus the U.S. Nygard entities.[24] AGI is of the (legally correct) view that the actual facts of the transaction determine the identity of the "Borrowers", and that those facts establish NIP as the borrower, as follows.[25]

21. The initial $27.8 million advance by the Lenders was distributed as follows: (a) approximately $23.5 million to BMO to pay in full a loan owing to BMO concerning which NIP was the borrower (the "**BMO Loan**"); (b) $1.8 million directly to NIP; and, (c) the

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[23] Receiver's Brief, at paragraphs 39-42
[24] Richter Advisory Group, Supplementary Ninth Report of the Receiver ("Supplementary Ninth Report") at paragraph 25(a)-(b)
[25] Supplementary First Pre-Filing Report of Albert Gelman Inc. ("Supplementary AGI Report") at

balance to pay professional fess and other costs required to close the financing transaction. It is therefore evident that NIP was the sole beneficiary of the Lenders' advance, and should be treated as the "Borrower" under the Credit Agreement.[26]

22. If this treatment is adopted, then any payments by NIP allocated toward the Lenders' advances were made in NIP's capacity as borrower, and not in any capacity as guarantor, with the result that NIP cannot have rights of subrogation pursuant to the *Act*. To the contrary, NPL should have rights of subrogation to the Lenders' secured position over NIP's assets to the extent of $19.6 million.

Scenario Two

The Receiver is Correct about the Borrowers but Erred in its Accounting

23. If we accept that the U.S. entities were the "Borrowers", the balance of the Receiver's argument on subrogation is predicated upon it having ignored the ramifications of the indebtedness owed by NIP to the U.S. entities. The Receiver states at paragraph 62 of its Supplementary Ninth Report that:

> *the extent that NIP and NPL, as guarantors, have paid obligations of the Borrowers to the Lenders and become respectively subrogated to debt / security held by the Lenders, both NIP and NPL would essentially be "sharing" the subrogated rights to the security of the Lenders over the Inkster Property and the Broadway Property*.

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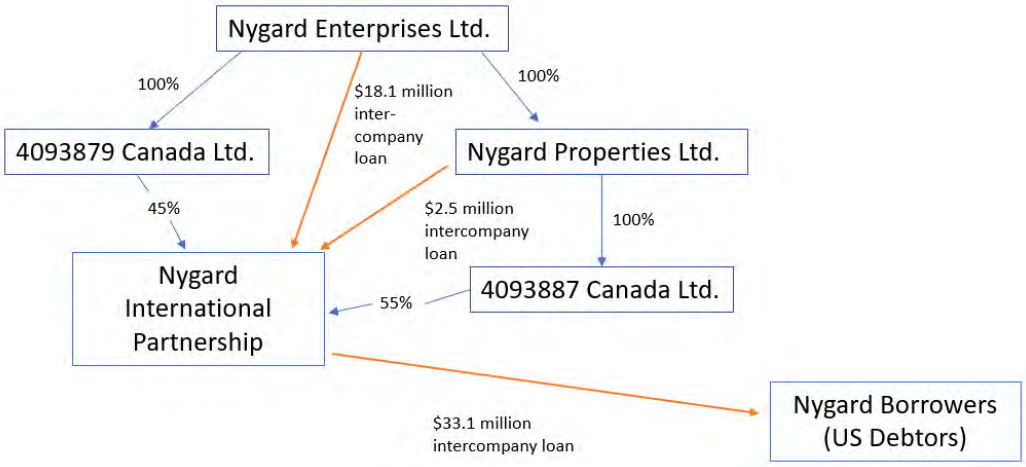
paragraph 10
[26]Supplementary AGI Report at paragraph 11

24. AGI has reported that the above assertion is incorrect because NIP *has not* paid the obligations of the Borrowers to the Lenders. Rather, NIP paid $25.4 million to the U.S. entities in partial repayment of its debt to them, (via the Receiver remitting the proceeds of the realization of NIP's assets to the Lenders). NPL paid the balance owed to the Lenders and, therefore, NPL alone has subrogated rights to the security of the Lenders.[27]

25. Below is an illustration of the relationships between the Canadian entities and the US entities (referred to hereafter as the "Borrowers"), including the intercompany loans as at January 31, 2020, the fiscal year-end immediately subsequent to the advances from the Lenders. The illustration reflects the accounting treatment of the Lender's advances which the Receiver believes is correct (i.e. it includes an amount due from NIP to the Borrowers resulting from the Lender's advances being paid directly to NIP rather than to the Borrowers.)[28]



[27] Supplementary AGI Report at paragraph 22
[28] Supplementary AGI Report at paragraph 22

26. As at January 31, 2020, NIP owed the Borrowers $33.1 million in respect of the proceeds from the Credit Facility. It follows that any amounts realized by the Receiver from the sale of NIPs assets to repay the Lenders would either directly reduce the intercompany loan of $33.1 million to the Borrowers or, in the alternative, would be offset against that intercompany loan. Therefore, before NIP could be entitled to any right of subrogation, more than $33.1 million, net of expenses, would have to come from the sale of NIP's assets in the Receivership. The net realization from NIP's assets was approximately $25.4 million. Therefore, not only does NIP not have any rights of subrogation, it remains indebted to the Borrowers in the amount of $7.7 million (being $33.1 million less $25.4 million).[29]

27. The end result is: (a) the Lenders have been paid in full (subject to inconsequential adjustments), (b) NIP has repaid a portion of its intercompany loan due to the Borrowers; (c) the Borrowers have repaid a portion of the Loan to the Lenders, and, (d) NPL, as guarantor, made payments directly to the Lenders to repay their advances. Below is a chart setting out the relationships after the Lender was repaid.

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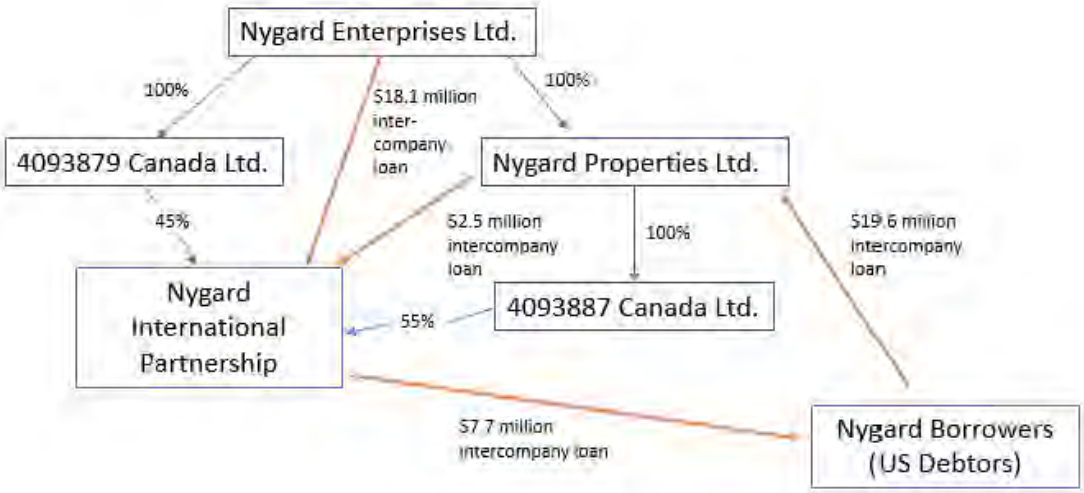
[29] Supplementary AGI Report at paragraph 21



28. As is illustrated above, in no scenario did NIP make payments to the Lenders as a guarantor. NIP's payments were all made in its capacity as debtor to the U.S. entities.[30] Therefore, NIP cannot have a right of subrogation to be "shared" with NPL. NPL is the only guarantor which has a right of subrogation as against, *inter alia*, NIP.

THE RECEIVER CANNOT VEST OUT NPL'S TITLE IN THE INKSTER PROPERTY

29. The Receiver attempts to distinguish the decision of the Court of Appeal for Ontario in *Third Eye Capital Corporation v Ressources Dianor Inc*., 2019 ONCA 508 by pointing out that that case decided that the court could not extinguish a third party's property interest in real property.[31] The Receiver ignores the fact that if a court is without authority to vest out a third party's interest in real property, it is certainly without authority to vest out NPL's *fee*

[30] Supplementary AGI Report at paragraph 22
[31] Receiver's Brief, at paragraph 52

simple interest in the Inkster Property, over NPL's objections, in order to benefit NIP's unsecured creditors.[32]

NPL IS SOLVENT, AND HAS DISCHARGED ITS GUARANTEE

30. Concerning the last point, the Receiver's Supplemental Ninth Report disputes many aspects of the AGI Report, but nowhere disputes AGI's conclusion that NPL is solvent. Rather, the Receiver questions whether NPL can be said to have made payments on its guarantee to the Lenders. The Receiver does not dispute that two of NPL's properties were sold, that those sales produced proceeds exceeding $19 million, and that those proceeds were assets in the receivership. Rather, the Receiver suggests that because it, the Receiver, has not yet formally chosen how to *allocate* the use of the proceeds from the sales of NPL's Niagara Street and Notre Dame properties (the "**Proceeds**") in the Receiver's accounting,[33] NPL cannot be said to have made payments on its guarantee to the Lenders (notwithstanding that NPL's guarantee is the only reason it is in receivership). For that reason, the Receiver asserts, the Receiver should be at liberty to sell the NPL's Inkster Property.

> *In the result, concluding that, in fact, NPL is "entitled" in some manner to such "excess", or to the Inkster Property and the Broadway Property (or the proceeds thereof) based solely on the timing at which Property has been sold and proceeds derived and applied over the course of the receivership, will require consideration of an appropriate allocation of contributions from Property to address all obligations. The need for such an analysis, which may be complicated, mitigates in favour of the Receiver continuing to realize upon Property, including the approval and closing of*

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[32] *Third Eye*, at paragraphs 113-115

[33] Ninth Report at paragraphs 114-116; Supplemental Ninth Report, at paragraph 44

the Inkster Transaction.[34]

31. Again, what the Receiver is really arguing is that because the Receiver has declined to complete a task, the Receiver can retain its powers indefinitely.

32. The underlying premise – that a lack of formal allocation prevents NPL from dealing with its assets for as long as the Receiver chooses – is incorrect. NPL guaranteed the indebtedness of the borrowers, *inclusive of enforcement costs*, to a limit of USD $20 million.[35] The "obligations" to which the proceeds of NPL's properties could notionally be applied by the Receiver are all either principal, interest, or enforcement costs (such as the Receiver's Charge) and are all payments on the guarantee. In short, the Receiver's allocation of the Proceeds as between principal, interest, and enforcement costs is irrelevant.

CONSOLIDATION

33. The basis for the Receiver's implied but formally non-existent motion for substantive consolidation of the Respondents' assets consists primarily of the manner in which certain terms have been defined in materials filed with this Court, rather than in concrete evidence that could meet the test set out by Chief Justice Morawetz in *Re Redstone*.

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[34] Ninth Report at paragraph 116

34. In its notice of application, the Lenders used the term "*the Nygard Group*" to refer to the respondents globally.[36] This definition was picked up by the respondents: Mr. Fenske, in his affidavits, used the terms "*Nygard*" or "*the Nygard Group*" to refer indiscriminately to one, more, or all of the respondents.[37] It should not have to be said, but Mr. Fenske's imprecise use of these terms was a matter of rhetorical convenience, not an admission that a yet-to-be-brought motion by the Receiver for substantive consolidation of the Respondents' assets had a legitimate basis.

35. The 50-page memo attached as Appendix F to the Receiver's Ninth Report seizes on Mr. Fenske's use of "*the Nygard Group*" and "*Nygard*", and appears to cite each appearance of these terms in Mr. Fenske's affidavits,[38] (and the use of the terms in the Receiver's own Reports)[39], as evidence of one, more, or all of "*Commingling of assets and business functions/Operation as one business enterprise/Difficulty of segregating assets/Transfer of assets without observance of corporate formalities/Shared bank accounts*" (hereinafter collectively "**Commingling**"). The blanket use of the Commingling allegation often extends beyond the use of the terms "*Nygard*" and "*Nygard Group*" into simple absurdity. The memo relies upon the following as evidence of Commingling.

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[35] Ninth Report at paragraph 29(a)
[36] Notice of Application dated March 10, 2020, at paragraph 1(b)
[37] See, for example, the Affidavit of Greg Fenske affirmed March 11, 2020, at paragraph 2
[38] Memo to Richter Advisory Group from Mel M. Labossiere, Appendix F to the Ninth Report, ("Richter Memo"), at pages 2-43
[39] Richter Memo at pages 44-50

a. The fact that correspondence respecting a third-party offer to purchase certain property owned by NPL was sent to an individual whose email address ended with "@nygard".[40]

b. The fact that Mr. Fenske objected to the Lender's affiant's failure to distinguish between guarantors and limited recourse guarantors.[41]

c. Peter Nygard's sworn statement that:

> *Many of the associates who have been working at 1340 Notre Dame have still not been allowed to pick up their personal items. The property of the estate of my sister Liisa Nichole Johnson is being withheld by the Receiver.*[42]

d. The fact that this Court made an order on March 13, 2020 that, *inter alia,* directed certain parties to reimburse the Lenders for payroll funding, and directed that certain draft cashflows were to be provided to Osler, the Lender's counsel.[43]

e. The fact that this Court made an order dated June 22, 2020 granting a priority charge for rent payments owing to certain of the Respondents' landlords.[44]

f. The fact that the Receiver offered to sell the Inkster Property to the respondents on September 29, 2020.[45] (It takes real confidence to

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[40] Richter Memo at page 10
[41] Richter Memo at page 18
[42] Richter Memo at page 29
[43] Richter Memo at page 48
[44] Richter Memo at page 30
[45] Richter Memo at page 39

assert that the Receiver's own act is evidence of the respondents' Commingling.)

36. That the respondent companies had defined roles within a larger business enterprise does not mean that the principle of corporate personhood may be disregarded, or that those distinct roles were so meaningless that the Receiver may arrogate to itself the power to dissolve the companies' assets into a single pot, for disposition as the Receiver sees fit. Similarly, that NPL may choose to sell the Inkster Property in order to make the proceeds available to creditors of other companies in a proposal made by those companies does not, contrary to the Receiver's suggestion, give the Receiver the authority to sell Inkster over NPL's objections. More generally, the Receiver's self-interested comments on the viability of a proposal by some of the respondents are irrelevant. The Receiver is not a creditor, and is not, and will not be, the trustee in any proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF NOVEMBER, 2020.

LEVENE TADMAN GOLUB LAW CORPORATION

WAYNE M. ONCHULENKO

Lawyer for the Respondents

2020 ONSC 1953
Ontario Superior Court of Justice [Commercial List]

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.

2020 CarswellOnt 5156, 2020 ONSC 1953, 317 A.C.W.S. (3d) 533, 78 C.B.R. (6th) 299

BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION (Applicants) and THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP (Respondents)

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC. (Applicants) and 33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP (Respondents)

Koehnen J.

Heard: March 27, 2020
Judgment: March 30, 2020
Docket: CV-20-00637301-00CL, CV-20-00637297-00CL

Counsel: David Bish, Adam M. Slavens, Jeremy Opolsky for Applicants, BCIMC Construction Fund Corporation
Steven Graff, Ian Aversa, Jeremy Nemers for Respondents
Virginie Gauthier, Allan Merskey, Peter Tae-Min Choi for Otera Capital Inc.
See Schedule A for complete list of counsel

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Receivership applicants advanced loans to three residential condominium projects and each of three projects was affiliated with C Group, debtors, which owned each project through individual, single asset, special purpose corporations — Applicants became aware of statement of claim against C Group, by former officer of C Group, alleging financial irregularities — As result, applicants appointed P and A Group to investigate and results of investigation raised three issues showing lack of transparency and forthrightness by debtors — Applicants lost all

confidence in debtors and no longer wanted to be involved with projects, they demanded payment on loans, and debtors could not comply with demand — Applicants brought application to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects — Application granted — In case at hand, there was breakdown in relationship that was caused by persistent and deliberate wrongdoing by debtor — There were no significant differences to outcome for other stakeholders between receivership or Companies' Creditors Arrangement Act proceeding, there were no material employment concerns, accordingly there was no reason to restrain exercise of applicants' contractual rights — It would be preferable to have receiver acting as officer of court who could act without being hamstrung by closing transaction that favours equity over creditors.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company

Receivership applicants advanced loans to three residential condominium projects and each of three projects was affiliated with C Group, debtors, which owned each project through individual, single asset, special purpose corporations — Applicants became aware of statement of claim against C Group, by former officer of C Group, alleging financial irregularities — As result, applicants appointed P and A Group to investigate and results of investigation raised three issues showing lack of transparency and forthrightness by debtors — Applicants lost all confidence in debtors and no longer wanted to be involved with projects, they demanded payment on loans, and debtors could not comply with demand — Applicants brought application to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects — Application granted — Circumstances in this case rendered receivership preferable to Companies' Creditors Arrangement Act (CCAA) procedure — This was situation where debtors had acted in manner which charitably would be described as lacking in transparency from inception of its relationship with creditor — In those circumstances, any reputational damage was of debtors' own making — Vast majority of jobs associated with projects were construction jobs, and construction personnel were not employed by debtors but were employed by arms-length contractors that debtors had retained to build projects — As result, there was little marked difference between receivership and CCAA proceeding with respect to either immediate or long-term employment.

Table of Authorities

Cases considered by *Koehnen J.*:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — considered

Confederation Life Insurance Co. v. Double Y Holdings Inc. (1991), 1991 CarswellOnt 1511 (Ont. Gen. Div.) — followed

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — referred to

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — referred to

Octagon Properties Group Ltd., Re (2009), 2009 ABQB 500, 2009 CarswellAlta 1325, 58 C.B.R. (5th) 276, 486 A.R. 296 (Alta. Q.B.) — considered

RMB Australia Holdings Ltd. v. Seafield Resources Ltd. (2014), 2014 ONSC 5205, 2014 CarswellOnt 12419, 18 C.B.R. (6th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(1) — considered

s. 244 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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

APPLICATION by receivership applicants to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects.

***Koehnen J.*:**

Overview

1 This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) 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 and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

2 The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

3 At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

4 In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

5 The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

6 The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

7 The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

8 The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

9 The Debtors are special-purpose, project-level entities for the development of each of the three projects.

10 Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

11 Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

12 The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

13 The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of $172,616,007 and $37,450,668 and a non-revolving letter of credit facility of up to $3,000,000.

14 As of March 2, 2020, the Receivership Applicants had advanced $107,668,017.82 under the Clover Facilities. In addition, $3,000,000 in letters of credit have been extended. The Receivership Applicants also extended a mezzanine mortgage on Clover, with $34,035,878.69 in principal outstanding.

15 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

16 There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

(b) The Halo Project

17 The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

18 The Halo Commitment Letter provides for two non-revolving construction loans in amounts of $156,850,7747 and $29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to $2,000,000.

19 As of March 2, 2020, the Receivership Applicants have advanced $47,429,211.83 in principal. In addition, $1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with $25,725,159.27 in principal outstanding.

20 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

21 There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

(c) The Yorkville Project

22 The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

23 The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to $571,300,000 and $83,000,000, respectively.

24 As of March 2, 2020, the Receivership Applicants had advanced $122,432,764.85 under the Facilities. In addition, $79,592,744.24 in letters of credit have been extended.

25 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

26 There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

27 There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking

mortgages. Construction lien holders have liens of approximately $38,000,000 registered against the properties.

B. Deterioration of the Relationship

28 In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

29 First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

30 Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately $10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

31 Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately $ X of increased costs were hidden in this manner.

32 In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

33 Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over $ X in discounted sales fall into this category.

34 The agreements between the Receivership Applicants and the Debtors require the Debtors

to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

35 Cost overruns on the three projects come to more than $ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately $ X were construction costs that were hidden from the lenders. The amount hidden on Clover was $ X; on Halo $ X and on 33 Yorkville, $ X.

36 Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is $ X over budget. The Debtors say PWC's number is overstated by $ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by $ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

37 In addition to the foregoing breaches, approximately $3.5 million in interest payments to the Receivership Applicants are overdue.

38 On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

39 The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

40 Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

41 In referring here to allegations of financial irregularity I am not referring to the

allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

42 A receiver may be appointed where it is just and convenient equitable to do so.

43 Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Ont. S.C.J. [Commercial List]), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]) at para. 27.

44 The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. Gen. Div.) at para. 20.

45 In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

(a) The lenders' security is at risk of deteriorating;

(b) There is a need to stabilize and preserve the debtors' business;

(c) Loss of confidence in the debtors' management;

(d) Positions and interests of other creditors.

46 All four factors apply here.

47 *Security at risk of deteriorating*: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The

lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

48 *The need to stabilize the business*: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

49 *Loss of confidence in management*: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

50 *Position and interests of other creditors*: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

51 In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

52 The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

53 The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

54 The share sale to Concord would close on payment of one dollar. An additional $38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

(a) Court approval of CCAA protection for Clover and Halo.

(b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo

(c) Completion of construction financing either with the existing lenders or new lenders.

55 As part of the CCAA process Concord states that it will

(a) provide $20,000,000 of debtor-in-possession financing at a rate of 5%. $7,000,000 would be advanced during the first 10 days.

(b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

56 The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

57 With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

58 Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

59 I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

60 In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]) at para. 61.

61 The factors addressed in argument frelevant to this exercise were as follows:

(a) Payment of the Receivership Applicants

(b) Reputational damage

(c) Preservation of employment

(d) Speed of the process

(e) Protection of all stakeholders

(f) Cost

(g) Nature of the business

(a) Payment of the Receivership Applicants

62 During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

63 It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

64 Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the CCAA proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

65 Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

66 The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

> We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

67 As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants. Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

68 Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

69 From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

70 I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

71 At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

72 The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant.

Any reputational damage to Cresford is of its own making.

73 One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

74 This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

75 In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

76 The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

77 The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

78 There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the

Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

79 The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

80 The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

81 As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

82 The Debtors submit that the CCAA is faster than a receivership.

83 During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

84 In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financer would probably want to see a certain percentage of units sold before committing to financing.

85 It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

86 If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

87 The Debtors submit that their CCAA application will protect all stakeholders. The only

stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive $38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive $38,000,000 in cash.

88 There has been no explanation in the materials before me to justify the receipt of $38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

89 In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

90 Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of “discount” and of “current market value” are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

(f) Costs

91 The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC’s fees. Regardless of whether Concord does or does not charge fees, the risk of PWC’s fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

92 The costs of financing a receivership or a CCAA proceeding are similar. Concord has

offered a DIP loan of $20,000,000 at 5% interest. The Receivership Applicants have offered a loan of $29,000,000 at 5% interest.

93 CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

94 Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put $38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

95 During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

96 In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

97 More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

98 In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.) the British Columbia Court of Appeal stated at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the

> remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

99 Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

100 The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61; *Dondeb Inc., Re*, 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), at para.16; *Octagon Properties Group Ltd., Re*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Alta. Q.B.), at para. 17.

101 The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

102 As Justice Kent pointed out in *Octagon*, as para 17,

> ...if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

103 Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

104 Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be

appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

105 In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

106 The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

107 By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

108 In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier. Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

109 More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

110 The Debtors also point to *Re 2607380 Ontario Inc.*, a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that *260* is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

111 In my view *Re 2607380 Ontario Inc.* does not assist the Debtors. In that case Conway J

recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.*, two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

112 With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

113 For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

114 For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

Schedule A — COUNSEL SLIP

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation
Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.
Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents
Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.
Sean Zweig and Danish Afroz for KingSett Mortgage Corporation
Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.
Haddon Murray for Tarion Warranty Corporation
David Gruber for Concord Group
Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority
Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.
Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc,, Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen
Brandon Mattalo for certain limited partnership interests
Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.
Brandon Mattale for certain limited partnership investors
Matthew Gottlieb for KingSett Real Estate Growth LP 4
George Benchetrit for Ernst & Young as proposed Monitor
Maria Konyukhova for PJD Developments
DJ Miller for investors in YSL

Application granted.

End of Document

2020 ONSC 3659
Ontario Superior Court of Justice

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.

2020 CarswellOnt 8665, 2020 ONSC 3659, 322 A.C.W.S. (3d) 75, 81 C.B.R. (6th) 283

BCIMC CONSTRUCTION FUND CORPORATION and BCIMC SPECIALTY FUND CORPORATION (Applicants) and THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. and 480 YONGE STREET LIMITED PARTNERSHIP (Respondents)

BCIMC CONSTRUCTION FUND CORPORATION and OTERA CAPITAL INC. (Applicants) and 33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP (Respondents)

Koehnen J.

Heard: June 4, 2020
Judgment: June 15, 2020
Docket: CV-20-00637301-00CL, CV-20-00637297-00CL

Counsel: Geoff R. Hall, Heather Meredith, Alexander Steele for Receiver, PricewaterhouseCoopers Inc.
David Bish, Adam M. Slavens, Jeremy Opolsky for Applicants, BCMIC
Virginie Gauthier for Applicant, Otera Capital Inc.
David Gruber for Concord Land Developments Limited
Steven Graff, Ian Aversa, Jeremy Nemers for Respondents
Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.
Kenneth Kraft for certain Clover Purchasers
Dominique Michaud for a Group of Halo Unit Purchasers
Fred Tayar, Colby Linthwaite for OTB Capital Inc.
Ryan Hanna for 2379646 Ontario Inc.
Maria Konyukhova for PJD Developments
Christopher J. Henderson for City of Toronto
Haddon Murray for Tarion Warranty Corporation
Shara Roy, Sahar Talibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc.,

formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen
Patricia Joseph for GFL Infrastructure Group Inc.
Ben Goodis for Quality Sterling Group
Rob Moubarak, Jonathan Frustaglio, Marissa Rebane for Strada Aggregates
Paul Guaragna for Global Precast Inc. and Affinity Aluminum Systems Ltd.
Nick Stanoulis for Stancorp Properties Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — General principles — Miscellaneous
Three large condominium construction projects were assigned into receivership — Each project was owned by single purpose, project specific general partner on behalf of limited partnership — Receiver brought application to approve sale and investor solicitation plan for each partnership — During proceedings, developer became sole shareholder of C and H project, proposing to lend money to debtors to enable the debtor to pay out first ranking creditor — Application granted with respect to certain partnerships — No objections to approval regarding Y partnership — Debtor should have opportunity to pay out debt to first creditor, receivership debt, and interest within 72 hours of receiving pay out statement from developer regarding C project — That debtor had engaged in misconduct should not prevent it from being able to realize its equity in projects — Concern that developer receive no privileges over other bidders misconceived its role, as it was not bidder but debtor's source of financing and sole shareholder — Sale arrangement approved regarding H but with first creditor's stalking horse bid removed — Debtor not in position to pay out debt on H project and developer did not wish to — Receiver's request for provision in H project order that precluded communications between bidders and other stakeholders without receiver's consent was denied.

Table of Authorities

Cases considered by *Koehnen J.*:

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 1953, 2020 CarswellOnt 5156, 78 C.B.R. (6th) 299 (Ont. S.C.J. [Commercial List]) — referred to

Business Development Bank of Canada v. Marlwood Golf & Country Club Inc. (2015), 2015 ONSC 3909, 2015 CarswellOnt 9453, 27 C.B.R. (6th) 166 (Ont. S.C.J. [Commercial List]) — referred to

Home Trust Co. v. 2122775 Ontario Inc. (2014), 2014 ONSC 1039, 2014 CarswellOnt 1888 (Ont. S.C.J. [Commercial List]) — referred to

Petranik v. Dale (1976), [1977] 2 S.C.R. 959, 11 N.R. 309, 69 D.L.R. (3d) 411, 1976 CarswellOnt 420, 1976 CarswellOnt 420F (S.C.C.) — followed

Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

3072453 Nova Scotia Co. v. 1623242 Ontario Inc. (2015), 2015 ONSC 2105, 2015 CarswellOnt 6947, 56 R.P.R. (5th) 240 (Ont. S.C.J.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by receiver for approval of sale plan.

***Koehnen J.*:**

1 At the request of BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation (collectively "BCIMC" or the "Applicants") I assigned three large condominium construction projects in Toronto into receivership at the end of March 2020, the reasons for which are indexed at 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]). More precisely put, each project is owned by a single purpose, project specific general partner on behalf of a limited partnership. The general partner and the limited partnership of each of the three projects were assigned into receivership.

2 The Receiver of those projects now brings a motion to approve a Sale and Investor Solicitation Process ("SISP") for each of the projects. For the reasons set out below, I grant the SISP for the Yorkville project as requested, decline to approve the SISP for the Clover project and approve the SISP for the Halo project as amended.

3 I heard the motions on Thursday June 4, 2020, and released a dispositive order on Sunday June 7 with reasons to follow. I set out my reasons below.

The Yorkville Project

4 The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. It was envisaged as two condominium towers, one 43 storeys, the other 69 storeys with 1,079 residential units. Excavation is well underway but no construction of the towers has begun.

5 As of March 2, 2020, BCIMC had advanced $122,432,764.85 to the Yorkville Project under various loan facilities as well as $79,592,744.24 in letters of credit. In addition, a co-applicant in respect of Yorkville, Otera Capital, had also advanced funds to Yorkville.

6 There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

7 BCIMC has first ranking security. There are three other major secured creditors on the project. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction liens have also been registered against the properties.

8 Aviva, KingSett and a lawyer for a group of unitholders appeared on the motion. None opposed the relief sought. The debtor and titleholder of the Yorkville Project did not oppose the relief sought either. As a result, I granted the relief on June 4.

The Clover Project

9 The relief sought with respect to Clover is more controversial.

10 The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It comprises two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. Clover is the most advanced of the three projects. Building is well underway with the higher floors now under construction.

11 As of March 2, 2020, BCIMC had advanced over $143,000,000 on various loan facilities plus approximately $3,000,000 in letters of credit on Clover. In addition, BCIMC has advanced funding during the course of the receivership.

12 BCIMC has both first and third ranking security against the Clover project.

13 There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

14 The proposed SISP in respect of Clover includes a stalking horse bid by a BCIMC fund other than the ones that have advanced money to date. The stalking horse bid includes a break

fee of 1% and would take out all secured debt except that held by OTB Capital. The OTB Capital debt reflects a mortgage originally held by the developer, Cresford Group which it assigned to OTB after Clover was placed into receivership. The stalking horse bid does not address other debts such as those of suppliers to the project.

15 The Receiver's SISP proposal is supported by BCIMC, counsel for the unitholders and counsel for one potential bidder apart from the stalking horse bidder.

16 The Receiver's proposal is opposed by Cresford, Concord Land Developments, OTB capital and at least one unsecured creditor. Opposition to the SISP is based on a proposal by Concord to pay out immediately the BCIMC debt, all of its costs and all of the receivership costs.

17 The Receiver and those who support the SISP object to the Concord proposal on three grounds: (i) Concord has no standing; (ii) the proposal is too unclear; and (iii) the proposal improperly interferes with the receivership process.

(i) Concord's Standing

18 Proponents of the SISP submit that Concord has no standing to pay out the BCIMC debt because it is a stranger to the receivership. If Concord wants to acquire Clover, it should participate in the SISP like any other potential bidder.

19 While it was referred to as the "Concord Proposal" during the hearing, it is more properly the debtor's proposal. Concord is proposing to lend money to the debtor to enable the debtor to pay out BCIMC. It matters little whether the funds are coming from the debtor directly or from a party financing the debtor, like a bank or Concord. The point is that the debtor, through whatever means, is ready willing and able to pay out the entirety of the BCIMC debt.

20 Before the hearing, Concord had sent me banking information that demonstrated its ability to pay out the debt immediately.

21 During the course of the initial receivership application in March, I was advised that Concord and Cresford were about to enter into a transaction at any moment that would see Concord assume ownership of all of the shares of the Clover debtor. At that time, there was, however, no consummated transaction nor was Concord then prepared to pay out the BCIMC debt.

22 To the extent Concord's status is an issue, it changed approximately 10 minutes into the hearing when I was advised that Concord had completed a transaction pursuant to which it had become the sole shareholder of Clover.

(ii) Lack of Clarity in the Concord Proposal

23 The Receiver opposes the Concord proposal because it is not sufficiently clear.

24 Concord says that after paying off the BCIMC debt, it would move to convert the receivership into a CCAA proceeding. In the course of the CCAA proceeding, Concord would want to disclaim the unit purchasers' agreements and negotiate new agreements. Unit holders who did not want to renegotiate would recover their deposits in full.

25 While a CCAA proceeding does pose some lack of clarity for the purchasers, any bidder in the SISP would also be looking to disclaim and renegotiate the unit purchase agreements. The Receiver submits that the SISP is likely to produce a better result for unit purchasers because it entails a competitive bidding process at the end of which the Receiver will select qualified bidders to participate in a further auction for the project. The Receiver says that the competitive nature of the bidding and auction process is likely to produce a better result for unit purchasers than would a two-party negotiation in a CCAA proceeding.

26 Mr. Kraft acts for approximately 200 unit purchasers. He submits that the unitholders want to: have certainty, move forward and avoid further delay. In his view, the SISP currently offers more certainty than does a CCAA proceeding because the SISP is associated with tighter timelines. Mr. Kraft volunteers, however, that this might not be the case in a week from now if Concord is permitted to convert the receivership into a CCAA proceeding and moves promptly to renegotiate.

27 The fact that the unitholders might obtain a better result in a competitive bidding and auction process is a fair one. There are however competing considerations to balance that potential benefit. By way of example, the bidding and auction process is likely to involve many moving parts. One readily foreseeable scenario is that the bids are relatively complex and that the process will not necessarily focus solely on the renegotiation of unitholder agreements. There are a significant number of other creditors involved who will need to be dealt with in the SISP. That would make choosing between bids potentially complex and would reduce the unitholders ability to negotiate. As noted, Concord envisages paying all creditors in full which may make renegotiation of purchase contracts a more central feature of the CCAA than it would be in the receivership.

28 The unitholders have also expressed an interest in speed and certainty. The stalking horse bid would give the stalking horse bidder two years to decide whether it will complete the project as a condominium. If so, the stalking horse bidder will offer purchasers a discount of $100 per square foot from the market price at the time the units are resold as condominiums. While I appreciate that the stalking horse bid may not succeed (and indeed, if it works properly will not

be the successful bid), the two years it contemplates nevertheless offers neither speed nor certainty. Having Concord assume carriage of the project can occur as soon Concord pays out the debt. A successful bidder under the SISP is not likely to assume carriage of the project before the middle or end of September at the earliest.

29 Concord is one of Canada's largest and most experienced condominium developers and builders. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects at various stages of planning and development in Canada, the United States and the United Kingdom. If Concord is allowed to assume carriage of the project it will likely want to complete construction and sale of units as quickly as possible to avoid the cost of having large amounts of financing or capital locked up in the project.

30 The duration of the CCAA proceeding is one over which the court has some influence. The court can also assist in ensuring a level playing field for the renegotiation of purchase agreements. By way of example, counsel for the unit purchasers has asked the Receiver to produce information it has about costs of construction. The Receiver has declined to produce that information because of confidentiality concerns. That makes good sense in the context of a bidding process. If there is no bidding process for Clover, the Receiver may be more willing to share its cost information with counsel for the unit holders or it may be more appropriate to order that it be shared. I underscore, however, that I have made no decision on that issue and have not even heard argument on it. The possibility of sharing that information does, however, offer an opportunity to create a more level playing field in the renegotiation of the purchase contracts.

31 Mr. Hanna appeared for an unsecured creditor owed approximately $3.5 million. He supports the Concord proposal because Concord intends to pay all construction suppliers fully in the course of completing Clover. Other bids may not necessarily do that. The stalking horse bid does not.

(iii) Interference with the Receivership Process

32 The Receiver submits that it would create a dangerous precedent to give a debtor a preferential right to redeem property well into a receivership. Mr. Hall submits that the purpose of a receivership is to have the Receiver take control of the entire process and that it would be inappropriate to permit others to do an "end run around" the receivership.

33 The Receiver's submission is in part, reflected in a standard provision in receivership orders which is found in paragraph 11 of the Clover order. It provides:

> 11. THIS COURT ORDERS that **all rights and remedies** against the Debtors, or any of them, the Receiver, or **affecting the Property**, including, without limitation, licences and

> permits, **are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court**, . . . (Emphasis added)

34 On its face, the bolded language in paragraph 11 would appear to preclude the debtor's right to exercise its equity of redemption without leave of the court.

35 The Receiver points to *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, 2009 CanLII 37930 [2009 CarswellOnt 4257 (Ont. S.C.J. [Commercial List])], where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

Business Development Bank of Canada v. Marlwood Golf & Country Club Inc., 2015 ONSC 3909 (Ont. S.C.J. [Commercial List]) and *Home Trust Co. v. 2122775 Ontario Inc.*, 2014 ONSC 1039 (Ont. S.C.J. [Commercial List]) are to similar effect.

36 The Receiver fairly volunteers that the issue arose in *Handelman* and the cases that follow it at a much later stage than it does with respect to Clover. In *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved.

37 A competing consideration to the concerns raised in *Handelman*, is the debtor's right to exercise its equity of redemption, that is to say to pay out the debt and retain its property.

38 Numerous courts have commented on the importance of the equity of redemption. The contemporary starting point of the analysis is the Supreme Court of Canada's decision in *Petranik v. Dale*, 1976 CanLII 34 (SCC), (1976), [1977] 2 S.C.R. 959 (S.C.C.) where Chief Justice Laskin held at p. 969:

> What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see Falconbridge, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question,

> therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

39 Dickson J. (as he then was) echoed similar sentiments at page 995:

> I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

40 An owner's right to redeem remains a core principle of real estate law. See for example: *3072453 Nova Scotia Co. v. 1623242 Ontario Inc.*, 2015 ONSC 2105 (Ont. S.C.J.) paras. 75, 98 — 100; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) paras. 58 — 74.

41 How then should I balance these competing interests in this case and determine whether I should grant leave under paragraph 11 of the receivership order to allow the debtor to exercise its equity of redemption?

42 Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.

43 While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.

44 While courts should be mindful of the clean hands principle when considering requests by the debtor in these circumstances, they should be equally mindful of a potentially underlying commercial reality: the possibility that the creditor may have an interest in structuring a receivership to allow it to acquire the property at an attractive price which would enable the creditor to make considerably more money by depriving the debtor of its property than the creditor would ever earn by way of interest under a mortgage.

45 While I am not saying that this is occurring here, there are circumstances that give rise to the potential for it to occur. By way of example, although BCIMC stated on the receivership motion at it wanted nothing further to do with the project and just wanted its money back, it has put in a stalking horse bid on the Clover and Halo projects which would see it paid a break fee. The Receiver has acknowledged that the properties are well known to the most logical potential

purchasers and that there is considerable interest in them. If there is considerable interest, one might ask whether a stalking horse bid is truly necessary. At the same time, the timelines in the SISP, 60 days to gather bids and conduct an auction, are those that one would see in usual times. These are not, however, usual times. The SISP arises in the midst of a worldwide pandemic which has seen many businesses, and particularly financial institutions, operating virtually. Most bank offices remain closed. Operating virtually makes it more time-consuming to conduct due diligence and obtain financing, especially given that financing for a project like this would likely be syndicated. BCIMC is unlikely, however, to require the same sort of time to conduct due diligence because it is already familiar with the project as its long-term financer. In addition, BCIMC, is a large government pension fund that does not require syndicated financing. It already has large pools of capital available for investment. These factors give BCIMC advantages over other bidders that translate into the potential to acquire the property in a receivership at an attractive price.

46 In considering these factors, I am not saying that they are present here nor am I suggesting that it would be improper for BCIMC to try to acquire the property at an attractive price in the receivership. Those are commercial opportunities that BCIMC is fully entitled to pursue. I am simply saying that these factors are part of the equities to consider before depriving a debtor of title to its property in circumstances where it is ready willing and able to pay out the creditor entirely.

47 The history of the proceedings and prejudice to different stakeholders are two further factors to consider when determining whether the debtor should have the right to redeem.

48 With respect to the history of the proceedings, on the initial receivership application, the debtor proposed a CCAA proceeding. BCIMC opposed because it would end up remaining in the project longer than it wanted to. At the time, BCIMC indicated that it simply wanted its money back and wanted nothing more to do with the project: see the receivership reasons 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]) at para. 56. The debtor now proposes to give BCIMC its money back pretty much immediately.

49 My reasons for assigning the project into receivership were driven in large part by the right of BCIMC to be repaid, the absence of any concrete proposal to do so and the unfairness of tying BCIMC to a debtor in whom it no longer had confidence: see for example paras. 64 — 69, 89, 91. The thrust of my reasons, and in particular of the paragraphs just referred, to was to leave open the possibility of the debtor resuming carriage of the projects by paying out BCIMC. The debtor is now able to do so unconditionally with respect to Clover.

50 Has anything occurred since assigning Clover into receivership on March 27, 2020 that would make it unfair to any other stakeholder to permit the debtor to exercise its equity of redemption?

51 BCIMC submits that it has funded the receivership and has spent time, money and energy into submitting a stalking horse bid.

52 In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.

53 Ms. Konyakhova appeared on behalf of PJD Developments, a potential bidder. She submits that Concord should not be given any privileges over other bidders who have waited patiently for the bidding process to occur. She underscores forcefully that bidding is the way to obtain the best offer.

54 The concern that Concord receive no privileges over other bidders misconceives Concord's role. As noted earlier, Concord is not a bidder, it is the debtor's source of financing and is now the debtor's sole shareholder. While I can understand a potential bidder's frustration at being deprived of the opportunity to bid on a project, that is not enough to quash a debtor's right to redeem. There is no evidence before me that it would be prejudicial to receivership processes at large to allow the Clover debtor to redeem. I appreciate that the possibility of a pay out arose at the last moment but no one sought an adjournment to file evidence to respond to the proposed redemption.

55 PJD had hoped to be able to bid on the property and has been denied that chance. That puts PJD and other potential bidders into a significantly less prejudicial position than if they had spent the time and money to submit a compliant bid only to lose out to another bidder in the competitive process.

56 The parties most likely to suffer prejudice by allowing the debtor to redeem are the unit purchasers. They believe they can achieve a better result in the competitive bidding process of a SISP than they can in a CCAA proceeding. To my mind that, however, is not, the real question.

57 There is no doubt that the debtor would have had the right to pay out BCIMC on the initial receivership application. Had it done so, the debtor would have had relatively free rein to bring a CCAA proceeding. In those circumstances it is unlikely that unit purchasers could have prevented a CCAA process by arguing that a receivership sale was preferable to CCAA. The unit purchasers have suffered no change of position since March 27 that would make the analysis any different today. To the extent they have, they can still raise those arguments if the debtor moves to convert the receivership into a CCAA proceeding.

58 As a result of the foregoing, I decline to approve the SISP for Clover and order that the

debtor should have the opportunity to pay out the BCIMC debt, the receivership debt, and interest on both within 72 hours of receiving a pay out statement in respect of those debts.

Halo Project

59 The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. Its plans call for a 39-storey tower with 413 residential units. Halo is in early stages of construction.

60 As of March 2, 2020, BCIMC had advanced approximately $73,000,000 in financing and $1,500,000 in letters of credit to the Halo project.

61 BCIMC has first and third-ranking charges/mortgages in respect of real property.

62 There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

63 The Receiver proposes a SISP for Halo that mirrors the proposal for Clover. Mr. Michaud appeared to make submissions on behalf of the 140 purchasers of Halo units who have retained him. They support the SISP.

64 The debtor seeks a four-week adjournment of the Halo SISP motion to allow it to finalize financing. During the hearing, Concord offered to finance the receivership during the adjournment period if BCIMC declined to do so. Concord's financing would be on the same terms as that of BCIMC. If the debtor does not come up with financing during the four week adjournment, Concord and the debtor agree that the SISP should proceed as presented.

65 I declined to grant the adjournment and authorized the SISP to proceed in respect of Halo.

66 The distinguishing feature between Halo and Clover is that the debtor and Concord are not presently prepared to or able to pay out the BCIMC debt on Halo.

67 The animating principle behind my reasons for assigning the projects into receivership was that BCIMC had advanced money, had been misled about the risk profile of the projects, had been misled, in part, about the use of funds, and, having been misled, should have the right to take control of the projects to protect its interests. That was subject to the debtor's right to pay out BCIMC in full if it were able to do so before any other party had relied on the receivership to an extent that would make it inequitable for the debtor to end the receivership by paying out BCIMC's debt.

68 The debtor is still not in a position to pay out the debt on Halo. Concord clearly has the financial resources to do so but has chosen not to. This means that, for whatever reason,

Concord prefers not to expose itself to the risk of the Halo in the present circumstances. Concord is fully entitled to make that choice. Concord is entirely at liberty to use or not use its assets for whatever purpose it wants.

69 However, in the absence of assuming any of the risk, Concord is not in a position to direct the terms that govern the administration of Halo either through receivership or otherwise. Given that BCIMC continues to bear the risk of Halo, the process that it has chosen to manage that risk, the Receivership, should continue to govern.

70 Nothing in the equities between the parties has changed with respect to the Halo project since it was assigned into receivership on March 27, 2020. BCIMC continues to hold a significant debt, indeed the debt is larger now than it was on March 27. For all the reasons that I articulated in my judgment with respect to the receivership order, BCIMC continues to have the right to enforce its debt as it sees fit. It has chosen to do so by way of receivership. Nothing has changed to make that inappropriate.

71 The SISP does not preclude the debtor or Concord from participating in the project going forward. It can participate as a bidder as can any other party.

72 The Clover and Halo bids were initially accompanied by a stalking horse bid by BCIMC with a break fee of 1%. During argument, the Receiver and BCIMC indicated that the stalking horse bid was a package deal, that is to say it was a bid on both projects or none. As counsel for BCIMC put it, Clover was the more desirable asset. If BCIMC could not maintain the stalking horse bid on Clover, it had no interest in continuing a standalone stalking horse bid on Halo. Given that the SISP on Clover will not proceed, the stalking horse bid on Halo has disappeared as a result of which I need not address the objections that certain parties raised about the break fee.

Communications

73 The Receiver seeks to include a provision in the Halo order that precludes communications between bidders and other stakeholders without the Receiver's consent. I have declined to include such a provision in the Halo SISP.

74 The unit purchasers represented at the hearing oppose the provision as do Concord and the debtor. They submit that a key component of any workout is the ability of stakeholders to reach agreements with each other. That is best achieved with unfettered communication.

75 The Receiver justifies the request by submitting that it is important that the Receiver have visibility into conversations between stakeholders and that it is problematic if the Receiver is not aware of the contents of those communications. The Receiver provided no detail about why it

was problematic for discussions to occur without the Receiver knowing about the contents or the fact of those discussions. The Receiver offered no authority in support of its position apart from stating that a similar provision had been included in an order of this court in another proceeding. In the absence of reasons for that order I cannot determine whether it was on consent, unopposed or whether the circumstances in that case made the order otherwise appropriate.

76 Although the Yorkville order contains a restriction on communication, that provision was unopposed, including by counsel for the purchasers of Yorkville units.

Disposition

77 For the reasons set out above, I dispose of the motions as follows:

(a) With respect to Yorkville, the SISP order is approved as requested.

(b) With respect to Clover:

(i) The debtor or anyone acting on its behalf shall have the right within 72 hours of receiving a statement of the amount owing, pay-out the BCIMC, debt, including receivership lending plus interest. (I have been advised that the debtor paid out the debt in full since the hearing but before these reasons were issued.)

(ii) In addition, the debtor will be liable for the applicants' costs including receivership costs. I assume it may take more than 72 hours for BCIMC and the receiver to present their costs breakdown to the debtor, as a result of which the costs need not be paid within 72 hours of receiving the statement of the amount owing on the debt. If there is a dispute about costs, I will resolve the dispute and determine the amount of costs payable. The debtor shall pay the applicants' costs within 72 hours of my determining the amount payable.

(iii) If the debtor pays the amounts set out in sub-paragraph (i) within 72 hours then the debtor may move to dissolve the receivership or for any other relief it seeks with respect to Clover.

(c) With respect to Halo:

(i) The SISP is approved but, given that BCIMC has advised that there will be no stalking horse bid on Halo if the debtor pays out the Clover debt, the Halo SISP will proceed without the stalking horse bid.

(ii) Communication amongst bidders and stakeholders (including unit purchasers) will not require the consent of or notice to the Receiver.

(iii) The disposition in the preceding paragraph may raise privacy or fairness issues with respect to communications with unit holders. By way of example, it might not be appropriate to allow bidders to contact unrepresented unitholders without having unitholders provide consent in advance. Similarly, it might not be fair to the bidding process to allow the debtor, who presumably has contact information for unitholders, to contact them while other bidders without contact information have no ability to contact unit holders. If there are concerns about the logistics of such communication, I will make myself available to resolve those during a case conference.

Application granted in part.

2020 ONSC 5444
Ontario Superior Court of Justice [Commercial List]

THE CLOVER ON YONGE INC

2020 CarswellOnt 12404, 2020 ONSC 5444, 322 A.C.W.S. (3d) 524, 82 C.B.R. (6th) 83

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CLOVER ON YONGE INC. AND THE CLOVER ON YONGE LIMITED PARTNERSHIP (Applicants)

Koehnen J.

Heard: July 22, 2020
Judgment: July 27, 2020
Docket: CV-20-00642928-00CL

Counsel: David Gruber, for CCAA Applicants and Concord Land Developments Limited
Steven Graff, Jeremy Nemers, for CCAA Applicants
Geoff R. Hall, Heather L. Meredith, Alexander Steele, for Monitor, PWC
Matthew P. Gottlieb, Andrew J. Winton, Zain Naqi, for a group of unit purchasers
Kenneth Kraft, for a group of unit purchasers
Karen Groulx, for Altus Group Limited
Aaron Grossman, for certain brokers
Mark Dunn, for Maria Athanasoulis
Jonathan Rosenstein, for Aviva Insurance Company of Canada
Fred Tayar, for OTB Capital Inc
Nick Stanoulis, for Stancorp Properties Inc. and certain unit purchasers
Christopher Henderson, for City of Toronto

Subject: Civil Practice and Procedure; Insolvency; Property

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Expert reports
In proceedings under Companies' Creditors Arrangement Act (CCAA) involving condominium

project, debtor scheduled motion to disclaim agreements of purchase and sale that it had entered into with approximately 496 purchasers, claiming it was economically unfeasible to complete project with pricing contained in purchase agreements because construction prices had dramatically increased since contracts were entered into — Debtor commissioned cost report and appraisal report — Purchasers received complete copy of cost report and redacted copy of appraisal report — Purchasers brought motion seeking production of unredacted appraisal report; A, former president of holding company with overall control of debtor, brought motion seeking production of cost report; real estate brokers brought motion seeking production of cost and appraisal reports — Purchasers' motion granted; A's motion dismissed; brokers' motion dismissed — Court was not absolutely bound by R. 30.04(2) of Rules of Civil Procedure (Ont.), but it remained relevant factor in exercise of discretion — One factor relevant to exercise of discretion was to consider way in which party had used contested document in its affidavit, and reliance on appraisal in debtor's materials inclined court more toward production — There was price to pay for extraordinary benefits that debtor sought, and here it was merely transparency — Both purchasers and court needed to know what range of alternatives was available to decide whether to agree to or permit disclaimer — Having appraisal information on disclaimer motion would assist in determining whether disclaimer would enhance chance of compromise and whether it caused significant financial hardship to any party to agreement — True stakeholder within debtor was entity that came into situation with eyes wide open in hope of making profit with benefit of court protection that CCAA afforded — Appraisal report was to be disclosed to purchasers — Given degree of need that A had for cost report, conflict created by giving her cost report, her limited interest in disclaimer motion and absence of any commitment by debtor to share report with her, she was not entitled to production of cost report — Debtor never promised to provide reports to brokers — Debtor agreed that if contracts were disclaimed and original unit buyers re-purchase them, brokers would be deemed to be broker and would earn commissions under new purchase, and that significantly reduced financial impact of disclaimer to them — Providing reports to brokers would give them advantage, and they were not entitled to production of reports.

Table of Authorities

Cases considered by *Koehnen J.*:

R. v. Vijaya (2014), 2014 ONSC 1653, 2014 CarswellOnt 3120, 304 C.R.R. (2d) 328 (Ont. S.C.J.) — considered

Timminco Ltd. v. Asensio (2009), 2009 CarswellOnt 1135, 95 O.R. (3d) 547, 78 C.P.C. (6th) 58 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 32(4) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 30.04(2) — considered

MOTION by purchasers seeking production of unredacted appraisal report; MOTION by former president seeking production of cost report; MOTION by real estate brokers seeking production of cost and appraisal reports.

***Koehnen J.*:**

1 This motion arises in the context of a *CCAA* proceeding involving a condominium project known as The Clover on Yonge. I will refer to the project in these reasons as either Clover or the debtor. Clover has approximately 522 residential units plus commercial and parking units and is in the course of being built on Yonge St. in Toronto. Clover has scheduled a motion to disclaim the agreements of purchase and sale that it had entered into with approximately 496 purchasers. Clover says it is economically unfeasible to complete the project with the pricing contained in the purchase agreements because construction prices have increased dramatically since the contracts were entered into in 2015.

2 Clover commissioned a cost report and an appraisal report, from Altus Group, a consultant, quantity surveyor and appraiser specializing in real estate.

3 Counsel for the unit purchasers have received a complete copy of the cost report and a redacted copy of the appraisal report. On this motion, the purchasers seek production of an unredacted appraisal report. In addition, Maria Athanasoulis seeks production of only the cost report and a number of real estate brokers seek production of both the cost and appraisal reports.

4 Clover resists further production to any of the moving parties. It submits that the redacted portions of the appraisal report contain sensitive information which would be detrimental to the debtor if it became public, particularly if the *CCAA* plan fails and the project has to be sold. In those circumstances, dissemination of the information contained in the appraisal report would be prejudicial to the ability to sell the project. Counsel for the purchasers have signed non-disclosure agreements in respect of the cost report and are prepared to do the same for the appraisal report. The non-disclosure agreements restrict the availability of the reports to counsel, experts and a two-person steering committee. The debtor nevertheless is of the view that there is

too much risk involved in the production of the unredacted appraisal report. The Monitor shares this view.

5 For the reasons set out below, I grant the purchasers' motion for production of the unredacted appraisal report and dismiss the motions of Ms. Athanasoulis and the brokers for production of the cost and appraisal reports.

A. The Purchasers' Motion

6 The purchasers point out that the debtor's deponent, Mr. McCracken, referred to the Altus reports in his affidavit supporting the disclaimer motion as a result of which they say production of the report must be ordered. The purchasers rely on rule 30.04 (2) which provides:

> (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

7 The purchasers submit that this is a mandatory provision that applies in all circumstances without exception. In support of this proposition they rely on language of D.M. Brown J. (as he then was) in *Timminco Ltd. v. Asensio* (2009), 95 O.R. (3d) 547 (Ont. S.C.J.) at para. 28, where he noted that a request to inspect must lead to "immediate and mandatory" production. There are no "[c]arve-outs" for "certain types of documents." Indeed, "[e]ven where a party has referred to an otherwise privileged document in its pleading, it must be produced if inspection is requested."

8 Nordheimer J. (as he then was) articulated similar views in *R. v. Vijaya*, 2014 ONSC 1653 (Ont. S.C.J.) at para. 35:

> It is a basic principle that a party who files an affidavit as evidence in a proceeding is obliged to produce any material referred to in that affidavit at the request of any other interested party. Normally, any such material should properly be marked as an exhibit to the affidavit, and therefore be automatically available to any other interested party, but the failure to mark the material as an exhibit does not shield it from production. The entitlement to see such material is codified for civil proceedings in rule 30.04 (2)...

9 The debtor and the Monitor submit that those cases did not involve *CCAA* applications and that a judge within the context of a *CCAA* proceeding has more discretion than the language of *Timminco* and *Vijaya* suggest. I am inclined to agree with the debtor and the Monitor in this regard. It strikes me that a federal statute that permits a court to disclaim contracts based on discretionary considerations and to develop a process for the resolution of litigious disputes

within the *CCAA* proceeding that departs significantly from the *Rules of Civil Procedure*, also affords the court the discretion to depart from other "mandatory" provisions of the rules such as rule 30.04 (2).

10 The question then becomes whether I should exercise my discretion in favour of production or maintain the more limited production that the debtor and the Monitor advocate.

11 Although I have found that I have the ability to exercise discretion and am not absolutely bound by rule 30.04 (2), the rule remains a relevant factor in the exercise of my discretion. One factor relevant to the exercise of discretion is to consider the way in which a party has used the contested document in its affidavit. A passing, incidental reference to a document may lead a court to exercise its discretion against production. Reliance on the document for a material issue before the court may incline the court towards production. Reference to the Altus appraisal in the debtor's materials tends more in the latter direction.

12 In Mr. McCracken's affidavit sworn July 8, 2020, he deposes in paragraph 8 that the project cannot be built with the original contracts in place "because the available revenue would be insufficient to repay the financing required; but it would be a viable project if the Pre-Sale Contracts were not in place." He goes on in paragraph 19 to state that if the original purchase agreements remain in place, the developer would need to generate approximately $2,125 per square foot from the unsold commercial units and parking units just to break even which, in his view, is impossible.

13 Mr. McCracken goes on in paragraph 45 of his affidavit to say:

> Altus Group is in the process of preparing an appraisal report providing their view of the anticipated market revenues of the various components of the Clover project, and which I anticipate will be generally in line with Concord's[1] view. I understand it will become available to counsel for unit purchasers and their steering committees who have entered into non-disclosure agreements with the Monitor."

14 A number of factors emerge from Mr. McCracken's affidavit. First, Mr. McCracken deposes that the revenues from the project make it unfeasible without disclaiming the original contracts. He supported that view by invoking the authority of the Altus appraisal. Thus, the Altus appraisal was not referred to inadvertently or incidentally, but as a means of according legitimacy to Mr. McCracken's views about revenue. It would be unfair to permit a party to influence the court by referring to independent expertise but then decline to produce that expertise.

15 Second, Mr. McCracken stated in his report that the appraisal report would be available to counsel for the unit purchasers and their steering committees. That affidavit was used in a

hearing at which parties made submissions on the process to be followed for the disclaimer motion and I made rulings in that regard. The strategies that parties pursue in respect of a disclaimer motion could reasonably be expected to be influenced by the commitments that an opposite party makes. It would be unfair to have a party and the court be influenced by a statement of the sort Mr. McCracken makes in his affidavit only to have him resile from that commitment later. While it became clear on the scheduling motion that the debtor would not disclose the unredacted appraisal report without a court order, that hearing occurred on July 17, 2020. Mr. McCracken's affidavit was delivered to counsel for the purchasers shortly after July 8, 2020. This is a real-time litigation. As set out in greater detail below, the debtor seeks a speedy determination of the disclaimer motion and of its proposed plan. In those circumstances, for the purchasers to be under a misunderstanding about whether they would get the appraisal for even a few days, can seriously prejudice their ability to mount an effective case.

16 Third, the disclaimer motion has been scheduled for August 20, 2020. Even that date is several weeks later than the debtor had asked for. The debtor and its new owner, Concord, have been aware of the disclaimer issue since at least February 2020. It has taken them until late June or July to complete the Altus report. It submits, however, that the purchasers do not need production of the Altus appraisal because they can obtain their own appraisal. The unfairness in this approach is manifest. Although Concord is one of the most sophisticated development companies in the world and has had six months to prepare an appraisal, it suggests that a disparate group of 496 purchasers be given approximately one month to do the same.

17 Fourth, the debtor seeks the protection of the court. In doing so it obtains substantial advantages. It has prevented creditors from commencing lawsuits against it, it has prevented creditors from assigning it into bankruptcy, all with the object of restructuring in the hope of creating a profitable enterprise out of what it says is now an insolvent one. As part of that process, the debtor wants to disclaim the contracts that it entered into with 496 purchasers without facing any liability.

18 It strikes me that production of the unredacted appraisal report accompanied by a non-disclosure agreement is a fair price for the debtor to pay for: (i) the right to argue disclaimer of 496 contracts; (ii) on a real-time basis; (iii) that does not give the purchasers adequate time to commission their own appraisal; (iv) after giving those purchasers a false sense of security that they would receive the appraisal report. There is a price to pay for the extraordinary benefits that the debtor seeks. Here the price is merely transparency.

19 The debtor and the Monitor submit that the issue of producing the appraisal does not require the court to balance the interests as I have done above because the appraisal is not relevant to the disclaimer motion. The debtor notes that, if it is successful on the disclaimer motion, it will offer the units back to the original purchasers on a cost plus formula. It is for that reason that they have produced the unredacted Altus cost report to the purchasers. Clover and the Monitor submit, that the cost report gives the purchasers sufficient information with which

to make decisions.

20 Section 32 (4) sets out the factors the court should consider when determining whether to disclaim contracts and provides:

> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the Monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

21 It strikes me that, at a minimum, the appraisal is relevant to the factors (b) and (c). It may well also irrelevant to any other relevant factors that the court is permitted to consider by virtue of the reference to "among other things" in the opening passage of section 32 (4).

22 When I asked counsel for the Monitor whether production of the appraisal report would not enhance the prospects of a viable arrangement by providing both parties with information that might enable them to reach a mutually acceptable compromise, he responded that this was not the issue on the disclaimer motion. The Monitor submits that the disclaimer motion is a threshold issue which is conceptually distinct from the negotiation or approval of a plan.

23 While I agree with that in theory, the distinction here is somewhat artificial. Disclaimer cannot necessarily be decided in a vacuum. It strikes me that both the purchasers and the court need to know what range of alternatives is available to decide whether to agree to or permit disclaimer; especially when the debtor proposes to seek plan approval within weeks of the disclaimer motion.

24 A more extreme example helps make the point. If the value of the property in a *CCAA* sale generated enough profit to pay the unitholders their full damages on the sale, that might lead a court to reject disclaimer because there was no particular benefit associated with it. If, however, sale without disclaimer left nothing for unit purchasers then disclaimer might be more acceptable because it does not put the unit purchasers into any worse position than they would otherwise be in. The commercial reality may be considerably muddier than those two extremes. The two ends of the spectrum do, however, at least demonstrate conceptually why appraisal information is relevant even on the disclaimer motion.

25 Having appraisal information on the disclaimer motion will assist in determining whether disclaimer will enhance the chance of a compromise and whether it causes significant financial

hardship to any party to the agreement.

26 The debtor and the Monitor note that the Altus reports were commissioned to help obtain financing and help the sales process, if needed. While that may be, Mr. McCracken appeared to recognize its relevance to the purchasers when he stated that it would be disclosed to them.

27 A further dynamic applies in this case. As noted earlier, the debtor was acquired by Concord in the course of this proceeding. In that light, this is not a situation of the debtor stakeholder having been victimized by economic circumstances beyond its control, but rather where the true stakeholder within the debtor is an entity that came into the situation with eyes wide open in the hope of making a profit with the benefit of the court protection that the *CCAA* affords. The disclaimer involves, as counsel for the purchasers put it, a transfer of wealth from the purchasers to Concord. There is nothing inherently wrong with that. If the project truly is economically unfeasible on its original pricing, Concord is entitled to a reasonable profit on its investment. That might be the only way to permit the purchasers to retain their units. At the same time, however, if a developer wants the court's assistance in facilitating a wealth transfer to itself, the court should have the benefit of full information associated with that wealth transfer.

28 Neither the Monitor nor the debtor submit that the purchasers would have some unfair advantage if they obtain the appraisal. Rather, their concern is that if recipients of redacted appraisal information inadvertently leaked it, creditors could suffer significant prejudice if the contracts were not disclaimed and the project had to be sold or if certain units had to be re-sold if their original purchasers did not participate in with whatever compromise may be negotiated. Those are valid concerns. It strikes me, however, that they can be addressed through appropriate non-disclosure mechanisms. By way of example, the debtor and Monitor have already agreed to disclose the cost report to purchasers with non-disclosure mechanisms that limit access to counsel, experts and a two-person steering committee. The purchasers agree that the appraisal report should be subject to the same type of restrictions. Neither the Monitor nor the debtor have identified any particular risks of doing so other than the general proposition that risk of disclosure increases as more people receive the information.

29 Ms. Groulx stated on behalf of Altus, that the appraisal was prepared for a specific purpose and for a specific party. Altus is concerned about being exposed to liability if others use the report. That too is a fair concern. It can however be addressed by a provision in the production order to the effect that giving the purchasers access to the appraisal does not give them any right of action against Altus. Any use of the appraisal by any party for any purpose other than as originally contemplated when Altus was retained should not give rise to any liability against Altus

30 For the reasons set out above I order that the Altus appraisal report be disclosed to counsel for the purchasers, their expert and their two-person steering committee in unredacted

form. No such recipient is to communicate any of the contents of the appraisal report to anyone other than an authorized recipient of the appraisal report.

B. The Claim of Maria Athanasoulis

31 Maria Athanasoulis is the former president of Cresford. She has a claim against Cresford and others for wrongful dismissal of $1,000,000. In addition she claims that she was entitled to 20% of the profits of the project.

32 Ms. Athanasoulis seeks production of the Altus cost report that has already been delivered to counsel for the purchasers. She does not seek production of the appraisal because she agrees that she may be part of a purchaser group who may be interested in acquiring the project if the *CCAA* proceeding is not successful.

33 Ms. Athanasoulis submits that she needs the cost report to help evaluate the debtor's proposed plan. At this point, the debtor envisages presenting a plan that would offer unit purchasers new contracts, would pay out all secured debt, would pay out all trade creditors and leave remaining unsecured creditors with a dividend of 3% of their claim amount.

34 Ms. Athanasoulis is in a different equitable position than the purchasers. Clover never agreed to share either of the reports with her. She has only a potential claim as a judgment creditor. Her claim has not been adjudicated. She is not a unit purchaser and has no particular interest in whether the purchase contracts are or are not disclaimed.

35 Ms. Athanasoulis is the former President and Chief Operating Officer of Cresford, the holding company with overall control of Clover before Concord acquired it. She is clearly a sophisticated individual with inside knowledge about the project.

36 Paragraph 61 of her statement of claim states:

> By the fall of 2018, Ms. Athanasoulis, and the rest of Cresford's senior management team, advised Mr. Casey that Clover would require an additional $50 million to complete construction. Though this additional funding requirement would mean that no profit would be earned on this project, all lenders, trades and costs would be paid in full and Cresford could continue as a going concern with a solid reputation. Cresford funded some of the Clover obligations using fees earned on other projects, but a shortfall of $37 million remains.

37 In other words, she admits the project was losing money. As a result, as of the time she left Cresford her 20% profit share would have had no value.

38 In addition, her wrongful dismissal claim of $1,000,000 is subject to some ambiguity. Ms. Athanasoulis admits in her statement of claim that she was not paid out of the Clover entities but from another corporation that formally employed Cresford employees. There are 13 corporate parties in her statement of claim against which she claims wrongful dismissal. There would appear to be an issue about how her claim should be allocated between Clover and the other defendants.

39 As a result of the foregoing, Ms. Athanasoulis is a contingent creditor and a potential purchaser of the debtor in any sale of the property and a party without an economic interest in the disclaimer issue.

40 Those factors make the cost report significantly less important for Ms. Athanasoulis to have than it is for the purchasers to have the cost and appraisal reports. Given that Ms. Athanasoulis is a potential purchaser of the project, the difficulties posed by her having the Altus cost report are significant. Ms. Athanasoulis admits that it would be improper for her to have the appraisal given that she is a potential bidder in any sale of the project. Giving her the cost report raises similar conflicts.

41 Given the degree of need that Ms. Athanasoulis has for the cost report, the conflict created by giving her the cost report, her limited interest (if any) in the disclaimer motion and the absence of any commitment by Clover to share the report with her, I dismiss her motion for production of the Altus cost report.

C.

D. The Real Estate Brokers

42 The real estate brokers at issue are those who are entitled to commissions under the original purchase agreements. They claim their commissions in the *CCAA* proceeding. If the contracts are disclaimed, they would lose their commissions and also be limited to a 3% dividend under the plan the debtor proposes. The brokers seek both the cost and appraisal reports.

43 They too have a significantly lesser need for the reports than do the unit purchasers.

44 Most significantly, the debtor has already agreed that, if the contracts are disclaimed and the original unit buyers re-purchase them, the brokers will be deemed to be the broker and will earn commissions under the new purchase. That significantly reduces the financial impact of a disclaimer to them. If the contracts are not disclaimed, the brokers would likely lose their right to commission in any event in a subsequent receivership or bankruptcy sale.

45 Even if the contract(s) in respect of which a broker has a commission claim is/are not re-purchased, having cost and appraisal information from Clover would give that broker an advantage over others and over Clover when the unit is re-sold. That subsequent sale to another purchaser is one in respect of which the purchaser is not entitled to transparency because it is an ordinary, arm's length purchase in respect of which Clover has not obtained any advantage vis a vis the new purchaser through the *CCAA* process.

46 The brokers have articulated no particular reason for needing the reports other than the general proposition that they would be helpful when they are considering their position on the plan. Their claims to the reports are, like those of Ms. Athanasoulis, weaker given that the debtor never promised to produce the reports to them, arguments for and against disclaimer are already being advanced by highly qualified counsel and they stand to earn commissions even if the contracts are disclaimed. As a result, I dismiss the brokers' motion for production of the cost and appraisal reports.

Other Relief

47 The debtor also sought other relief on the hearing which was not contested and in respect of which I signed orders immediately after the hearing. The principal issue involved an increase to the DIP facility. The increase was clearly necessary. It provided funding to take out the previous secured lender. To that extend it does not prime any other stakeholders. The interest rate on the DIP loan is also more favourable to the debtor than the interest rate on the previous loan. To the extent that the DIP funds ongoing construction and does prime other stakeholders, that construction preserves the value of the project and is in all stakeholders' interests. In approving the DIP I am not, however, deciding whether the conditions in the DIP that call for further court rulings or orders have been satisfied. Those will be issues for another day.

Conclusion

48 For the reasons set out above, I grant the purchasers' motion to have access to the unredacted Altus appraisal provided access is restricted to counsel, their expert and the two person steering committee and provided all those who receive access sign a satisfactory non-disclosure agreement. I am available to resolve any disagreements about terms of access or use. I dismiss the motions of Ms. Athanasoulis and the brokers for access to either the cost or appraisal reports.

Purchasers' motion granted; former president's motion dismissed; real estate brokers' motion dismissed.

Footnotes

1 Concord is the new owner of Clover. Concord acquired Clover in the course of the *CCAA* proceeding. When doing so it made clear that it would proceed with the *CCAA* only if it were permitted to disclaim the contracts. If not, it indicated that the *CCAA* proceeding could not succeed.

KERR AND HUNTER

on

RECEIVERS AND ADMINISTRATORS

EIGHTEENTH EDITION

BY

Muir Hunter Q.C.
M. A. (Oxon); LL.D (Hons); MRI

One of Her Majesty's Counsel and a
Bencher of Gray's Inn
Visiting Professor of Insolvency Law,
University of Bournemouth

LONDON
SWEET & MAXWELL
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CHAPTER 12

DISCHARGE OF A RECEIVER

12–1 As already stated,[1] the rules regulating the appointment and control of receivers by the court have been substantially amended and codified, by new Rules, CPR 69 and CPR PD 69, revoking and replacing RSC Ord.30, with effect from December 2, 2002, with respect to proceedings commenced on or after that date.[2] The new rules relating to the discharge of receivers are as follows.

The court is now empowered to discharge a receiver, or to terminate his appointment, at any time, and to appoint another receiver in his place.[3] In particular, at the commencement of his appointment, the court may terminate it, if he fails, by the date specified, to give the security which the court has required, or to satisfy the court as to the security which he has in force.[4]

His appointment may also be terminated, if he is proved to have failed to comply with any rule, practice direction or direction of the court.[5]

When the court is discharging a receiver, or terminating his appointment, the court may require him to pay into court any money held by him, or to specify the person (*e.g.* his successor), to whom he must pay over any money, or to transfer any assets still in his possession,[6] and to make provision for the discharge or cancellation of any guarantee given by him as security.[7]

The receiver, or any party to the proceeding, may apply to the court for the receiver to be discharged on completion of his duties.[8]

12–2 **The case law.** The case law on these subjects, as analysed by Sir Raymond Walton, as slightly abridged, has been printed below. Despite the updating of the rules, the principles applicable will no doubt remain much the same.

12–3 **On his own application.** Unless the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge,[9] an application to the court is necessary, in order to divest his

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[1] See Ch.5, above.
[2] Civil Procedure (Amendment) Rules, 2002 (SI 2002/2058, rr.2, 26, and Sch.7.
[3] CPR 69.3.
[4] CPR 69.5(2). Under the former rules, if he did not complete the security by the date specified, his appointment terminated.
[5] CPR 69.9(1).
[6] CPR 69.11(1)(a).
[7] CPR 69.11(1)(c).
[8] Insolvency 1986, s.45(1); CPR 69.10.
[9] *Day v Sykes, Walkers & Co.* (1886) 55 L.T. 733; [1886] W.N. 209.

possession.[10] The appointment of a receiver, made previously to the judgment in the action, will not be superseded by the judgment, unless the receiver is appointed only until judgment or further order.[11] But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order.[12]

As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his application, before he has completed his duties, without showing some reasonable cause why he should put the parties to the expenses of a change,[13] otherwise he may have to pay the costs of his removal and of the appointment of his successor. If, however, he can show reasonable cause for his discharge, such as ill-health, he may be discharged and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands.[14] As an alternative, if his indisposition be only temporary, he may obtain the leave of the court to appoint an attorney for a limited period.

A manager may find himself in a situation where, without the whole-hearted co-operation of some party to the action, which is not forthcoming and cannot be privately compelled, he is unable to function effectively as a manager. In these circumstances, it is proper for him to apply in the alternative to be discharged, or to have his functions restricted to those which it is possible for him to carry out.[15]

Similarly, if there proves to be no advantage in continuing to carry on a business, either because it cannot be run at a profit, or because the possible profits do not justify the expenses of managing it, the manager, may, and indeed should, make a similar application.[16]

A receiver ought not to make an application for discharge to come on with the further consideration of the action; for the court can, on the further consideration, discharge him without such an application. Accordingly, the costs of a separate application for discharge have been refused.[17]

12–4 On satisfaction of incumbrance. A receiver is generally continued until judgment in the action in which he has been appointed; but, if the right of the claimant ceases before that time, the receiver will be discharged at once.[18] But where the appointment is made in a foreclosure action at the instance of a claimant who is subsequently paid off, another incumbrancer may, on application, obtain leave to be added as claimant, in which case the

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[10] *Thomas v Brigstocke* (1827) 4 Russ. 64; see now CPR 69.10.

[11] See para.5–40, above.

[12] *Ponsonby v Ponsonby* (1825) 1 Hog. 321; *Anon.* (1839) 2 Ir. Eq. R. 416.

[13] *Smith v Vaughan* (1744) Ridg. temp. Hard. 251; *cf. Cox v M'Namara* (1847) 11 Ir. Eq. R. 356.

[14] *Richardson v Ward* (1822) 6 Madd. 266.

[15] *Parsons v Mather & Platt Ltd*, unreported, December 9, 1974, CA (Appeal Court Judgments (Civil Division) No.392A), where (in effect) the manager was relieved of his management duties and restricted to those of a pure receivership.

[16] See *e.g.* the master's order in *Fillippi v Antoniazzi* (1976) R. 2251 unreported of November 1, 1977, directing that the receiver and manager be at liberty to cease trading forthwith at the premises of the partnership business.

[17] *Stilwell v Mellersh* (1851) 20 L.J. Ch. 356.

[18] *Davis v Duke of Marlborough* (1818) 2 Swan. 108.

receivership may be continued.[19] Similarly, if a receiver is appointed for the purpose of satisfying a number of claims, he will not be discharged merely on the application of a satisfied claimant, if some of the other claims are still outstanding.[20] Proceedings may always be stayed without prejudice to the receivership.[21]

Continuance becoming unnecessary. If, in the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees.[22] Again, where a receiver, who had been appointed in consequence of the executors of a testator's will having refused to act, moved away from the vicinity of the estates over which he had been appointed receiver, the court, on the consent of the other parties, and the executors expressing their willingness to act, made an order that the receiver should pass his accounts.[23] A receiver will be discharged, when the object of his appointment has been fully effected,[24] as, for instance, when arrears of annuity, to obtain which he was appointed, have been paid.[25] **12–5**

Other causes for discharge. A receiver is liable to be discharged for irregularity in carrying in his accounts, for conduct making it necessary to take proceedings to compel him to do so, and for so submitting his accounts that the amount of the balance in his hands cannot be ascertained.[26] So also, if his conduct has been such as to impede the impartial course of justice,[27] or to amount to a gross dereliction of duty,[28] or if his appointment as a receiver has been improper.[29] **12–6**

It is conceived, however, that a charge of misbehaviour against a receiver, for suffering the owner of an estate, over which the receiver was appointed, to remain in part possession of it to the prejudice of the estate, will not be regarded by the court as a sufficient reason for discharging the receiver, for in such a case the parties themselves have caused the loss, by not compelling the owner, by the authority of the court, to deliver up possession to the receiver.[30]

Where a receiver becomes bankrupt, he will be discharged, and another receiver appointed.[31]

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[19] See *Munster, etc., Bank v Mackey* [1917] 1 Ir.R. 49.
[20] *Largan v Bowen* (1803) 1 Sch. & Lef. 296.
[21] *Damer v Lord Portarlington* (1846) 2 Ph. 34; *Paynter v Carew* (1854) 18 Jur. 417; *Murrough v French* (1827) 2 Moll. 497.
[22] *Bainbrigge v Blair* (1841) 3 Beav. 421, 423. It is otherwise where, on the appointment of new trustees, there are questions still outstanding: See *Reeves v Neville* (1862) 10 W.R. 335.
[23] *Davy v Gronow* (1845) 14 L.J. Ch. 134.
[24] *Tewart v Lawson* (1874) L.R. 18 Eq. 490. See, too, *Hoskins v Campbell* [1869] W.N. 59.
[25] *Braham v Lord Strathmore* (1844) 8 Jur. 567.
[26] *Bertie v Lord Abingdon* (1845) 8 Beav. 53.
[27] *Mitchell v Condy* [1873] W.N. 232.
[28] *Re St. George's Estate* (1887) 19 L.R. Ir. 566.
[29] *Re Lloyd* (1879) 12 Ch. D. 447; *Nieman v Nieman* (1889) 43 Ch. D. 198; *Re Wells* (1890) 45 Ch. D. 569; *Brenan v Morrissey* (1890) 26 L.R. Ir. 618.
[30] *Griffith v Griffith* (1751) 2 Ves.Sen. 400.
[31] *Daniell's Chancery Practice* (8th ed.), p.1479.

If a receiver has been wrongly appointed over property belonging to a person who is not a party to the action, he will be discharged, even though there has been an abatement of the claim by the death of a sole defendant.[32]

The court will discharge a receiver upon the application of a prior mortgagee who demands to go into possession as such by himself or by his receiver.[33]

Where a receiver had been appointed in an administration suit, another person, who was willing to act at a lower salary, was ordered to be substituted for him, as receiver, on the application of a mortgagee of a tenant for life of the property.[34]

12–7 Property to be sold. Where estates, over which a receiver has been appointed, have been ordered to be sold, the receiver will be continued, until completion of the sale, in order that he may collect any arrears of rent.[35]

12–8 Balance due to receiver. The receiver of an estate will not be discharged until he has received from the estate any balance found due to him on passing his accounts.[36] In administration actions, a receiver may be discharged on passing his accounts, and be paid his remuneration and costs, without waiting to see whether the estate is sufficient to pay all costs payable out of it.[37]

12–9 Application of one party only. A receiver, being appointed for the benefit of all the parties interested, will not be discharged on the application of that party only at whose instance he was appointed.[38]

12–10 Mode of application to discharge. The application to discharge a receiver appointed in a claim should be made by application notice[39]; the direction for his discharge may be given in the judgment at the trial, or in the order upon further consideration.[40]

In the Queen's Bench Division, an application to discharge a receiver is made to the master by application notice,[41] which may be issued before or after submission of the receiver's final account. In the former case, the order is made, subject to the receiver complying with the usual Central Office regulations; in the latter, on production of the master's certificate, and proof that the receiver has complied with the directions therein.

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[32] *Lavender v Lavender* (1875) 9 Ir.R.Eq. 593.
[33] *Re Metropolitan Amalgamated Estates* [1912] 2 Ch. 497; above, para.2–27.
[34] *Stanley v Coulthurst* (1868) W.N. 305.
[35] See *Quin v Holland* (1745) Ridg. temp. Hard. 295.
[36] *Bertrand v Davies* (1862) 3 Beav. 436.
[37] *Batten v Wedgwood, etc., Co.* (1885) 28 Ch. D. 317.
[38] *Davis v Duke of Marlborough* (1812) 2 Swans. 108; *Bainbrigge v Blair* (1814) 3 Beav. 421, 423.
[39] *Atkin's Court Forms*, Vol.33 (1981 Issue), p.247; forms of order, *Seton* (7th ed.), p.781; see also Palmer's *Company Precedents* (16th ed.), Vol.III, Chap.69.
[40] *Seton* (7th ed.), pp.781, 782.
[41] See now CPR 69.10.

Where, under the former procedure, a bond has been given up on application at the General Filing Department, it will be delivered up on production of the master's order: see below.

Service and appearance. An application for the discharge of a receiver should be served on all the parties.[42] The service of it on the receiver should be personal, and such service will not be dispensed with, unless an order for substituted service is obtained.[43] But a receiver, though served, is not entitled to appear at the hearing of the application, unless some personal charge is made against him. If he appears, he will not be allowed the costs of his appearance,[44] except under special circumstances.[45] **12–11**

Form of order on discharge. If the receiver has not submitted his final account, nor paid over any balance shown thereby, or determined after examination to be due from him, the order discharging him will direct him to do so. **12–12**

The order of discharge may be conditional on the performance of some act by the receiver, or be otherwise contingent on some future event. On proper evidence of compliance or of the happening of the event, the master will indorse on the order a direction that any guarantee given by the receiver is to be cancelled. On production of the order in the Filing Department, Central Office, the guarantee is indorsed with the vacating note and delivered to the solicitor against his receipt.[46]

Effect of discharge. The court has power, by making an order for release and discharge, to protect the receiver from all liability for acts done in the court of his duties. This power should not be exercised without the court first investigating, or making provision for the investigation of, claims of which the court has notice. But the court is not obliged to wait until the end of the limitation period, before protecting its officer against such a claim, if the claimant, having had ample opportunity to do so, neglects to prosecute any claim.[47] **12–13**

Notice to surety. Under the usual form of guarantee, the receiver is bound to give to the surety by post notice of his discharge: and within seven days thereafter, send the surety an office copy of the order discharging him. **12–14**

In an Irish case, in which a receiver was discharged owing to gross dereliction of duty, the order discharging him disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of the appointment of his successor.[48]

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[42] *Daniell's Chancery Practice* (8th ed.), p.1499.
[43] *Att.-Gen. v Haberdasher's Company* (1838) 2 Jr. 915.
[44] *Herman v Dunbar* (1857) 23 Beav. 312.
[45] *General Share Co. v Wetley Brick Co.* (1882) 20 Ch. D. 260, 267.
[46] CPR 69.11. This does not arise, where the receiver is a licensed insolvency practitioner and is covered by continuous security.
[47] *IRC v Hoogstraten* [1984] 3 W.L.R. 933, at p.944H.
[48] *Re St. George's Estate* [1887] 19 L.R. Ir. 566.

IN COMPANY CASES

12–15 Administrative receivers; vacation of office. There are now special rules dealing with the vacation of office by administrative receivers.[49] Such a receiver must forthwith vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company.[50] Where he vacates office at any time, his remuneration, and any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time, in priority to any security held by the person by or on whose behalf he was appointed.[51]

12–16 Resignation of administrative receiver. When an administrative receiver proposes to resign, he must give *at least seven days' notice,* stating the date when he intends his resignation to take effect, to (i) his appointor, (ii) the company, or, if it be in liquidation, the liquidator, and (iii) to the members of the creditors' committee, if any.[52] No such notice is, however, required if he resigns in consequence of the making of an administration order.[53] If the receiver dies in office, his appointor must, *forthwith on becoming aware of the death,* give notice to the same persons.[54] The making of an order does not itself terminate his appointment; but since an order can only be made, where an administrative receiver is in office, with the consent of his appointor,[55] his resignation will necessarily follow.

Where an administrative receiver vacates office on completion of his receivership, or by resignation, or by virtue of having ceased to be qualified as an insolvency practitioner, he must *within 14 days* give notice to the registrar of companies,[56] and *forthwith give notice* to the company or its liquidator, and to the members of the creditors' committee (if any).[57]

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[49] An administrative receiver may now only be removed by the court: Insolvency Act 1986, s.45(1).

[50] Insolvency Act 1986, ss.45(2), 62(2): for the meaning of "insolvency practitioner qualified to act in relation to the company," para.4–7, above.

[51] Insolvency Act, 45(3).

[52] Insolvency Rules 1986, r.3.34(1), (2).

[53] *ibid.,* r.3.33(3). See Ch.14, below, s.1.

[54] *ibid.,* r.3.34(1).

[55] Insolvency Act 1986, Sch.B1, para.15(1)(b).

[56] Insolvency Rules 1986, r.3.35(1), (2).

[57] Insolvency Act 1986, s.45(4); Insolvency Rules 1986 (SI 1986/1925) r.3.35(2): notice may be given by the individual by indorsement, on the notice given of his cessation, to the register of charges: Insolvency Act 1986, s.48—Companies Act 1985, s.405(2); Insolvency Rules 1986, r.3.35(4).

CHAPTER 26

TERMINATION OF ADMINISTRATIVE RECEIVERSHIP

26–1 Displacement of the receiver: general. A receiver appointed by the debenture-holders may, if the court thinks fit, be displaced by the court (but only by the court), on the application of other debenture-holders, or of the appointor, in favour of its own receiver. A receiver appointed by or on behalf of subsequent debenture-holders will be displaced by the appointment of a receiver by or on behalf of prior debenture-holders.[1–2] On the making of an administration order,[3] or the extra-judicial appointment of an administrator and its taking effect, any administrative receiver[4] of the company must vacate office[5]; and any receiver of part of the company's property must vacate office, on being required to do so by the administrator.[6]

26–2 Removal. Just as his appointment takes effect only when communicated to the receiver, so also (in the absence of any special provision) notice of removal, under a power to remove, is effective only when received by him.[7] To the extent to which it is his duty to have paid preferential debts, a receiver who is removed from office must ensure that these are discharged, or that he retains sufficient assets in his hands to meet them, before he parts with the assets. Alternatively (see below), his removal may be accompanied by another appointment, under such circumstances that the receivership may properly be regarded as continuous, in which case he will be justified in transferring the whole of the assets in his hands, save as mentioned below, to the new receiver. If he does not either ensure payment of the preferential debts, or else that the receivership may properly be regarded as continuous, he will be personally liable to any disappointed preferential creditor whose debt he ought to have discharged.[8]

Having regard to the personal liability imposed upon all receivers by statute in respect of their own contracts (save in so far as such contracts

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[1] [2] *Re Maskelyne British Typewriter Co.* [1898] 1 Ch. 133; *Re Slogger Automatic Feeder Co.* [1915] 1 Ch. 478.

[3] See Chap.14 above.

[4] See, as to appointments of administrators, judicial or extra-judicial, Pt III, above.

[5] For the meaning of "administrative receiver", see para.21–1.

[6] Formerly, Insolvency Act 1986 Pt II, s.11(1)(b) (repealed): now, since the Enterprise Act 2002, Pt 10, see Insolvency Act 1986, Sch.B1, para.41(1).

[7] n.6, above para.41(2).

[8] *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] Ch. 375, CA; *per* Donovan L.J. at p.398.

may provide, which is unusual, to the contrary), a receiver who has been removed will, like any other agent who has properly made himself liable in respect of his principal's contracts, have a lien on the assets in his hands against all such liabilities personally incurred by him.[9]

Duty to cease to act. If, at any stage of his management of the company, the receiver has in his hands sufficient moneys to discharge all the debts of the company which he is bound to discharge, all possible claims which could be made against him and in respect of which he is entitled to an indemnity, his own remuneration, and all moneys secured by the instrument pursuant to which he was appointed, it will be his duty to cease to act with all due expedition; this should confine his further activities to taking the necessary steps to conclude his administration. If he continues to act, any accounts will be taken against him thereafter with annual rests from the date when he had sufficient moneys in his hands to cover all such amounts.[10] His continuance in possession of the company's assets thereafter might also be regarded by the courts as wrongful, since his appointment is only for the purpose of enabling the encumbrancers, entitled to the benefit of the instrument under which he was appointed, to recover their debt; once this purpose has been achieved, there is no ground for his continuance in office. The effect would be that thereafter he would be in the position of trespasser.[11] **26–3**

For various reasons, the receiver may have sufficient moneys in his hands for the above purpose, but may not be in a position to settle all possible claims which could be made against him and in respect of which he is entitled to an indemnity. He should then request his appointor to apply for his discharge, and should retain sufficient moneys to answer his indemnity, and account at once for any balance to the company. Alternatively, he may (but cannot be forced to) accept an indemnity from the company which may (but cannot be compelled to) offer such indemnity.

Death. If, after the death of a receiver, the company attempted to deal with its assets before the debenture-holders had an opportunity of appointing a new receiver, the company could clearly be restrained by injunction from so acting. In the normal case, an appointment will be promptly made in replacement, and the receivership can then be regarded as continuous,[12] but provision will of course have to be made to ensure the indemnification of the receiver's estate against all liabilities personally incurred by him. **26–4**

Continuity of receivership. Although the only directly relevant decision relates to a special statutory situation,[13] where a new receiver is appointed, **26–5**

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[9] *I.R.C. v Goldblatt* [1972] 498. The debenture holder who procured the removal of the receiver was also held liable. Crown preferences, involved in that case, have been abolished by Enterprise Act 2002, s.251 with effect from September 15, 2003.

[10] *Foxcraft v Wood* (1828) 4 Russ. 487.

[11] *cf. Ashworth v Lord* (1887) 36 Ch. D. 545.

[12] See below.

[13] *Re White's Mortgage* [1943] Ch. 166 (appointment of receiver requiring leave under the Courts (Emergency Powers) Act 1939.

in the place of a receiver who has died or been removed, without undue delay, the receivership may be regarded as continuous.[14] This is particularly important as regards any undischarged statutory duties, such as the duty to discharge preferential debts.[15] If these have not been discharged prior to the death or removal, then his personal representatives or the receiver himself, as the case may be, will, if the receivership can be regarded as being continuous, but not otherwise, be justified in accounting to the new receiver in respect of the entirety of the assets in his hand (save for such portion thereof as is required for his protection against contractual claims), leaving it to the new receiver to complete the statutory obligations in this regard.

If, however, the receivership cannot be regarded as continuous,[16] he cannot safely take this course. Nor, if no further receiver is to be appointed, can he simply take the course of accounting to the company, without first discharging all preferential debts, and distributing, if required, the "prescribed part" to the unsecured creditors.

26–6 Ceasing to act. Upon ceasing to act as such, the receiver or manager is required to render accounts, as set out below, and is also, on so ceasing, is required to give the registrar of companies notice thereof.[17] This notice is entered by the registrar in the register of charges. Default incurs a fine on summary conviction not exceeding one-fifth of the statutory maximum, and on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum.[18]

26–7 Vacation of office by administrative receiver. An administrative receiver will automatically vacate office on the making of an administration order[19]; but no such order is made without the consent of his appointor,[20] unless the security whereunder he was appointed is considered by the court to be liable to be set aside as being at an undervalue, or a voidable preference, or an invalid floating charge.[21] The relationship between the appointments of administrators and the appointment and functions of administrative receivers is considered in Chapter 14, above.[22]

Apart therefrom, he may at any time be removed from office by order of the court, but not otherwise.[23] Accordingly, no provision in the debenture

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[14] Insolvency Act 1986, s.46(2): see also s.62(6).

[15] Under Insolvency Act 1986, new s.176A, inserted by Enterprise Act 2002, s.253: see Ch.29, below.

[16] In *Re White's Mortgage*, n.14, above, a delay of 10 months was held to break the continuity of the receivership.

[17] Companies Act 1985 (as amended), s.409(2).

[18] n.17, above s.405(4). All notices under Companies Act 1985, s.405 must be in the prescribed form: see s.405(3). The appropriate form is Form 405(2) in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).

[19] Formerly under Insolvency Act 1986, s.11(1)(b) (repealed): now under Insolvency Act 1986, Sched. B1, paras 39(1)(a), 41(1).

[20] Formerly under n.19, s.9(3)(a) (repealed); now under Insolvency Act 1986, Schedule B1, para.39(1)(b)(c)(d).

[21] n.19, s.9(3)(a)

[22] See Chap.14 above.

[23] Insolvency Act 1986, s.45(1).

whereunder he was appointed, authorising his removal by the appointor, or by anybody else other than the court, will be effective.

He will similarly vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company[24]; This will be without prejudice to the validity of any acts which he may have carried out, after he ceased to be so qualified.[25] In this event, he must forthwith give notice of his vacation of office to the liquidator of the company, if it is in liquidation, and to the members of the creditors' committee, if there is one.[26] Within 14 days, he must also send a notice to that effect to the registrar of companies.[27]

He may resign, by giving at least seven days' notice of his intention to do so to his appointor and to the company, or, if it is then in liquidation, its liquidator, specifying the date on which he intends his resignation to take effect.[28] Then, within 14 days after his vacation of office, he must send a notice to that effect to the registrar of companies.[29]

If the administrative receiver dies, his appointor must, forthwith upon his becoming aware of the death, give notice of it to the registrar of companies[30] and to the company, or, if it is then in liqnidation, to its liquidator.[31]

He will also, of course, vacate office on the completion of his receivership: all the same, in this case notices must be given as if he had vacated office in consequence of ceasing to be qualified as an insolvency practitioner.[32]

When he vacates office, his remuneration, any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security held by his appointor.[33]

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[24] n.23, s.45(2).

[25] Insolvency Act 1986, s.232; Schednle B1, para.104.

[26] Insolvency Rules 1986, r.3.35(1).

[27] Insolvency Act 1986, s.45(4). Such notice may be given by means of an indorsement on the notice required by Companies Act 1985, s.405(2) for the purposes of the register of charges: Insolvency Rules 1986, r.35(2). If an administrative receiver, without reasonable excuse, fails to comply with this obligation, he is liable on summary conviction to a fine not exceeding one-fifth of the statutory maximnm, and on conviction after continued contravention to a daily default fine not exceeding one-fiftieth of the statutory maximum: Insolvency Act 1986, ss.45(5). 430, Sch.10. He is no longer liable to a daily default fine, for continued default: s.45(5), as amended by Companies Act 1989, ss.107, 212, Sch.16.

[28] Insolvency Rules 1986, r.3.33(1), (2). The appropriate form is Form 3.9 in Sch.4: see r.12.7. No notice is necessary if he resigns in consequence of the making of an administration order: *ibid.* r.3.33(3). As appears from the text to nn.4–7 above, the receiver will automatically vacate office on the making of such an order, and the precise import of this subrule is accordingly unclear.

[29] See n.27, above, above.

[30] Insolvency Rules 1986, r.3.34(a). The appropriate form is Form 3.7 in Sch.4 to the Insolvency Rules 1986, r.12.7.

[31] Insolvency Rules 1986, r.3.34(b).

[32] Insolvency Rules 1986, r.3.35(1).

[33] Insolvency Act 1986, s.45(3).

26–8 Floating charge "re-floating" after receiver ceases to act. Where a receiver has ceased to act, for one reason or another,[34] for a period of one month, and no other receiver has been appointed, the floating charge, by virtue of which he was appointed, ceases to attach to the property the subject of the charge, and again subsists as a floating charge.[35]

For the purposes of calculating that period of one month, no account shall be taken of any period when an administration order was in force. A charge to which these provisions apply is sometimes referred to as having "re-floated".[36]

26–9 Accounts to be rendered upon ordinary receiver ceasing to act. On ceasing to act, the receiver must deliver the usual abstract within one month, and must include the figures from the last abstract,[37] up to the date of so ceasing.[38] It will, as in the case of all other abstracts, show the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.[39]

Where a receiver is appointed out of court, and subsequently the same person is appointed administrative receiver in a debenture-holders' action, his accounts are taken in the action: if a different person is appointed, the first receiver may apply by summons to have his accounts taken in the action.[40]

26–10 Accounts upon administrative receiver ceasing to act. Within two months (or such extended period as the court may allow) after ceasing to act as administrative receiver, he must send to the registrar of companies, to the company and to his appointor, and to each member of the creditors' committee (if there is one), the requisite account of his receipts and payments as receiver.

26–11 Balance in accounts due to company. The duty of the receiver to keep accounts and make them available for inspection by the company, as and when required, has already been noted. But whereas the receiver is not a debtor to the company in respect of any intermediate balance which might appear from his accounts to be due to the company, he will be a debtor to the company in respect of the final balance, after discharging all preferential debts and so forth, shown by his accounts to be due to the company. It follows that this balance can be the proper subject of a third party debt order.[41]

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[34] By dying, or losing his qualification, or resigning, or being removed by order of the court.
[35] Insolvency Act 1986, s.62(6).
[36] See n.35, above.
[37] The prescribed form is Form 497 in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).
[38] Insolvency Act 1986, s.38.
[39] For penalty for default, see Insolvency Act 1986, s.38.
[40] *Practice Note* [1932] W.N. 79.
[41] As envisaged by the judgment in *Seabrook Estate Co. Ltd v Ford* [1949] 2 All E.R. 94, 97.

Remuneration, expenses and indemnity on vacation of office. Where a receiver or manager appointed under powers contained in an instrument, whether or not an administrative receiver, vacates office, his remuneration,[42] expenses properly incurred by him, and any indemnity[43] to which he is entitled out of the assets of the company, are charged on, and are to be paid out of any property of the company which is in his custody or under his control at that time, in priority to any charge or other security held by the person by or on whose behalf he was appointed.[44] **26–12**

Withdrawal of receiver before payment off of debenture holders in full. If a receiver is withdrawn by consent, before the debenture-holders have been paid off in full, any floating charge comprised in their security, having once crystallised, will not refloat automatically, and can only be made so to do by express agreement. A more difficult question is whether, after the withdrawal of a receiver, the debenture-holders are still entitled to a fixed equitable charge on the assets so released to the company; in principle, there appears to be no reason why this charge should not continue to attach to any assets which belonged to the company at the date of crystallisation, and which have not been disposed of during the receivership. The charge would not attach to assets of the company acquired subsequently to the date of crystallisation.[45] The practical results of this position are so inconvenient that it is thought that an intention to waive the fixed charge will readily be implied. **26–13**

Destination of books and papers. The ownership of documents in the possession of a receiver at the end of the receivership may vest in the company, or in the debenture-holders, or may remain with the receiver, depending on their nature. All documents generated by or received by the receiver pursuant to his duty to manage the business of the company, or to dispose of its assets, vest in the company. Documents containing advice and information about the receivership, or about the companies brought into existence by the receiver for the purpose of enabling him to advise the debenture-holders, belong to them. Notes, calculations, working papers and memoranda prepared by the receiver, not pursuant to any duty to prepare them, but better to enable him throughout to discharge his professional duties, belong to the receiver. **26–14**

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[42] As to the court's power to fix his remuneration, see n.33, above.

[43] As to his indemnity, see para.9–17 above. For the indemnity enjoyed by a receiver appointed by the court, see para.8–11 above.

[44] Insolvency Act 1986, s.37(1), (4) (ordinary receivers); s.45(3) (administrative receivers).

[45] *Re Yagerphone* [1935] Ch. 392. The passage in the test was criticised by Russell L.J. in *N.W. Robbie & Co. Ltd v Witney Warehouse Co. Ltd* [1963] 1 W.L.R. 1324 at 1338; but he omitted to observe that it is dealing with the position of future assets, acquired after (i) a crystallisation of the charge and (ii) a subsequent withdrawal of the receiver. It is still submitted that future assets fall within the scope of the floating charge only.

26–15 Transitional provisions of the Insolvency Act 1986. The 17th edition of this work contained, at pp.441 *et seq.* a detailed analysis of the law in force before Insolvency Act 1985 and Insolvency Act 1986 came into force, and of the changes effected by the new legislation, and of the transitional provisions relating to preferential debts.

Milwaukee & Minnesota R. Co. v. Soutter, 69 U.S. 510 (1864)

Syllabus **Case**

U.S. Supreme Court

Milwaukee & Minnesota R. Co. v. Soutter, 69 U.S. 510 (1864)

Milwaukee & Minnesota Railroad Company v. Soutter

69 U.S. (2 Wall.) 510

ERROR TO THE CIRCUIT

COURT FOR WISCONSIN

Syllabus

1. Though a court below is bound to follow the instructions given to it by a mandate from this, yet where a mandate has plainly been framed, as regards a minor point, on a supposition which is proved by the subsequent course of things to be without base, the mandate must not be so followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably.

2. The appointment or discharge of a receiver is ordinarily matter resting wholly within the discretion of the court below. But it is not always and absolutely so.

Thus, where there is a proceeding to foreclose a mortgage given by a railroad corporation on its road &c. -- a long and actively worked road -- a sort of property to a control of which a receiver ought not to be appointed at all, except from necessity, and the amount due on the mortgage is a matter still unsettled and fiercely contested, the appointment

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or discharge of a receiver is matter belonging to the discretion of the court in which the litigation is pending.

But when the amount due has been passed on and finally fixed by this Court, and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court below has then no discretion to withhold such restoration, and a refusal to discharge the receiver is judicial error which this Court may correct, supposing the matter (not itself one in the nature of a final decree) to be in any way fairly before it otherwise.

If other parties in the case set up claims on the road, which they look to the receiver to provide for and protect, these other claims being disputed, and, in reference to the main concerns of the road, small, this Court will not the less exercise its power of discharge. It will exercise it, however, under conditions, such as that of the company's giving security to pay those other claims, if established as liens.

Bronson and Soutter had filed a bill in the Circuit Court for Wisconsin, against the La Crosse & Milwaukee Railroad Company, to foreclose a mortgage given by the said company to them to secure bonds to the extent of one million of dollars which that company had put into circulation and the interest to a large amount on which was due and unpaid. To this bill the Milwaukee & Minnesota Railroad Company -- a company which, on a sale under a mortgage junior to that of Bronson and Soutter, was organized and became, under the laws of Wisconsin, successor in title and interest to the La Crosse & Milwaukee Company, and also three other persons, one named Sebre Howard -- were made or became defendants, and opposed the prayer for foreclosure. They alleged that the bonds which the mortgage to Bronson and Soutter had been given to secure had been sold, transferred or negotiated at grossly inadequate prices, fraudulently in fact, and were not held for full value by these persons, who sought by the foreclosure to recover their par. The court below, being of this opinion, gave a decree in that suit to the extent of but fifty cents on the dollar. Coming here by appeal at the last term, [Footnote 1] the decree, after an animated, protracted, and very able argument in support of it by Mr. Carpenter, in behalf of numerous parties interested, was reversed, and a decree ordered to be entered

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below for the full amount, *cent* for *cent*. [Footnote 2] The suit, at the time of the decree here, had been pending for four years. The mandate from this Court ran thus:

"It is ordered that this cause be remanded to the Circuit Court of the United States for the District of Wisconsin with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court *ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest* and apply it to the same, and that if the moneys thus applied are not sufficient to discharge the interest due on the first day of March, 1864, *then* to ascertain the balance remaining due at that date. *And in case such* balance is not paid within one year from the date of the order of the court ascertaining it, *then* an order shall be entered directing a sale of the mortgaged premises."

Upon the filing of this mandate in the court below, the receiver was ordered to make report of the funds in his hands, from which it appeared that he had some $50,000 to $60,000 applicable to the payment of the interest on the bonds in suit.

The Milwaukee & Minnesota Railroad Company, which, as already stated, was an encumbrancer on the road junior to Bronson and Soutter, insisted that instead of this small amount, there was really, or ought to be, in the receiver's hands between $300,000 and $400,000 applicable to the payment of interest, and asked an order of reference to a master, with instructions to hear testimony and ascertain and report on this claim. The court made the order and postponed further action in the case until the succeeding term in September. At that term it was ascertained that the master would be unable to report on the complicated accounts of the receiver, involving several millions of dollars, and the receiver was again ordered to report the funds actually in his hands. From this second report it appeared

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that he had no money properly applicable to the payment of the debt of Bronson and Soutter, and thereupon the court proceeded to ascertain the amount of interest due on the bonds secured by their mortgage, and entered a decree accordingly, giving the defendant a year to pay it, before a sale of the mortgaged premises.

From this decree the Milwaukee & Minnesota Railroad Company, the already mentioned successors in title and interest to the La Crosse & Milwaukee Railroad Company, appealed, the first ground assigned for their appeal being that the decree was a departure from the mandate of the court because such decree should not have been rendered *until the accounts of the receiver were adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants interest.*

But another matter was now presented here.

At the first term of the court below, after the mandate was filed, the Milwaukee & Minnesota Railroad Company proposed to pay all the interest due on the mortgage of Bronson and Soutter on condition that an order should be made discharging the receiver, and placing the road and its appurtenances in the possession of them, the Milwaukee Company, just named. Upon the hearing of this petition, the judges of the circuit court were divided in opinion, and the application so, necessarily, refused.

The amount of Bronson and Soutter's debt, above mentioned, exclusive of interest, which the Milwaukee & Minnesota Railroad Company proposed to pay was one million of dollars, and this, added to twelve hundred thousand dollars of prior mortgages, made two millions two hundred thousand dollars, which the road and its appurtenances would have to be worth in order to secure the debt of Bronson and Soutter. The road on which the mortgage was a lien is ninety-five miles, and runs from Milwaukee to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It was in good condition. It constitutes a part of the direct line from Milwaukee to the

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Mississippi and is one of the valuable railroads of the United States. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars, though the reports showed a large falling off in the receiver's receipts of later time.

In addition to the opposition made to this motion by Bronson and Soutter, it was opposed by one Sebre Howard who, with the Milwaukee & Minnesota Railroad Company, had been a defendant to their bill and on whose motion the receiver had been appointed. Howard objected to the discharge because, as alleged, he had a judgment of $16,000 against the La Crosse & Milwaukee Railroad Company which he asserted to be a lien on the road, though whether it was so or not depended on some questions of fact and law not perhaps quite clear. This Court, assuming a certain state of facts, decided that he had, but it was said that facts had not been well explained to the court.

One Selah Chamberlain, too, opposed it, objecting to the discharge of the receiver and particularly to delivering the property into possession of appellants, because, as he asserted, he himself was holder of a lien of over $700,000 in the road, and because that lien, according to his view, was secured by a lease which entitled him to the possession of the road. This same Chamberlain had been in possession under his lease for some time prior to the appointment of the receiver under a contract with the La Crosse & Milwaukee Railroad

Company by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which Bronson and Soutter had filed their bill. This he had failed to do, and he had actually abandoned the possession to the Milwaukee & Minnesota Company, who were in possession at the time the receiver was appointed. His judgment on a suit by the complainants had been assailed, and as it seemed, though counsel denied this view, declared to be fraudulent and void by a decree of the district court of the United States, but that question was not finally determined.

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A *third* railroad company, called the Milwaukee & St. Paul Company, a rival company of the Milwaukee & Minnesota, whose relation to it will appear in the diagram below, also opposed the discharge.

image:a

This company was an organization created after the litigation already mentioned, as brought about by the proceedings of Bronson and Soutter to foreclose their mortgage, had commenced. It was no party to preceding suits. It owned the western end of the La Crosse & Milwaukee Railroad -- that is to say, the road from Portage to La Crosse (one hundred and five miles), and was organized for the purpose of working a road, as its name imports, from Milwaukee to St. Paul; of course, the ownership and control of an eastern end was indispensable to the purpose. This company had procured, in June, 1863, an order from the district court that the receiver should deliver to them the eastern end of this road and all its appurtenances, and they had used them from that day. This Court, however, subsequently declared the proceeding of the district court to have been without

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jurisdiction, and the order a usurpation of authority. [Footnote 3] The interest of this third company was, of course, of a strong character, for the necessities of their situation required that they should own an *eastern* end of the road to complete their line from Milwaukee, one great terminus of the road to St. Paul.

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MR. JUSTICE MILLER delivered the opinion of the Court.

The first ground assigned for the appeal is that the decree is a departure from the mandate of the court because it should not have been rendered until the accounts of the receiver were

adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants' interest coupons.

This construction of the mandate cannot be sustained. The receiver is the office of the court, and neither party is responsible for his misfeasance or malfeasance, if any such exists, and it was not, therefore, reasonable that complainants should be delayed in the collection of their debts until the close of a litigation over the receiver's accounts, which might occupy several years. The suit had already been pending four years, and the mandate required the circuit court, in its decree *nisi,* to give another year for the payment of the sum found due. To suppose that this Court

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intended, in addition to these five years, to withhold the recovery of complainants for the additional uncertain period which might be necessary to litigate the receiver's accounts, is to impute to it a manifest injustice. The language of the mandate had reference to the sum actually the receiver's hands, properly applicable to the payment of this debt, and not to what it might turn out on full investigation ought to be there for that purpose. This Court had no reason to suppose that there would be any controversy with the receiver on the subject, and framed its mandate on the supposition that all the money for which he would be responsible, would be at once forthcoming. If such is not the case, neither the loss nor the delay of ascertaining the fact was intended by this Court to be imposed on the complainants. The decree of the court is therefore AFFIRMED.

But another order was made by the circuit court, of a very important nature, after the return of the case from this Court, and before the decree just affirmed, which appellants seek to have reversed.

At the first term of that court after the mandate was filed, the appellant proposed to pay all the money due on complainants' mortgage on condition that an order should be made discharging the receiver and placing the road and its appurtenances in the possession of appellants. Upon the hearing of this petition of appellant, the judges of the circuit court were divided in opinion, and the application was thereupon refused, as it was not a division upon a subject which is authorized to be certified to this Court for its action.

The appellant insists that this Court shall now review the order of the circuit court on this subject, and while conceding that it is not such an order as standing alone could be the subject of an appeal, contends that as the record is properly here on appeal from the final decree which we have just considered, the whole record is open for our inspection, and that it is our duty to correct the error of which he complains in this particular.

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There is no question but that many orders or decrees affecting materially the rights of the parties are made in the progress of a chancery suit which are not final in the sense of that word in its relation to appeals. The order of the court affirming or annulling a patent and referring the case to a master for an account is an instance. The adjudications which the court makes on exception to reports of masters, often involving the whole matter in litigation, are not final decrees, and in these and numerous other cases, if the court can only, on appeal, examine the final or last order or decree which gives the right of appeal, it is obvious that the entire benefit of an appeal must in many cases be lost.

The order complained of in this case seems to be one of this class. The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this Court, when the whole case is before it, on the record brought here by appeal from a final decree.

The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the circuit court with which this Court will not interfere.

As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment, or the discharge of a receiver for the mortgaged property, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court and by this Court also on appeal, and the amount of the debt definitely fixed by this Court, the right of the defendant

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to pay that sum and have a restoration of his property by discharge of the receiver is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error -- judicial error -- which this Court is bound to correct when the matter, as in this instance is fairly before it. That the order asked for by appellants should have been granted seems to us very clear.

It was objected by the complainants that the receiver should not be discharged, because the security of the road and its appurtenances was not sufficient to ensure the payment of their debt, and therefore its receipts should be applied to that purpose through the agency of a receiver.

The amount of complainants' debt, exclusive of the interest (which appellants proposed to pay), was one million of dollars, which, added to twelve hundred thousand dollars of prior mortgages, made the sum of two millions two hundred thousand dollars which the road and its appurtenances should be worth to secure complainants' debt. The roadbed on which complainants' mortgage is a lien is ninety-five miles from Milwaukee to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi River, which is one of the most valuable routes in the United States, both present and prospective. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars, and although these reports show a great falling off in the receiver's receipts since that time, the circumstances which have produced it are not of a character to incline us to continue the road in the possession of a receiver. The road was also in good repair. The decree which we have just affirmed authorizes the complainants, upon default in payment of any future installment of interest, to apply for and have an order of sale of the road under that decree. Under these circumstances, when appellants propose to pay to me $300,000 or

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$400,000 of complainants' debt before possession is given, it is idle to say that the security of their debt requires the road still to be detained from its lawful owner.

Sebre Howard objects to the discharge of a receiver, because he has a judgment of $16,000 against the La Crosse & Milwaukee Railroad Company, which he claims to be a lien on the road, and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged.

The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars worth of property -- of such peculiar character as railroad property is -- from its

rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this Court.

Selah Chamberlain objects to the discharge of the receiver, and particularly to delivering the property into possession of appellants, because he says he has a lien of over $700,000 on the road, and because that lien is secured by a lease which entitles him to the possession of the road.

Mr. Chamberlain had been in possession under his lease for some time prior to the appointment of a receiver, under a contract with the La Crosse & Milwaukee Railroad Company, by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which this suit is brought. This he had failed to do, and had actually abandoned the possession to the complainants in this suit, who were in possession at the time the receiver was appointed. His judgment was assailed and declared to be fraudulent and void by a decree of the district court of the United States. There is a question whether that decree

Page 69 U. S. 524

is binding as between him and the present appellants, which we do not intend to decide here; but we refer to this fact as having strong influence on the question of the propriety of keeping the road in the hands of a receiver for his benefit, or delivering it to him if the receiver is discharged. We shall endeavor to protect his interest, whatever it may be, in any order that shall be made on the subject.

As to the Milwaukee & St. Paul Railway Company, who also resisted this application, we do not see that they have any legal interest in the matter, and the interest which prompts their interference is not such as the court can consider on an application of this kind.

In reference to all these parties, we remark again that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers, the exercise of which can only be justified by the pressure of an absolute necessity. Such a necessity does not exist here, and the fact that so many years of the exercise of this power has not produced payment of any part of the debts which the receiver was appointed to secure is an irresistible argument against his longer continuance.

The order of the court dismissing this application is therefore, REVERSED, and the case remanded to the circuit court with instructions to ascertain the amount due to complainants

within some reasonable time to be fixed by said court and to make an order that on the payment of that sum, with the costs of complainants, into court, the receiver shall be discharged, and the railroad from Milwaukee to Portage City, with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road, be delivered by said receiver to the Milwaukee & Minnesota Railroad Company; but that no such discharge of the receiver or delivery of the road and its appurtenances shall be made until said company shall first enter into bond

Page 69 U. S. 525

with sufficient surety to pay to Sebre Howard and Selah Chamberlain all such sums as may come into the hands of said company, which shall hereafter be found to be rightfully applicable to the payment of their claims if they shall be established as liens on said road. And the appellants to recover their costs in this Court.

Action accordingly.

[Footnote 1]

See supra, page <|69 U.S. 283|>283.

[Footnote 2]

See supra, page <|69 U.S. 312|>312.

[Footnote 3]

Bronson v. La Crosse Railroad Company, 1 Wall. 405.

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

Subject: Corporate and Commercial; Insolvency

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.
>
> . . . . .
>
> 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.

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1997 ABCA 136
Alberta Court of Appeal

Royal Bank v. W. Got & Associates Electric Ltd.

1997 CarswellAlta 235, 1997 ABCA 136, [1997] 6 W.W.R. 715, [1997] A.J. No. 373, 141 W.A.C. 241, 196 A.R. 241, 47 C.B.R. (3d) 1, 70 A.C.W.S. (3d) 580

The Royal Bank of Canada, Plaintiff-Defendant by Counterclaim (Appellant) and W. Got & Associates Electric Ltd., Defendant/Plaintiff by Counterclaim (Respondent/Appellant by Cross-Appeal) and Donald E. Sanderlin, Defendant (Respondent) and Ernst & Whinney Inc. Gordon Mctavish and Robin D. Hood, Defendants by Counterclaim (Not Party to the Appeal)

Lieberman, McClung and Hetherington JJ.A.

Judgment: April 11, 1997
Docket: Edmonton Appeal 9403-0574-AC

Proceedings: affirming (1994), 17 Alta. L.R. (3d) 23 (Q.B.); additional reasons at (April 15, 1994), Doc. Edmonton 8403-17715 (Alta. Q.B.)

Counsel: *F.R. Foran, Q.C.* and *M.G. Massicotte*, for the Appellants.
J.A. Weir, Q.C., P.J. MacNaughton and *P.G. Kirman*, for the Respondents.

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

Headnote

Banking and Banks --- Tortious liability of banks — Miscellaneous grounds of liability
Bank applying for appointment of receiver without adequate notice to debtor — Bank's affidavit being misleading and incomplete — Bank's action constituting conversion and trespass to chattels.

Creditors and Debtors --- Payment by Debtor — Circumstances of payment — Time for payment — Payment on demand
Bank making demand one day before applying to appoint receiver — Demand not allowing time

for response — Bank effectively obtaining appointment without notice.

Damages --- Exemplary and punitive damages — Grounds for awarding exemplary and punitive damages — Trespass — Trespass to chattels
Bank obtaining appointment of receiver without reasonable notice and using misleading affidavit — Receiver selling debtor's assets soon after appointment — Bank's conduct being affront to administration of justice open to grave censure — Exemplary damages warranted.

Guarantee and Indemnity ---
Bank obtaining appointment of receiver without reasonable notice and using misleading affidavit — Receiver shutting down business and selling assets — Bank claiming against guarantor for outstanding amounts of loan — Bank's wrongful conduct destorying guarantor's equitable rights of subrogation and indemnity — Guarantor not liable to bank on guarantee.

Torts --- Conversion — What constituting
Bank having receiver appointed without adequate notice and using misleading affidavit — Receiver shutting down business and selling assets — Bank's conduct causing chain of events that led to business being wrongfully shut down — Bank liable in conversion.

Torts --- Conversion — Damages — Valuation — General
Bank having receiver appointed without adequate notice and using misleading affidavit — Receiver shutting down business and selling assets — Bank liable in conversion for full value of assets as well as amounts owed to creditors — Bank also liable for damages for future loss of profits.

Torts --- Trespass — Trespass to goods — General
Bank having receiver appointed without adequate notice and using misleading affidavit — Receiver shutting down business and selling assets — Bank's conduct causing chain of events that led to business being wrongfully shut down — Bank liable in trespass.

Practice --- Practice on interlocutory motions and applications — Notice of motion or application — Service — Time for
Bank making demand for payment one day before application for appointment of receiver — Debtors not receiving notice and debtor's solicitor attending without instructions from client — Application being made essentially ex parte so that debtor's solicitor could not present evidence — Bank not giving debtor reasonable notice.

Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — General
Bank applying for appointment of receiver — Bank's affidavit lacking candor and not making full disclosure — Defects in bank's evidence being egregious — Receiving order set aside.

The plaintiff bank loaned money to the defendant company and the loan was guaranteed by the defendant principal. The plaintiff did not advise the principal or the company's solicitor of its

intention to appoint a receiver but the bank's employee knew that both were attempting to speak with him. A demand letter was sent to the company's place of business 1 day before the application was made. Under the loan debenture any notice was to go to company's head office. The guarantee provided a mode of service which, if employed, would be deemed service, but did not require that the demand letter be posted to the guarantor. The guarantor did not see the demand letter. The application to appoint a receiver was made, in effect, ex parte, although the company's solicitor attended without instructions from his client. The receivership order was granted.

Within 3 weeks of the order, the receiver advised the company's bonding company and contractors that the company would not complete its outstanding bonded projects. The receiver terminated the company's employees and advised all creditors that the accounts payable were frozen. Nothing in the receivership order prohibited payment to creditors. The receiver then sold the company's inventory. The plaintiff brought an action against the defendants for the outstanding amounts of the loans. The company counterclaimed against the bank for loss of assets, future profits and goodwill, exemplary damages for wrongful seizure and improper and unlawful appointment of a receiver.

The action was dismissed and the counterclaim was allowed. The court held that where effective notice of the demand was not given, it could not be said that there was reasonable notice. The court found that the plaintiff intended to make the demand at the same time as the application for the appointment of a receiver. The demand was one which was not intended to allow time for a response. The plaintiff thus intended to, and in fact did, obtain the appointment with neither formal nor informal notice of its intention to do so.

The court held that reasonable notice of the receivership application was not given to the company's solicitor. If reasonable notice had been given, the solicitor could have obtained instructions and become more knowledgeable about the affairs between bank and company. He might have been able to present evidence in affidavit form for the expected cash flow of company in the near future. The basically ex parte nature of the application prevented that evidence from being presented. Once the receivership order was granted, the events that led to the closing of company had begun.

As the application was essentially ex parte, the plaintiff had a duty to act in the utmost good faith and make full, fair and candid disclosure of the facts. However, the court found that the order was obtained on the basis of flagrantly incomplete and misleading representations of fact contained in the plaintiff's affidavit. The deponent could not have been sure at the time of the swearing of the affidavit that the demand letter had come to defendants' attention. Paragraphs of the affidavit lacked candor and full disclosure. The defects were found to be serious, even egregious. When the paragraphs that were subject to criticism were left aside there was little left to invoke the equities in favour of making an order appointing a receiver. The statement of claim contained no allegations of fact that, if proved, would lay a foundation which could engage the court's jurisdiction to appoint a receiver. If there had been notice, and full, fair and candid

disclosure of facts, the order would not have been made. The plaintiff's conduct was the same as if it had made a demand and appointed a receiver privately without giving reasonable time to respond to the demand. It was liable for trespass to chattels and conversion. All of the steps were initiated by plaintiff or were the consequence of plaintiff's initiatives and it was therefore liable for all damages flowing therefrom. Liability began with the appointment of the receiver, as the appointment was made without having given the debtor reasonable time to respond to the demand. As soon as the receivership order was granted, company's future was set, and there was little hope for an appeal or challenge.

The court held that the guarantor was not liable on the guarantee. The wrongful conduct of the plaintiff towards the company had considerable impact on the magnitude or likelihood of the materialization of the risk which the guarantor had assumed. The plaintiff's breach put the principal debtor out of business and thus increased the guarantor's risk substantially and effectively destroyed the guarantor's equitable rights of subrogation and indemnity.

The court awarded the defendants the full value of the assets converted as at the date of the conversion, being the date of the appointment of the receiver. The company's assets sold by the receiver did not assist in valuing the inventory. Valuations were made for holdbacks, work in progress, advances to shareholders, advances recoverable from affiliated companies, goodwill and fixed assets. The debt to the plaintiff was included in the net value of the company, so that the company was entitled to damages for the amount of the indebtedness. The plaintiff was liable to the company for the amount due by the company to creditors other than bank. The company was also entitled to damages for future loss of profits. Significant future profits were unlikely and speculative, but were still capable of assessment

The court held that exemplary damages have been awarded where the conduct of the tortfeasor was intentional. The plaintiff's employee intentionally failed to contact the principal and the company's solicitor. The plaintiff's conduct from that point forward was open to grave censure. The plaintiff did not provide full disclosure in obtaining the order. Once the order was granted, the damage to the company was complete. The plaintiff's conduct seriously affronted the administration of justice and offended the ordinary standards of morality or decent conduct in the community to such a marked degree that censure by way of an award of exemplary damages was warranted

The plaintiff appealed.

Held: The appeal was dismissed.

Per Lieberman J.A. (McClung J.A. concurring): The findings of fact made by the trial judge with respect to the plaintiff's obligation to give reasonable notice of its demand, and the improper and misleading conduct of the plaintiff in obtaining the receiving order, were supported by the evidence and should not be interfered with. The trial judge's reasons with respect to the defendant principal not being liable on his guarantee were correct.

The order presented ex parte by the plaintiff was for both preservation and realization of assets. Ordinarily, one who causes or procures the wrongful appointment of a receiver is liable for all the damages caused thereby. Those damages should be charged to the person securing the appointment. It is not necessary to show that the appointment was procured maliciously or by fraud. The plaintiff was liable for the damages suffered by the company.

The trial judge reviewed the evidence thoroughly in order to compute the quantum of damages. His findings of fact, and the amounts he ordered, should not be interfered with. The tortious conduct of the plaintiff warranted the imposition of exemplary damages.

Per Hetherington J.A. (dissenting): The trial judge erred in concluding that the bank was liable to the company for trespass and conversion. The bank could not be held liable for acts of the receiver since the receiver was an agent of the court, not of the bank. The plaintiff also did not have a cause of action in equity against the bank.

However, the bank was liable to the plaintiff in breach of contract. It was implied in the debenture that the bank would give the plaintiff a reasonable time to pay the moneys secured by the debenture before taking steps to enforce the security. It was also implied that the bank would give the plaintiff notice before taking any steps to enforce this security. As the trial judge found that the bank breached both these implied obligations, it was liable in damages for breach of contract.

The plaintiff was entitled to damages so as to be put in as good a position as if the bank had not breached their contract by appointing the receiver. The quantum of damages and of interest on the damage award, as well as the issue of whether the plaintiff should have mitigated its loss, should be reffered back to the trial judge. However, the plaintiff was not entitled to punitive damages.

The trial judge did not err in concluding that the conduct of the bank was such to as to relieve the principal of liability on his guarantee. The trial judge had concluded that the bank's conduct in obtaining the appointment of the receiver at least contributed in a significant manner to the downfall of the plaintiff's business. This conduct materially increased the principal's risk and relieved him of liability.

Table of Authorities

Cases considered by *Lieberman J.A.* (McClung J.A. concurring):

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Bauer v. Bank of Montreal, [1980] 2 S.C.R. 102, 32 N.R. 191, 10 B.L.R. 209, 110 D.L.R. (3d) 424 (S.C.C.) — referred to

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Bankruptcy Act, R.S.C. 1970, c. B-3
Generally — referred to

Statutes considered by *Hetherington J.A.* (dissenting):

Judicature Act, R.S.A. 1980, c. J-1
s. 13(2) — referred to

APPEAL by plaintiff, in action to recover debt, from judgment allowing defendant's counterclaim for conversion and trespass to goods.

***Lieberman J.A.* (McClung J.A. concurring):**

1 The judgment that is the subject matter of this appeal and cross-appeal resulted from an action in which the Royal Bank of Canada (the Bank) sued W. Got & Associates Electric Ltd. (Got) and Donald E. Sanderlin (Sanderlin) for the repayment of monies advanced to Got pursuant to a debenture, and Sanderlin under the terms of a guarantee related thereto. The statement of claim, claiming the amount of $1,300,298.96 plus interest, was issued on May 31, 1984. The judgment of McDonald J. is reported in (1994), 17 Alta. L.R. (3d) 23 (Alta. Q.B.). Supplementary Reasons dealing with issues of Income Tax, interest and costs are reported in (1994), 18 Alta. L.R. (3d) 140 (Alta. Q.B.). All page references herein will relate to the report of the trial judge in (1994), 17 Alta. L.R. (3d) 23 (Alta. Q.B.).

2 For the following reasons I would dismiss both the appeal and the cross-appeal.

Proceedings Following the Issue of the Statement of Claim

3 On June 1, 1984, the day following the issuance of the statement of claim, the Bank applied *ex parte* to Master Funduk for an order appointing Ernst & Whinney Inc. receiver and manager of Got. The Master granted the order which is still extant.

4 On June 17, 1984 Bowen J., in chambers, granted an order increasing the powers of the receiver. That order was consented to by the solicitors for Got and Sanderlin. The order, in my view, granted the receiver the powers of both preservation and realization.

5 On June 28, 1984, Sanderlin filed a notice of motion requesting, *inter alia*, an order setting aside the Master's Order of June 1, 1984. On the same day Sanderlin filed a notice of appeal of the order of Bowen J. Neither of these appeals have been pursued.

6 On August 8, 1984, statement of defence in the action commenced by the Bank was filed on behalf of both Got and Sanderlin. Got also joined by counterclaim the Bank and the receiver, Ernst & Whinney. The counterclaim included as defendants by counterclaim two employees of the Bank — Gordon McTavish (McTavish) and Robin Hood (Hood). Statements of defence to the counterclaims were filed in due course. Thereafter a succession of orders authorizing the disposal of Got's assets were granted to the receiver. I shall refer to only one of those orders, that being the order of McDonald J. dated August 15, 1984 which read in part:

> "AND UPON being advised that Counsel for the Defendants is not objecting to this application based on the following expressed understanding between Counsel that granting of this Order:
>
> > (a) will not prejudice the right of the Defendants to raise all of the allegations contained in their Statement of Defence and Counterclaim at the trial of this action;"

7 On February 11, 1992, the Bank and the receiver applied to Feehan J. in chambers for an order striking out Got's and Sanderlin's statements of defence and counterclaims on the ground that the issues raised therein were *res judicata* in that the Master's Order of June 1, 1984 was still extant. In his written reasons dismissing that application, the learned chambers judge said:

> "Both the Royal Bank and the Receiver based their applications upon two grounds: the first is the contention that the issues raised in the Statement of Defence and Counterclaim are *res judicata*, having already been decided against Got. The Applicants submit that to allow the matter to proceed when it is *res judicata* is an abuse of the process of the Court. The second group is that to allow the Statement of Defence and Counterclaim to stand would, in effect, be allowing Got to set aside, discharge, or vary the Orders of Master Funduk, dated June 1, 1984, and Justice Bowen, dated June 6, 1984, without pursuing the proper appeal procedures. The Applicants contend that the time periods for launching appeals of these appeals of these Orders have run out long ago.
>
> . . . . .
>
> The evidence shows that attempts were made to appeal the Orders of both Master Funduk and Justice Bowen on June 29, 1984, within the proper time period, but that the Notices of Motion filed in this regard were discontinued. Got maintains these were not pursued because Counsel had reached an understanding whereby Got's rights to raise the allegations contained in its Statement of Defence and Counterclaim were preserved until the trial of this action. This understanding was reflected in the subsequent Consent Order of Justice McDonald dated August 15, 1984, and the Order of Justice O'Byrne, dated September 26, 1984 (filed June 28, 1985).
>
> . . . . .
>
> Clearly, the parties must have contemplated the preservation of some rights of the

> Defendants and Plaintiff by Counterclaim. Yet, to grant the Royal Bank's application at this point, would be to effectively preclude Got from ever coming to trial on its allegations. That is not the intent of any of these Orders.
>
> . . . . .
>
> What then is the effect of the preservation of rights clauses in the Orders noted above? The McDonald Order, having been granted at a time when the solicitors for the Royal Bank and the Receiver were one, must mean that the Defendants will continue to have the right to raise all of the allegations contained in their Statement of Defence and Counterclaim at the trial of this action. To date, there has been no trial nor any other opportunity for the Defendants to raise their allegations before the Court. The matters raised in the Statement of Defence and Counterclaim are not *res judicata*. Neither is this a circuitous attempt by the Defendants and Plaintiff by Counterclaim to appeal the Orders of Master Funduk and Justice O'Byrne.
>
> Further, there will be no prejudice suffered by the Plaintiffs in dismissing this application. The Royal Bank has been granted leave to amend its Pleadings, and did so, to properly respond to the issues raised by Got in its Statement of Defence and Counterclaim, including the issue of *res judicata*."

8 An appeal from the Order of Feehan J. came before the Court of Appeal of Alberta on November 3, 1992. By memorandum of judgment dated November 17, 1992, Fraser C.J.A., speaking for the court said:

> "For the sound reasons given by Feehan J. in his judgment, we dismiss the appeal."

The learned Chief Justice added:

> "... in our view the debtor's rights to appeal the Funduk and Bowen orders, which appeals had been filed as of the date of the McDonald order, were subsumed in the agreement made between the parties.
>
> We leave for another day the proposition that the appointment of a receiver by a court of original jurisdiction is a final order to which the doctrine of *res judicata* applies so as to preclude a debtor from challenging the validity of appointment of a receiver in the first instance even where the debtor defends on this basis the main action initiated by the creditor.
>
> Nothing in this decision precludes the Royal Bank from raising the *res judicata* argument at the forthcoming trial."

9 The action herein finally came on for trial before McDonald J. on April 7, 1993. The learned trial judge delivered judgment by way of comprehensive and detailed written reasons on

the February 7, 1994. The terms of the judgment are as follows:

> "1. The Plaintiff shall have judgment against W. Got & Associates Ltd. in the amount of $2,864,075.03 (principal of $1,295,000 plus interest as per Exhibit 10 to June 30, 1994).
>
> 2. The Plaintiff by Counterclaim shall have judgment against the Royal Bank of Canada as follows:

a) Indebtedness to Royal Bank	$2,864,075.03
b) Damages for net value of company plus interest	119,154.00
pursuant to the Judgment Interest Act (To June 30,	103,862.57
1984)	
c) Accounts payable plus interest at the contractual	532,491.00
rate of the Plaintiff (Royal Bank Prime +2%)	655,948.78
d) Income Tax plus interest at the contractual rate	83,200.00
of the Plaintiff (Royal Bank Prime +2%)	102,489.88
e) Deferred income taxes plus interest at the	162,737.00
contractual rate of the Plaintiff (Royal Bank Prime	200,467.49
+2%)	
f) Loss of profits plus interest pursuant to the	45,000.00
Judgment Interest Act (to June 30, 1994)	39,225.00
g) Exemplary damages	100,000.00
	$4,882,912.54

> being a net judgment of *$2,144,575.72*.
>
> 3. Interest will be calculated from May 31, 1984 until judgment.
>
> 4. The Defendant by Counterclaim Ernst & Whinney Inc. is adjudged to be jointly and severally liable to the extent of $10,000, with fault appointed 50% to each of the Plaintiff and the Defendant by Counterclaim Ernst & Whinney Inc. under paragraph 2.f) Loss of Profits above. (Calculated as $5,000 plus interest pursuant to the *Judgment Interest Act* being $4,358.33 for a total of $9,358.33 to June 30, 1994)."

The terms of the supplementary judgment on the issues of income tax, interest and costs must be added to the above.

The Master's Order of June 1, 1984

10 That the application to the Master for an Order appointing a receiver was intended to be *ex parte* is beyond question. After hearing evidence of the hearing before the Master during which a lawyer, who had no instructions from these respondents and by coincidence was present, intervened, the trial judge found that the Order granted was indeed *ex parte*. He also found that the Order was improperly obtained in that the Affidavit of McTavish, used in support

of the Bank's application for a court-appointed receiver, lacked candour and, at best, was misleading. He made the further finding that notice of the application should have been given to Got and that when McTavish swore the affidavit he did not know whether the demand contained in the statement of claim had been delivered to Got. I concur with these findings. The learned trial judge said at p. 44:

> "... The order was obtained ex parte, without genuine notice to Got, and on the basis of flagrantly incomplete and misleading representations of fact. There was no legal foundation for the order. This was a situation of the bank's making. If there had been notice, and full, fair and candid disclosure of the facts, the Master would not have been led to make the order. The bank intended to move with cat-like tread, and only the vigilance of the Master impeded its progress for a time. If the Master had had the benefit of submissions by counsel for Got, who had the benefit of genuine notice, of a statement of claim which set forth the facts upon which the bank relied, of an opportunity to meet the allegations contained in the affidavit on an *informed* basis and perhaps with the support of Mr. Sanderlin's own affidavit, and of sufficient time to reflect upon the law as it applied to the facts, the Master's vigilance would have been even more effective, and he would not have made the order."

and at p. 46:

> "In the present case the bank's acts were to all intents and purposes the same as if it had appointed a receiver privately. It demanded payment by letter. By para. 4 of its statement of claim the bank stated that:
>
> > Got, by the terms of the Debenture granted to and in favour of the Plaintiff a floating charge over the undertaking and all of the property and assets of Got, both present and future, real and personal, movable and immovable of whatsoever, nature and kind and wheresoever situate.
>
> By its statement of claim (para. 6) it declared 'the security created by the Debenture to be specifically charged against all of the assets of Got charged by the Debenture' and it said that it 'hereby applies to appoint a Receiver and Manager of the undertaking and all of the property and business of Got as charged by the Debenture.' It then in fact applied to the Court for the appointment of a Receiver and Manager. Thus, the bank's conduct was for all practical purposes to the same effect as if it had made a demand, and appointed a receiver privately without giving reasonable time to respond to the demand."

11 The trial judge, having made the analogy of the receivership order in the peculiar circumstances of this case to the appointment of a private receiver, then held that the Bank was exposed to damages in both trespass and conversion.

Res Judicata

12 The trial judge considered this issue in the context of whether Got or Sanderlin should have continued with the applications to vary the Master's order or should have pursued the notice of appeal that was filed on June 1, 1984. He held that the Master's Order "still stands". And that:

> "... there is no issue to be decided as to whether the Order is res judicata."

He then referred to his Order of August 15, 1984 and that portion of which stated the following:

> "... based on the following expressed understanding between Counsel that granting of this Order:
>
> (a) will not prejudice the right of the Defendant to raise all of the allegations contained in their Statement of Defence and Counterclaim at the trial of this action ..."

Grounds of Appeal

13 The grounds of appeal as set out in the appellant's (Bank's) factum are:

> "I. The learned trial judge erred in law in holding that the Bank was liable to Got in damages for trespass and conversion.
>
> II. The learned trial judge erred in law in failing to hold that the Receivership Order was *res judicata* so as to preclude Got from challenging the validity of the appointment of the Receiver and further, in failing to hold that the challenge by Got was a collateral attack on the Receivership Order.
>
> III. Alternatively, if the Bank was liable in trespass and conversion, the learned trial judge erred in failing to hold that Got owed a duty to move promptly to set aside the Receivership Order to mitigate its loss and by holding that no practical purpose would have been served by proceeding with an appeal or an application to set aside the Receivership Order or stay its effect.
>
> IV. The learned trial judge erred in concluding that there was no factual basis for the Receivership Order to have been granted, whether by virtue of the McTavish Affidavit or on the basis of the evidence adduced at trial.
>
> V. The learned trial judge erred in holding that in the circumstances a demand for payment was required or, alternatively, if required, that an effective demand was not made and that reasonable time to comply therewith was not provided by the Bank.

VI. The learned trial judge erred in assessing the damages:

(a) by overstating Got's assets and hence its damages by at least $121,550 plus interest;

(b) by taking into consideration the existence of Can-Am in determining the amount of Got's goodwill;

(c) in awarding damages by making 'every reasonable presumption ... in favour of [Got]';

(d) by finding Got to be a going concern, by *inter alia*, taking into consideration the said amount of $121,550, by taking into consideration the existence of Can-Am and by making 'every reasonable presumption ... in favour of [Got]';

(e) by applying the British Columbia Court of Appeal decision of *Bradshaw Construction Ltd. v. Bank of Nova Scotia*, [1993] 1 W.W.R. 596 (B.C. C.A.); and

(f) by finding that Got was entitled to damages for a loss of profits in addition to its net value on a going concern basis.

VII. The learned trial judge erred in awarding exemplary damages. Alternatively, the amount of exemplary damages was excessive.

VIII. The learned trial judge erred in holding that Sanderlin was not liable on the Guarantee."

14 I approach the grounds of appeal set out above by stating that in my view, the findings of fact made by the trial judge with respect to the improper and misleading conduct of the Bank in obtaining the receivership Order of June 1, 1984 are supported by the evidence and I would not interfere with them. That conduct includes the findings with respect to McTavish's affidavit, the Bank's intention, the characterization of the Order as "*ex exparte*" and the lack of notice.

Trespass and Conversion

15 All counsel concede that they can find no reported Canadian case wherein a party obtaining a court order for receivership is not protected from any liability arising from that order. In the peculiar circumstances of this case where the order was improperly obtained, the question arises whether the Bank is protected by the usual legal immunities. The appellant's counsel characterized the order as a preservation order. In my view, however, it was much more than that.

16 Paragraph 16 of the Order provides:

> "That the Receiver and Manager shall be at liberty to proceed to sell the assets of Got in the ordinary course of Got's business."

And paragraph 18(c) provides:

> "... to take steps for the preservation or realization of the undertaking, property and assets of Got..."

17 Certainly the Order that the Bank's solicitors presented *ex parte* to the Master was for both the preservation and realization of the assets. Although the Master struck out many of the provisions in the Order presented to him, the remainder and the provisions of the successive orders granting the receiver authority to dispose of Got's assets leads me to the conclusion that the Order cannot be characterized purely as a preservation order. Its provisions for the sale of the assets bears directly and properly on the learned trial judge's ruling as to the obligation of the Bank to give Got proper and adequate notice of its demands. In *Ronald Elwin Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.), the Supreme Court of Canada had occasion to consider the question of what is reasonable notice of a demand for payment in proceedings under the *Bankruptcy Act* that ultimately resulted in a wrongful seizure. Estey J. in delivering judgment for the Court said at p. 746:

> "The rule has long been that enunciated in *Massey v. Sladen* (1868), L.R. 4 Ex. 13, at p. 19: the debtor must be given 'some notice on which he might reasonably expect to be able to act'. The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment."

and at pp. 747-48:

> "... The Listers remained entitled to reasonable notice. The majority of the Court of Appeal concluded that the appellants were required either on these facts or generally to ask for time to pay. No authority was cited for the proposition and none was advanced in this Court. Here the Listers allowed the receiver to enter into possession and to proceed to liquidate Mr. Lister's assets and those of the Company on behalf of Dunlop. This technical or mechanical acquiescence in no way eliminated, by waiver, acquiescence or otherwise, the appellants' entitlement to reasonable notice. In the result therefore, Dunlop and its agents, its employees and the receiver were guilty of trespass and conversion."

18 In *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), [1992] 1 W.W.R. 577

(Alta. C.A.) appeal dismissed without reasons [1994] 1 S.C.R. 552 (S.C.C.), Fraser J.A., (as she then was) in considering the liability of a *privately appointed* receiver cited *Lister, supra,* and said at page 508:

> "When a creditor fails to provide reasonable notice to a debtor before appointing a receiver and seizing the debtor's assets, the creditor is liable in tort for trespass and conversion: ..."

19 In the case at bar, Got seeks to hold the Bank liable for the acts of a *court appointed* receiver. The learned trial judge, having found that the receivership Order was improperly obtained, concluded that the Bank was liable in trespass and conversion as well as in equity for the damages incurred by Got. He said at page 45:

> "In these circumstances it does not lie in the bank's mouth to invoke the order as protection from that liability in damages to which it would undoubtedly have been exposed if it had appointed a receiver privately. I do not say that the Master's Order is now to be set aside, as might have been done if it had been attacked within days after its making. Thus, there is no issue to be decided as to whether the Order is res judicata. The Order stands, and thus affords protection to the receiver for taking possession of Got's assets and for those of its acts which were countenanced by the Order, and it affords protection to third parties who dealt with the receiver in good faith and in reliance upon the Order. But the Order cannot protect the bank from what would otherwise be its liability."

20 The circumstances prevailing in this case are so unusual that it is not surprising that the learned trial judge did not cite any Canadian authority in reaching his conclusions. Counsel were also unable to refer to any authority on this point. American Courts have, however, dealt with similar situations. In my respectful view, it is most helpful for our courts to seek guidance from American courts, particularly on issues of a commercial nature that are common to our countries. Such guidance is frequently sought in the area of insurance law.

21 In *Huggins v. Green top Dairy Farms,* 273 P.2d 399 (1954), the Court recognized the seriousness and potentially fatal effect that the appointment of a receiver has on a debtor and stated at p. 404:

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

In my view, the above quotation accurately states the commercial realities arising from a receivership order.

22 I acknowledge that authorities from the United States are not binding authorities to be followed in Alberta, but I respectfully suggest that in the absence of any Canadian authority based upon facts such as those existing in this case they serve as a useful guide to the manner in which the issues herein may be resolved.

23 In *K.C. Oil Co. v. Harvest Oil & Gas Co.*, 194 P. 228 (Okl. S.C. 1920), the Court was dealing with a void receivership order and held that:

> ”It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver, to show that the appointment was procured maliciously and without probable cause.”

I note particularly that in that case the Court held that it was not necessary to show that the “wrongful” appointment was procured by fraud. While it is true that the Order in the case at bar had not been declared void it is significant that even where there was a “void” as opposed to a “voidable” Order, fraud was not necessary to set the Order aside. In the case before us, the trial judge did not find that the conduct of the appellant was fraudulent.

24 Another American decision that bears upon the problem before us is *Butler v. Thomasson*, 256 S.W.2d 936 (U.S. Tex. Civ. App. 1953) at p. 939. In that case, the Court referred to 75 C.J.S., *Receivers*, §431, wherein the following quotations are found at pages 1103-4:

> ”Ordinarily one who causes or procures the wrongful appointment of a receiver is liable for all the damages caused thereby, ... and the limit of recovery is the damages sustained as the actual, natural, and proximate result of the unwarranted appointment of the receiver.
>
> In accordance with the rule that the owner of property for which a receiver is wrongfully secured is entitled to all damages sustained by reason of the appointment, all losses, sustained, which would not otherwise have resulted, should be charged to the person securing the appointment.
>
> If property taken possession of is sold, the measure of damages is the value of the interest in such property of the person wrongfully dispossessed, and the measure of damages is the same as in other cases of conversion.”

25 It is submitted by appellant’s counsel that the American decisions to which I have referred have no relevance to the case at bar because the Order herein was not obtained by fraud and has at no time been declared void. In answer to this submission, I point out that in the *K.C. Oil* case, the Court did not hold that is was necessary to find that the wrongful appointment was

obtained by fraud in order to hold the petitioning creditor liable for trespass. In *Butler*, the Order in issue was described as illegal. There was no mention of it being void. In the case at bar, although the Master's Order is not void, it is under attack in the pleadings.

26 The reasoning in the American authorities is similar to that of the learned trial judge which I respectfully adopt. I conclude that the Bank is liable for the damages suffered by Got.

Res Judicata

27 Feehan J., in dismissing the application of the Bank to strike out Got's and Sanderlin's statement of defence and counterclaim, stated:

> "The matters raised in the statement of defence and counterclaim are not res judicata."

The Court of Appeal, in dismissing the appeal from this order, stated:

> "For the sound reasons given by Feehan J. in his judgment, we dismiss the appeal."

Obviously the Court of Appeal agreed with the chambers judge on the issue of *res judicata*. It is hard to reconcile this inevitable conclusion with the final paragraph of the Court's memorandum in which it is stated:

> "Nothing in this decision precludes the Royal Bank from raising the *res judicata* argument at the following trial."

28 It will be recalled that Feehan J. also preserved the right of the Bank to raise the issue of *res judicata* at the "forthcoming trial".

29 The only explanation that can be offered to explain the apparent contradiction between the finding that matters raised in the statement of defence and counterclaim were not *res judicata* and the reservation of the right of the Bank to raise the issue at trial is that in the event that issues not contained in the pleadings were to arise at trial the plea of *res judicata* would be open to the Bank with respect to those new issues.

30 For the reasons set out by Feehan J. and confirmed by the Court of Appeal, I am of the view that the issues raised in the pleadings are not *res judicata*.

31 Even if the issue of *res judicata* could at this stage be raised by the Bank, I would not give effect to it. It ill behooves the Bank whose conduct was found to be reprehensible to at this stage raise this issue. All third parties, other than the Bank, are protected under the Order but it would be against all principles of equity to allow the Bank to hide behind the Order which we

have found to have been improperly obtained. It is trite but accurate to say that "he who comes to equity must come with clean hands". The remedy of receivership is purely equitable in its origin. See *Hopkins v. Worcester & Birmingham Canal Proprietors* (1868), L.R. 6 Eq. 437 (Eng. Ch. Div.). In the case before us, the Bank did not have clean hands. The only other maxim of equity to which I would refer is:

> "Equity will not suffer a wrong to be without a remedy."

32 In my view, because of its conduct and of the totality of the proceedings and orders prior to trial, the Bank is estopped from raising the issue of *res judicata*.

33 Feehan J. dealt with the Bank's submission that Got and Sanderlin were, by issuing a statement of defence and counterclaim, making a collateral attack on the Master's Order and on the Order of O'Byrne J. He stated that those pleadings were not a collateral attack. The Court of Appeal confirmed "his sound reasons".

34 I concur with the reasons of the learned trial judge with respect to the potential delay that would be involved if Got had proceeded with the notice of appeal of the Master's Order rather than by countering the Bank's statement of claim with a statement of defense and counterclaim. In the circumstances, after again reviewing the chronology of the various proceedings leading up to the discharge of the receiver and the trial of the action, I do not consider the action taken by Got to be a collateral attack on the Master's Order.

McTavish's Affidavit

35 I repeat that I agree with the trial judge's conclusion that this affidavit was at the best misleading and that it lacked candour.

Notice

36 For the reasons set out above I agree with the trial judge that the Bank was obliged to give Got reasonable and adequate notice of its demand and that it failed to do so.

Breach of Contract

37 I respectfully agree with the reasons of Hetherington J.A. in which she found that the appellant was liable to the Respondent Got by reason of a breach of contract.

The Sanderlin Guarantee

38 Sanderlin, on April 25, 1980, guaranteed payment to the Bank of all debts and liabilities of Got. The trial judge in holding that Sanderlin was not liable to the Bank on this guarantee said at p. 86:

> "I concluded that, in principle and on the authorities, the wrongful conduct of the bank toward Got (to use Iacobucci J.'s words in *Pax Management* at p. 305) had considerable 'impact on the magnitude of likelihood of the materialization' of the risk which Mr. Sanderlin had assumed as guarantor. The bank's breach put the principle debtor out of business and thus increased the guarantor's risk in a way which was 'not plainly substantial' and which effectively destroyed the guarantor's equitable rights of subrogation and indemnity.
>
> Mr. Sanderlin is not liable on his guarantee."

I agree with the trial judge.

Liability of the Receiver Ernst and Whinney Inc.

39 Following an exhaustive review of the relevant evidence and authorities, McDonald J. found that the receiver had breached its fiduciary duties. He said at p. 95:

> "In my view, Ernst, by terminating the contracts without obtaining the advice and directions of the court permitting it to do so, breaches the fiduciary duty which it owed to all those classes of persons previously mentioned, including the shareholder, Mr. Sanderlin."

40 The receiver has not appealed that portion of the judgment.

41 There remains to be considered Got's cross-appeal that sets out the following grounds:

> "ISSUE I. The learned trial judge erred in law in not finding the Bank liable to Got with respect to the claims of Western Surety Company (Western Surety) against Got.
>
> ISSUE II. The learned trial judge erred in law by failing to declare the contractual rate of interest awarded to Got to be compounded monthly."

42 The trial judge held that the Bank was not liable to indemnify Got with respect to the claims of the bonding company, Western Surety Company (Western). Those claims are the

subject matter of two other actions, one of which is being held in suspense and the other resulting in an award of damages against Got, Sanderlin and an associated company, Cam-Am, for $469,889.49.

43 I shall leave aside the question of whether the trial judge should have allowed the cross-appellant to amend its pleadings as he did. In any case, he dismissed this portion of the cross-appeal with reasons which I respectfully adopt. He said at pp. 70-71:

> ”In the case of the first mentioned action, involving Can-Am contracts, I agree with Mr. Verville that no causal relationship whatever has been established between what the bank did and Can-Am’s decision to complete the contracts and ultimately (apparently) failing to complete them with the result that Western Surety had to do so. The evidence shows that the bank did not even know of the existence of a performance bond before the receivership order was obtained. Even if such a causal relationship had been established, and even if a copy of the judgment had been put in evidence, that judgment would not be evidence in this case that Can-Am (and Got and Mr. Sanderlin as indemnitors) was properly subject to a claim by Western Surety for the amount of the claim for which it succeeded in obtaining judgment. Just as, before the abolition in Alberta of the Rule of *Hollington v. F. Hewthorn & Co.*, [1943] K.B. 587 (C.A.), by an amendment to the *Alberta Evidence Act* now found in R.S.A. 1980 c. A-21, s. 27, evidence of a conviction was inadmissible as evidence of any fact in a subsequent civil proceeding arising from the same event, similarly evidence of a previous civil judgment (other than one which is res judicata) is inadmissible as evidence of the facts in a subsequent civil proceeding. See the discussion in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, pp. 1043-1046; *Cross on Evidence*, 5th ed. (1979), pp. 455-61, esp. at pp. 460-61.
>
> In the case of the second mentioned action, where there has not been a judgment in favour of Western Surety, counsel for Got have not enlightened me as to how, even if a causal relationship had been shown between what the bank did and Western Surety’s having completed the contracts in question (which it has not), there is any principle of law which would permit the court to grant the relief sought.
>
> Therefore the relief sought against the bank in regard to the matters involving Western Surety will not be granted.”

Damages

44 There was a plethora of evidence with respect to damages adduced at the trial of this action. The learned trial judge reviewed this evidence thoroughly at pp. 48-71 and in doing so arrived at the figures set out in his judgment. At p. 68, he specifically rejected the appellant’s submission that awarding damages for loss of profits was “tantamount to double counting.”

45 There was ample evidence to support the findings of fact upon which the trial judge based his computation of damages and I would not interfere with them or with the amounts he ordered.

46 It is argued by appellant's counsel that the learned trial judge did not consider the principles of mitigation in assessing damages. In my respectful view, contrary to the opinion expressed by my colleague Hetherington J.A., his findings of fact, although not specifically referring to mitigation, effectively excluded any possibility of the respondent being able to mitigate. He said at p. 48:

> "By the middle of August, 1984, no practical purpose would have been served by proceeding with an appeal. Even if the appeal had been successful, and the Order had been set aside, Got was finished as a viable business. Its contracts were gone; its staff were gone and its credit with suppliers was shattered; its credibility as a contractor was destroyed."

47 I would not disturb these findings of fact and would confirm the assessment of damages made by the trial judge following his thorough review of the evidence relating thereto.

Exemplary Damages

48 I approach this issue from two aspects; first the appellant's liability based on tort (conversion and trespass) and second the appellant's liability based on breach of contract.

49 The leading authority on exemplary damages in this Court is *Paragon Properties Ltd. v. Magna Investments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta. C.A.). In that case, although the Court was divided in the result, there was no dispute as to the principle to be applied when considering punitive or exemplary damages. At pp. 166-167, Clement J.A. says:

> "The point was dealt with by Johnson, J.A., in delivering the judgment of this Court in *McKinnon v. F.W. Woolworth Co. Ltd. et al.* (1968), 70 D.L.R. (2d) 280, 66 W.W.R. 205, wherein he holds that exemplary damages may still be awarded in this Province in cases where the conduct of the wrongdoer is, in the judgment of the Court, sufficiently censurable to invoke the principles upon which such awards rest, without the limitation imposed in England by *Rookes v. Barnard*.
>
> . . . . .
>
> It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred."

The above passage was quoted with approval by both McIntyre J. and Wilson J. in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.). In my respectful view, the

tortious conduct of the appellant as found by the learned trial judge is such that warrants the imposition of exemplary damages.

50 An award of exemplary damages in cases where liability is based upon breach of contract depends upon different considerations. In *Vorvis*, *supra*; McIntyre J., speaking for the majority, said at p. 1107:

> *"In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract*. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award. In tort cases, claims where a plaintiff asserts injury and damage caused by the defendant, the situation is different." (Emphasis Added.)

Wilson J., in dissent, said at p. 1130:

> "I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an 'actionable wrong'. In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not."

51 It is significant that in *Vorvis*, McIntyre J. did not "close the door" on the possibility of exemplary damages being awarded where liability is based on breach of contract. In my respectful view, the conduct of the Bank in the case at bar was "unusual" and was such as to allow the imposition of exemplary damages even if the liability is based upon breach of contract. In Waddams, *The Law of Contract*, 3rd ed. (1993), the learned author writes at p. 509:

> "In *Vorvis v. Insurance Corp. of British Columbia*, the majority of the Supreme Court of Canada, while refusing exemplary damages in the particular case (one of wrongful dismissal), left open the possibility of exemplary damages for breach of contract in 'very unusual cases.'
>
> It is suggested that where the plaintiff has a personal interest in performance of the sort that a court would protect by a decree of specific performance, or by an injunction to restrain breach, a case can be made for deterring wrongful interference with such interests."

52 The conduct of the appellants as found by the learned trial judge is such that warrants the imposition of punitive or exemplary damages. The amount awarded is, in my view, not excessive and I would confirm it.

Costs

53 Following oral argument herein, counsel were requested to file additional submissions. I award costs to the respondent in this connection in the amount of $4,000.00 plus disbursements.

Hetherington J.A. **(dissenting):**

Introduction

54 The Royal Bank of Canada sued W. Got & Associates Electric Ltd., alleging that Got was in default under a debenture. Among other things, the Bank asked for

- judgment against Got in the amount of $1,300,298.96 plus interest; and
- the appointment of a receiver and manager of the business of Got.

55 In the same action, the Bank sued Donald E. Sanderlin on his guarantee of the indebtedness of Got to the Bank. It asked for judgment against Mr. Sanderlin in the amount set out above plus interest.

56 The day after it issued the statement of claim in this action, the Bank applied to Master Funduk for the appointment of the receiver and manager. This application was made under s. 13(2) of the *Judicature Act*, R.S.A. 1980, c. J-1, and was granted.

57 Got and Mr. Sanderlin defended the action. Got alone counterclaimed against the Bank and others seeking damages for negligence, trespass and conversion. The action was tried by Mr. Justice McDonald, then of the Court of Queen's Bench.

58 On the claim, Mr. Justice McDonald gave judgment in favour of the Bank against Got for $2,864,075.03, which included principal and interest. He found that Mr. Sanderlin was not liable on his guarantee. On the counterclaim, he gave judgment in favour of Got against the Bank in the amount of $4,882,912.54 plus interest. His written reasons for judgment are reported at (1994), 17 Alta.L.R. (3d) 23 (Alta. Q.B.). Supplementary reasons for judgment relating to damages, interest and costs are reported at (1994), 18 Alta.L.R. (3d) 140 (Alta. Q.B.).

59 The Bank appealed from this judgment, and Got gave notice that at the hearing of the appeal it would ask the court to vary the judgment in certain particulars.

Issues

60 The issues in this appeal are set out below in the form of questions, with my answers to them:

Got and Mr. Sanderlin

(1) Was the validity of the order appointing the receiver and manager *res judicata* at trial? No.

Got

Liability

(2) Did the trial judge err in concluding that the Bank was liable to Got for trespass and conversion? Yes.

(3) Do the equitable maxims relied on by Got give it a cause of action against the Bank in damages? No.

(4) Is the Bank liable to Got for breach of contract? Yes.

Damages

(5) How should Got's damages be calculated? On the basis that Got should be put in as good a position as if the contract had not been breached.

(6) Could Got have mitigated its loss? To be determined.

(7) Should the Bank pay punitive damages to Got? No.

Interest

(8) Did the trial judge err in determining the amount of interest which the Bank was obliged to pay to Got? Not necessary to answer.

Mr. Sanderlin

(9) Did the trial judge err in concluding that the conduct of the Bank was such as to relieve Mr. Sanderlin of liability on his guarantee? No.

Facts

61 The debenture executed by Got in favour of the Bank is dated May 27, 1980. Mr.

Sanderlin signed it as president and director of the company; Mr. Alan A. Covey signed as secretary and director.

62 In his reasons for judgment (pp. 73 to 81) the trial judge described in considerable detail the relationship between the Bank on the one hand, and Got and Mr. Sanderlin on the other, up to around 3:00 p.m. on the 30th of May, 1984. It is sufficient for the purposes of this appeal to say that at that time or shortly thereafter, the Bank returned NSF payroll cheques made by Got totalling $33,000. Pursuant to a general assignment of book debts, it also sent notices by courier to all of Got's creditors, telling them that any payments should be made to the Bank. The trial judge found that up to this point the Bank's conduct was not open to criticism (at p. 81).

63 A chronology of the events which followed is set out in Appendix A to these reasons. I will enlarge on the significant parts of it in the paragraphs that follow.

64 By letter dated the 31st of May and addressed to Got and Mr. Sanderlin, the Bank demanded immediate payment from Got of its loans in the sum of $1,300,298.96. It also demanded immediate payment of that sum from Mr. Sanderlin. It did not say what it would do if its demands were not met.

65 On the 31st of May, a copy of this letter was delivered to a receptionist at 357 - 10310 Jasper Avenue in Edmonton. This was the address of the head office of Got according to the debenture (AB p. 2967). The trial judge erred in saying that it was not (at p. 35). As well, it was the address at which the debenture permitted the Bank to give notice to Got (AB p. 2982). On the same day another copy of the letter was delivered to Mr. Sanderlin's secretary.

66 The statement of claim in this action was also issued on May 31. And on that date Mr. Gordon McTavish, a Bank employee, swore an affidavit in support of the application of the Bank for the appointment of a receiver and manager (AB pp. 3153 to 3160). The trial judge found (at pp. 35 to 39) that this affidavit lacked candour and was misleading. This was a reasonable finding in light of the evidence.

67 Mr. Covey testified as to the circumstances under which the Bank obtained the order appointing a receiver and manager of the business of Got. At that time he was solicitor for Got and Mr. Sanderlin. Mr. Donald Bailey, who was the Bank's solicitor, did not testify.

68 During the afternoon of the 31st of May, Mr. Covey ran into Mr. Bailey in an office and retail complex in Edmonton. Mr. Bailey told Mr. Covey that he was on his way to apply for an order appointing a receiver and manager of the business of Got. Mr. Covey replied that he should have been given notice of the application, and should have an opportunity to get instructions.

69 Mr. Bailey was not able to make his application for the appointment of a receiver and

manager that afternoon, but appeared before Master Funduk the following morning, that is, on the 1st of June. It appears that Master Funduk required Mr. Bailey to give notice to Mr. Covey. Both solicitors appeared before the master that afternoon.

70 Mr. Covey testified that he had not been able to contact Mr. Sanderlin to get instructions from him about the application. The trial judge found further (at pp. 32, 33) that Mr. Covey "did not have knowledge of Got's and Mr. Sanderlin's affairs in sufficient detail for him to contest many of the statements made in Mr. McTavish's affidavit."

71 As a result, the trial judge found (at p. 34) that the Bank's application for the appointment of a receiver and manager was essentially *ex parte*. With respect, I do not entirely agree. An *ex parte* application is one made by or on behalf of one party, in the absence of another party or anyone representing that party. It cannot be said that the Bank's application was made in the absence of any representative of Got. Mr. Covey was there and spoke in opposition to it. He was the secretary and director of the company. He could certainly speak for it, whether he had instructions to act as its solicitor or not. It might be said that the application was *ex parte* in relation to Mr. Sanderlin.

72 It is true, however, that Mr. Covey was seriously hampered in his opposition to the application because he did not have the information he needed, and had not been able to get in touch with Mr. Sanderlin to get it. Mr. Covey asked that the application be adjourned so that he could cross-examine Mr. McTavish. Master Funduk refused this request because the proposed order provided that until the 21st of June, the receiver and manager was only to take possession of the property, assets and undertaking of Got, and to carry on and operate the business of the company.

73 After a lengthy hearing, Master Funduk appointed the receiver and manager. The provisions just described were left in the order prepared by Mr. Bailey. However, many other provisisons were deleted. A copy of the order is marked as Appendix B to these reasons. Taking into account the deletions, the order was, as counsel for the Bank contended, a preservation order.

74 It is true that paragraph 18.(c) refers to realization as well as preservation. The relevant parts of that paragraph read:

> "18. That the Receiver and Manager shall be at liberty if in its judgment it is necessary or desirable, without further reference to this Honourable Court:
>
> . . . . .
>
> (c) to take steps for the preservation or realization of the undertaking, property and assets of Got, ..."

However, that paragraph must be read in the light of Paragraph 16, which reads:

> ”16. That the Receiver and Manager shall be at liberty to sell the assets of Got, *in the ordinary course of Got’s business.*” (Underlined part handwritten. Deletions and handwritten addition initialed by Master Funduk.)

As I have said, in my opinion the order made by Master Funduk was a preservation order.

75 Paragraph 2 of the order contains a declaration that the security constituted by the debenture had become enforceable. This has not been disputed.

76 The trial judge concluded that if Mr. McTavish had been candid and made full disclosure in his affidavit, Master Funduk could not properly have appointed a receiver and manager of the business of Got. He said (at p. 38):

> ”In my opinion the net effect of the paragraphs which were misleading, failed to disclose material facts and lacked candour, was much more than marginal. There was bound to be a cumulative effect upon the Master’s decision as to whether it was ‘just or convenient’ to make an interlocutory order appointing a receiver (that being the test stated in s. 13(2) of the *Judicature Act*, R.S.A. 1980, c. J-l). If in respect of the matters dealt with in those paragraphs there had been candour, full disclosure and an absence of misleading statements, in my view it would have been an abuse of discretion to grant the order, even with the limits that were added to it and the deletions made from it as a result of Mr. Covey’s representations. For, if there had been full and not misleading disclosure, it would have been apparent that there was not that degree of urgency which would be required to justify the making of such an order in circumstances in which Mr. Covey had not had a genuine opportunity to obtain instructions from his client, and in which there was no notice of motion specifying the grounds upon which the order was being sought, and the statement of claim and affidavit had not been served upon the defendants.”

77 This was a reasonable conclusion in light of the evidence. Under the debenture, the Bank could have appointed a receiver (AB at p. 2978). It did not have to ask the court to appoint one. Courts are reluctant to appoint receivers at the request of parties which themselves have the power to appoint. They will do so only in exceptional circumstances. (See *Canadian Imperial Bank of Commerce v. El Dorado Holdings Ltd.*, unreported, (October 14, 1983), Doc. 15672 (Alta. C.A.) (available in [1983] A.U.D. 396), at p. 3.) Here there were no exceptional circumstances, although the affidavit of Mr. McTavish suggested that there were.

78 Further, the trial judge found that the Bank did not give Got or Mr. Sanderlin a reasonable time to respond to its demand, nor notice of its intention to apply for an order appointing a receiver and manager. He said (at p. 43) that the Bank moved

> "... with no intention at all of seeing that a genuine demand be given, or that any time (much less, reasonable time) be given to respond, or that any notice be given of the application to the court for the appointment of a receiver."

This finding is amply supported by the evidence.

79 The order made by Master Funduk provided that any interested party could apply to the court on 2 clear days', notice to any other interested party, for "any order or other relief as may be advised". Got did not at any time ask the court to set aside or vary Master Funduk's order. Nor did it appeal from it.

80 On the 6th of June, 1984, Mr. Justice Bowen made an order expanding the powers of the receiver and manager. Mr. Covey consented to this order as "Solicitor for the Defendant". There is nothing in the order to indicate which defendant he represented. On the 29th of June, 1984, Mr. Sanderlin filed a notice of application for an extension of time to appeal and a notice of appeal from this order. He did not proceed with either the application or the appeal.

81 On the 29th of June, 1984, Mr. Sanderlin also filed a notice of motion to set aside the order of Master Funduk. He did not proceed with this application.

82 On the 9th of August, Mr. Sanderlin and Got filed a statement of defence in this action, and Got filed a counterclaim against the Bank and others. It alleged negligence, trespass and conversion, and asked for damages. It did not ask that the order appointing the receiver and manager be set aside or varied.

83 On the 15th of August, Mr. Justice McDonald made an order increasing the amount which the receiver and manager could borrow. Counsel for Got and Mr. Sanderlin did not object, based on an understanding between counsel which is set out in the preamble to the order. It reads in part as follows (AB at p. 32):

> "... Counsel for the Defendants is not objecting to this application based on the following expressed understanding between Counsel that granting of this Order:
>
> > (a) will not prejudice the right of the Defendants to raise all of the allegations *contained in their Statement of Defence and Counterclaim* at the trial of this action;
> >
> > (b) is not an admission on the part of the Defendants that the Plaintiff and the Receiver and Manager aforesaid have acted properly in placing the Defendant, W. Got & Associates Electric Ltd., in receivership and in the administration of the receivership;"
>
> . . . . .
>
> (Emphasis added)

84 On the 26th of September, Mr. Justice O'Byrne made an order approving the sale of certain chattel assets of Got. His order contained the following provision (AB at p. 35):

> "2. This Order is granted expressly without prejudice to the rights of the Defendants, W. Got & Associates Electric Ltd. and Donald E. Sanderlin, against The Royal Bank of Canada ... *in the counterclaim* herein, ..." (Emphasis added)

85 On the 3rd of December, Mr. Justice Dechene made an order permitting the receiver and manager to sell the remaining assets of Got.

86 On the 18th of May, 1990, Mr. Justice Dea made an order discharging the receiver and manager. This order contained the following provision (AB 52):

> "6. This Order is granted expressly without prejudice to the rights of the Defendants, W. Got & Associates Electric Ltd. and Donald E. Sanderlin or the Plaintiff by Counterclaim, W. Got & Associates Electric Ltd. *in the action herein."* (Emphasis added)

87 I turn now to the issues.

Got and Mr. Sanderlin

Liability

(1) Was the validity of the order appointing the receiver and manager res judicata at trial?

88 On the 11th of February, 1992, Mr. Justice Feehan denied the application of the Bank to strike the statement of defence of Mr. Sanderlin and Got, and certain paragraphs of the counterclaim of Got, on the ground that the issues they raised were *res judicata*.

89 On the 3rd of November, this court dismissed the Bank's appeal from the order of Mr. Justice Feehan. In doing so it said (AB at pp. 74, 75):

> "For the sound reasons given by Feehan J. in his judgment, we dismiss the appeal. We agree with him that the preservation of the debtor's rights, as expressed in the McDonald order and reiterated in subsequent orders, extended to the right to challenge at trial the receiver's appointment as well as its handling of the receivership. This is because in our view the debtor's rights to appeal the Funduk and Bowen orders, which appeals had been filed as of the date of the McDonald order, were subsumed in the agreement made between the parties.
>
> . . . . .

> Nothing in this decision precludes the Royal Bank from raising the *res judicata* argument at the forthcoming trial."

90 The trial judge was of the view that he did not need to decide whether the order appointing the receiver and manager was *res judicata,* because there was then no question of setting it aside. He said at p. 45:

> "I do not say that the Master's Order is now to be set aside, as might have been done if it had been attacked within days after its making. Thus, there is no issue to be decided as to whether the Order is res judicata."

91 Before us, counsel for the Bank argued that

> "The learned trial judge erred in law in failing to hold that the Receivership Order was *res judicata* so as to preclude Got from challenging the validity of the appointment of the Receiver and further, in failing to hold that the challenge by Got was a collateral attack on the Receivership Order."

However, even if I were persuaded by the submissions of the Bank in this regard, I could not give effect to them. I am bound by the decision of this court quoted above. In it the court held that Got and Mr. Sanderlin were entitled to challenge at trial the receiver's appointment. No evidence has come to light since the 3rd of November, 1992, which would affect this decision.

92 The validity of the order appointing the receiver and manager was therefore not *res judicata* at trial.

93 However, while they have challenged the validity of the order appointing the receiver and manager, Got and Mr. Sanderlin have never asked any court to set it aside.

Got

Liability

(2) Did the trial judge err in concluding that the Bank was liable to Got for trespass and conversion?

94 Got does not suggest that the Bank itself did anything which might be considered trespass or conversion. It complains of the conduct of the receiver and manager in this regard.

95 The trial judge said (at p. 40):

> "If this had been a case of the debenture holder appointing a private receiver, and if reasonable notice of the intention to enforce its rights under the debenture had not been given, the debtor (Got) would have had an action for damages against the bank for trespass and conversion, by virtue of the acts of the receiver, the bank's agent."

He then cited and quoted from the case of *Ronald Elwin Lister Ltd. v. Dunlop Canada Ltd.* (1982), 135 D.L.R. (3d) 1 (S.C.C.).

96 I need not decide whether this statement by the trial judge is correct in the light of paragraph 9 of the debenture (AB at p. 2978). That paragraph says that at any time after the security provided for in the debenture becomes enforceable, the Bank may appoint a receiver, and that the receiver shall be deemed to be the agent of Got. I need not consider this because the Bank did not appoint a receiver.

97 The Bank applied for and obtained a court order appointing a receiver and manager under s. 13(2) of the *Judicature Act*. The receiver and manager was then, not an agent of the Bank, but an officer of the court (See *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577 (Alta. C.A.), at p. 592). In these circumstances the Bank could not be held liable for acts of the receiver and manager as its principal.

98 It appears from the reasons of the trial judge that in the circumstances of this case, and in relation to Got's claim against the Bank, he thought that he could ignore the court order appointing the receiver and manager. He said (at p. 44):

> "The conduct of the bank, however unacceptable it may have been in equity, affords no defence to the bank's claim for judgment for the loans and interest as claimed. However, its conduct will be among the matters considered when deciding the counterclaim. For, in regard to the counterclaim by Got, in my view the fact that an Order was made appointing the receiver cannot be used as a shield by the bank in defending against Got's counterclaim."

And (at p. 45):

> "In these circumstances it does not lie in the bank's mouth to invoke the order as protection from that liability in damages to which it would undoubtedly have been exposed if it had appointed a receiver privately."

99 The trial judge did not cite any authority for the proposition, implicit in the passages quoted above, that he could ignore the court order appointing the receiver and manager, and I cannot agree with it. He could not simply pretend that a subsisting order did not exist. And as long as that order remained in effect, the receiver and manager was an officer of the court, not the agent of the Bank. There was then no legal basis on which the trial judge could find the Bank

liable in trespass and conversion for the acts of the receiver and manager.

100 The situation might have been different if the trial judge had set aside the order appointing the receiver and manager, but he did not. Indeed Got did not at anytime ask the court to set aside the order appointing the receiver and manager.

101 The trial judge therefore erred in concluding that the Bank was liable to Got in damages for acts of trespass and conversion committed by the receiver and manager.

(3) Do the equitable maxims relied on by Got give it a cause of action against the Bank in damages?

102 Counsel for Got argued that the decision of the trial judge was in accordance with three equitable maxims, that is,

(a) He who comes to equity must come with clean hands;

(b) Equity will not suffer a wrong to be without a remedy; and

(c) Equity looks to substance rather than form.

103 The appointment of the receiver and manager was an equitable remedy. The maxims set out above might, therefore, have been relevant when that appointment was made, or if Got had at any time asked that the appointment be set aside. They are not relevant to Got's counterclaim, because it does not expressly or by implication contain a claim for equitable relief. It does not disclose a cause of action in equity. There is no authority for the proposition that these maxims can, by themselves, give rise to an equitable cause of action.

(4) Is the Bank liable to Got for breach of contract?

104 The remaining question is whether the Bank is liable to Got for breach of contract. In my opinion, the counterclaim of Got would support such a claim. The trial judge did not deal with this question because he found the Bank liable for the torts of trespass and conversion.

105 Paragraph 7. of the debenture executed by Got in favour of the Bank is relevant in this regard. It reads in part as follows (AB at pp. 2975 to 2977):

> "7. The principal, interest and other moneys secured by this Debenture shall become immediately due and payable, whether with or without prior demand therefore, and the security hereby constituted shall become enforceable in each and every of the following

events:

> (a) if the Company makes a default in the payment, in whole or in part, of the principal of or interest on this Debenture or any other moneys secured hereby;
>
> . . . . .
>
> (j) if the Company makes default in the due payment, performance or observance, in whole or in part, of any debt, liability or obligation of the Company to the Holder, whether secured hereby or otherwise."

106 There is no requirement of notice in this clause. Nor was there a requirement. of notice in the clause before the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, *supra*. That clause read (at p. 5):

> "6.1 Notwithstanding anything to the contrary contained in the Debenture and without prejudice to the right of the holder of this Debenture to demand payment at any time of the principal and interest hereby secured, all unpaid principal and interest owing under this Debenture shall forthwith become due and payable and the security hereby constituted shall become enforceable in each and every of the events following:
>
> (i) if the Company makes default in the payment of the principal of the Debenture when the same becomes payable;
>
> . . . . .
>
> (xix)if the Company fails to pay to Dunlop any monies due to Dunlop as and when they become due and payable;"

107 In that case, Mr. Justice Estey, writing for the court, said (at pp. 16 and 17):

> "The rule has long been enunciated in *Massey v. Sladen* (1868), L.R. 4 Ex. 13 at p. 19, that the debtor must be given 'some notice on which he might reasonably expect to be able to act'. The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but none the less real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.

108 This authority (*Massey*) relates back to the dictum of Cockburn C.J. in *Toms v. Wilson* (1863), 4 B. & S. 442 at p. 454, (1863), 122 E.R. 524 at p. 529. Blackburn J., in concurring, put

the matter directly:

> But, when, by the express terms of the instrument creating the debt, payment is to be made 'immediately upon demand in writing, it must be construed to mean within a reasonable time.

Baron Pigott in *Massey, supra*, stated (at p. 19):

> It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act."

109 The court held that Dunlop Canada Ltd. should have given Ronald Elwyn Lister Ltd. a reasonable time to pay the moneys secured by the debenture, before it took steps to enforce its security. Dunlop had appointed a receiver. It was therefore liable for the torts of trespass and conversion committed by its agent, the receiver. It could, as well, have been found liable for breach of the debenture. See *McLachlan v. Canadian Imperial Bank of Commerce* (1989), 35 B.C.L.R. (2d) 100 (B.C. C.A.) at p. 105; and *Murano v. Bank of Montreal* (1995), 31 C.B.R. (3d) 1 (Ont. Gen. Div. [Commercial List]) at p. 31.

110 I am persuaded by the reasoning and authority of *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* that I should imply in the debenture executed by Got in favour of the Bank, two provisions. The first is a requirement that the Bank give Got a reasonable time to pay the moneys secured by the debenture, before taking steps to enforce the security provided for in the the debenture. The second is that the Bank should give Got notice of the steps it proposes to take to enforce this security, unless it has some good reason for not giving notice.

111 The trial judge found that the Bank did not give Got a reasonable time to respond to its demand for payment, nor reasonable notice of its intention to apply for an order appointing a receiver and manager. This finding is amply supported by the evidence. The Bank therefore breached its contract with Got in these two ways.

Damages

(5) How should Got's damages be calculated?

112 Got is entitled to be put in as good a position, so far as money can do it, as if the Bank had not breached their contract. S. M. Waddams, *The Law of Damages*, 2nd ed. (Canada Law

Book Inc., 1995) para. 5.30.

113 The trial judge found that the Bank did not give Got reasonable notice of its application for the appointment of a receiver and manager. I have found that in failing to do this, the Bank breached an implied term of the debenture. The trial judge also found that if Got had received reasonable notice of the application for the appointment of a receiver and manager, it could have opposed that application successfully, and Master Funduk would not have made the appointment.

114 In these circumstances the damages awarded to Got must put it in as good a position, so far as money can do it, as if Master Funduk had not appointed the receiver and manager. The trial judge did not assess damages in this way. He assessed damages for trespass and conversion. In particular, he said (at p. 45) that Got's "... damages for conversion will represent the full value of the property converted by the bank to its own use as well as any additional damage which it may have suffered by reason of the conversion which is not too remote. ..." This is the test he applied (See p. 48). It is not the same as the test for damages for breach of contract. I do not know whether the result would be the same or not. I would therefore return this matter to the Court of Queen's Bench so that Got's damages can be assessed on this basis.

(6) Could Got have mitigated its loss?

115 Counsel for the Bank argued that Got could not recover for losses which arose as a result of wrongdoing by the Bank, but which could have been avoided had Got taken reasonable steps to minimize the loss. Counsel for Got did not dispute this.

116 However, counsel for the Bank contended that it would have been reasonable for Got to move promptly to set aside the order appointing the receiver and manager. Counsel for Got disagreed.

117 Counsel for Got relied on findings of fact made by the trial judge in the following passage from his reasons for judgment (at pp. 47 and 48):

> "It is said by counsel for the bank that if there were such serious failures on the bank's part in the procedure used to apply for the June 1st Order and in the affidavit of Mr. McTavish upon which the bank relied in making the application, Got and its solicitors would have moved to set aside the Order or appealed from the making of the Order. The answer to that argument is this: Once the receivership order was made on June 1 without Got being given reasonable notice of the bank's calling the loan, *the damage was done*. If an application had been made to set aside the Order, or to stay it, Got's solicitor would have had to file an affidavit by Mr. Sanderlin and perhaps affidavits by Mr. Mowbrey and other persons. No doubt the bank's solicitors would have exercised their right to cross-examine the

> deponents. And Got's solicitor would have wanted to cross-examine Mr. McTavish on his affidavit. Mr. Hood had returned from his course in Toronto and Got's solicitor might have sought to examine him for the purpose of using his evidence on the motion, bearing in mind that the hasty steps taken by the bank at the end of May were not consistent with Mr. Hood's intentions before he departed for Toronto. All of this would have taken time: Contrary to the suggestion of the bank's counsel, it could not realistically have been done on Monday, June 4. It is also unrealistic to accept Mr. Verville's suggestion that on June 4 a stay could have been applied for. *The reality is that an application to set aside the Order, or to say (sic) its effect, would have taken weeks*. Alternatively, Got could appeal the Order. Got in fact chose that route, ... *By the middle of August, 1984, no practical purpose would have been served by proceeding with an appeal. Even if the appeal had been successful, and the Order had been set aside, Got was finished as a viable business*. .... For these reasons it cannot be said that Got's complaints about the way the receivership order was obtained cannot now be heard because they were not pressed home during the summer of 1984." (Emphasis added)

118 First, the last sentence quoted above makes it clear that the trial judge was not discussing mitigation of loss in this passage. In fact, he did not ever discuss this. However, the statements quoted above are relevant to the question of whether Got could have mitigated its loss.

119 Second, Got neither appealed from, nor applied to set aside, the order appointing the receiver and manager. On the 29th of June, 1984, 28 days after this order was granted, Mr. Sanderlin filed a notice of motion to set it aside. On the same day he filed a notice of application for extension of time to appeal and notice of appeal from the order of Mr. Justice Bowen giving the receiver and manager further powers. He did not proceed with either application.

120 Third, the trial judge said that once the order appointing the receiver and manager was made, that is, on the 1st of June, 1984, "the damage was done". He did not say what damage he had in mind, and I have not been able to find any evidence which is of assistance in determining this.

121 In the same vein, the trial judge said that by the middle of August, 1984, no practical purpose would have been served by proceeding with an appeal. He said that "Got was finished as a viable business." However, no assets of the business operated by Got were sold, other than in the ordinary course of business, until after the order made by Mr. Justice O'Byrne on the 26th of September, 1984.

122 Fourth, the trial judge said that an application to set aside or stay the order appointing the receiver and manager "would have taken weeks". However, the order itself provided that any interested party could apply to the court on 2 clear days notice to any other interested party, for "any order or other relief as may be advised". Got could have made such an application on, or

during the week of, June 4, 1984. Pending a final determination on the validity of the order, the court could have stayed its effect, or at least ensured that it remained a pure preservation order. These directions might have mitigated Got's loss. The court might also have required from the Bank an undertaking as to damages.

123 In my opinion it would have been reasonable for Got to move promptly to set aside the order appointing the receiver and manager. If it had, would it have mitigated its loss? The trial judge did not consider this question. It should therefore be dealt with by the Court of Queen's Bench in assessing the damages for which the Bank is liable to Got as a result of its breach of contract.

(7) Should the Bank pay punitive damages to Got?

124 In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), the Supreme Court held that punitive damages can be awarded in cases of breach of contract. However, the effect of the decision of Mr. Justice McIntyre, writing for the majority, appears to be that this can only be done where the conduct complained of, by itself, constitutes an actionable wrong other than the breach of contract. In this case none of the conduct complained of constitutes an actionable wrong, except that which I have found to be in breach of the Bank's contract with Got. I am therefore prevented by the decision in *Vorvis* from holding that the Bank should pay punitive damages to Got.

Interest

(8) Did the trial judge err in determining the amount of interest which the Bank was obliged to pay to Got?

125 It is not necessary for me to answer this question. I have said that I would return this case to the Court of Queen's Bench, so that damages could be assessed in a manner quite different from the way in which they were assessed by the trial judge. The judge given this task in the Court of Queen's Bench should determine what interest, if any, the Bank must pay on those damages.

Mr. Sanderlin

(9) Did the trial judge err in concluding that the conduct of the Bank was such as to relieve Mr. Sanderlin of liability on his guarantee?

126 Counsel for the Bank summarized the law in this regard as follows:

> "A secured creditor, in the absence of an agreement to the contrary, must protect and preserve its security and be in a position to return or reassign it to the debtor or surety upon repayment of the debt. A surety is competent to contract out of this equitable protection but a creditor may only rely upon such a contract in respect of lawful dealings."

In support of these propositions he cited the following cases:

> *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.) at pp. 426 and 427; and
>
> *Bank of Montreal v. Wilder* (1986), [1987] 1 W.W.R. 289 (S.C.C.) at p. 303.

Counsel for Got did not disagree with this statement of the law.

127 Counsel for the Bank then contended that, in a paragraph in the guarantee which he signed, Mr. Sanderlin contracted out of the equitable protection described above. The relevant parts of that paragraph read as follows (AB at p. 3244):

> "(1) The Bank may ... and otherwise deal with, the customer and others and with all securities as the Bank may see fit, ... the whole without in any way limiting or lessening the liability of the undersigned under this guarantee, and no loss of or in respect of any securities received by the Bank from the customer or others, whether occasioned by the fault of the Bank or otherwise, shall in any way limit or lessen the liability of the undersigned under this guarantee."

128 The problem with this argument is that counsel for the Bank conceded that the Bank could only rely on this clause in respect of lawful dealings. In two respects the dealings of the Bank were not lawful. They were in breach of its contract with Got, whose indebtedness Mr. Sanderlin was guaranteeing. In these circumstances, the Bank cannot rely on the clause quoted above.

129 It is clear from the findings of the trial judge and from the evidence that the Bank's conduct in obtaining the appointment of the receiver and manager at least contributed in a significant manner to the downfall of the business of Got. It therefore increased Mr. Sanderlin's risk in a material way.

130 In my opinion the trial judge did not err in concluding that the conduct of the Bank was such as to relieve Mr. Sanderlin of liability on his guarantee.

131 In summary, I would allow the appeal of the Bank only to the extent necessary to set aside the award of damages and interest made by the trial judge. I would return this case to the Court of Queen's Bench so that damages could be assessed in accordance with these reasons,

and appropriate interest on them determined.

132 Since Got's request that this court vary the trial judgment relates to damages and interest, it is not necessary for me to consider it.

Appeal dismissed.

APPENDIX A — Chronology

1984

May 31 Bank served Got with demand for immediate payment of loans (AB pp. 4001 to 4005).

Bank left with Mr. Sanderlin's secretary a demand that he pay Got's indebtedness immediately (AB pp. 4001 to 4005).

Bank issued statement of claim against Got and Mr. Sanderlin (AB pp. 1 to 6).

Mr. McTavish swore affidavit in support of application of Bank for appointment of receiver and manager (AB pp. 3153 to 3160).

June 1 Master Funduk appointed receiver and manager (AB pp. 7 to 16).

June 6 Mr. Justice Bowen gave receiver and manager further powers. Mr. Covey consented as "Solicitor for the Defendant". (AB pp. 17 to 21).

June 29 Mr. Sanderlin filed notice of motion to set aside the order of Master Funduk appointing the receiver and manager (AB pp. 22, 23).

Mr. Sanderlin filed notice of application for extension of time to appeal and notice of appeal from order of Mr. Justice Bowen giving receiver and manager further powers (AB pp. 24, 25).

August 9 Mr. Sanderlin and Got filed statement of defence, and counterclaim by Got against the Bank and others (AB pp. 26 to 31).

August 15 Mr. Justice McDonald gave receiver and manager further powers. Counsel for Got and Mr. Sanderlin did not object based on an understanding between counsel, which is set out in the preamble to the order. (AB pp. 32, 33).

September 26 Mr. Justice O'Byrne approved the sale of certain chattel assets of Got, his order to be without prejudice to certain rights of Got and Mr. Sanderlin (AB pp. 34 and 35).

December 3 Mr. Justice Dechene permitted the receiver and manager to sell the remaining assets of Got (AB pp. 36, 37).

December 4 The Bank filed statement of defence to Got's counterclaim (AB pp. 38 to 41).

1990

May 18 Mr. Justice Dea discharged the receiver and manager. This order was made without prejudice to certain rights of Mr. Sanderlin and Got. (AB pp. 51, 52).

1991

December 24 The Bank filed a reply to the statement of defence of Mr. Sanderlin and Got (AB pp. 57 to 61).

1992

February 11 Mr. Justice Feehan denied the application of the Bank to strike the statement of defence of Mr. Sanderlin and Got, and certain paragraphs of the counterclaim of Got, on the ground that the issues they raised were *res judicata*. (Order at AB 62, 63; Memorandum of Decision at AB pp. 64 to 69).

November 3 The Court of Appeal dismissed the Bank's appeal from the order of Mr. Justice Feehan (Formal Judgment at AB p. 72; Memorandum of Judgment Delivered from the Bench at AB pp. 74, 75).

1994

February 7 Reasons for judgment of Mr. Justice McDonald filed ((1994), 17 Alta.L.R. (3d) 23).

April 18 Supplementary reasons for judgment of Mr. Justice McDonald filed ((1994), 18 Alta.L.R. (3d) 140).

APPENDIX B — In the Court of Queen's Bench of Alberta— Judicial District of Edmonton— Between: The Royal Bank of Canada Plaintiff— - and -— W. Got & Associates Electric Ltd. and Donald E. Sanderlin, Defendants

Before the Honourable Master M. Funduk, In Chambers, The Law Courts, Edmonton, Alberta

On Friday, The 1st day of June, A.D. 1984.

Order

UPON THE APPLICATION of The Royal Bank of Canada, and upon reading the Statement of Claim and the Affidavits filed in this action, and upon hearing Counsel for the Plaintiff, and upon Ernst & Whinney Inc. ("Ernst") consenting to be appointed Receiver and Manager of the

property, assets and undertaking of the Defendant, W. Got & Associates Electric Ltd. (”Got”); AND UPON it appearing that the Plaintiff is secured by the undertaking, property and assets, both real and personal of Got, by virtue of a debenture dated May 27, 1980 and registered in the Office of the Registrar of Corporations for the Province of Alberta on June 3, 1980 (the “Debenture”).
IT IS HEREBY ORDERED AND DECLARED:

1. That there is due and owing by Got to the Plaintiff, the sum of $1,300,298.96, together with interest on $802,663.01 at the rate of The Royal Bank of Canada’s prime lending rate of interest (”RBP”) plus 1-1/2% per annum and on $331,139.18 at the rate of RBP plus 2% per annum, on $165,558.15 at the rate of RBP plus 2-1/2% per annum, and on $938.62 at the rate of RBP plus 5% per annum from May 30, 1984, to the date of payment together with the amount due to the Plaintiff for all costs, charges and expenses of this action as is provided for in the Debenture and that the sums are secured by the Debenture to the extent of the principal sum of the Debenture and interest thereon;

2. That pursuant to the terms of the Debenture that:

(i) the security constituted has become enforceable; and

(ii) the security created therein has become specifically charged against all the assets thereby charged but not all ready specifically charged thereby.

3. That Ernst be and is hereby appointed Receiver and Manager, without giving security or posting a bond, of all the undertaking, property and assets, both real and personal, of Got, comprised in or subject to the security and charge created by the Debenture and to manage the business of Got.

4. That until June 21, 1984, the Receiver and Manager shall only take possession of all of the property, assets and undertaking of Got, including the moving and storage of the property of Got not presently on lease or hire or in use in the normal course of the business of Got to a location of the Receiver and Manager’s choice, and carry on and operate the business of Got including control of all receipts and disbursements of Got.

5. That if the indebtedness of Got to the Plaintiff is fully paid on or before June 21, 1984, then the Receiver and Manager appointed hereunder shall be discharged upon submission of an accounting to this Honourable Court upon notice to Got.

6. That the Receiver and Manager shall be at liberty to appoint and employ such agents and assistants as are necessary for the purpose of performing its duties hereunder, and any and all proper expenditures which shall be made by it in so doing shall be allowed to it in passing its accounts and shall form a charge on the property, assets and undertaking of Got, in priority to the claims of all creditors.

7. That Got, and any person upon whom this Order is served, shall forthwith deliver or cause to be delivered to the Receiver and Manager the property, assets and undertaking together with all books, documents, papers and records of every kind of Got.

~~*8. That the Receiver and Manager is hereby authorized and empowered to institute and prosecute and to continue the prosecution of all suits, proceedings and actions at law, as are necessary for the proper protection of the property, assets and undertaking of Got and to defend all suits, proceedings and actions instituted against it as Receiver and Manager and to appear in and conduct the defence of any suits, proceedings and actions now pending in any court against Got; the authority hereby conferred shall extend to such appeals as the Receiver and Manager shall deem proper and advisable in respect to any order or judgment pronounced in any suit, proceeding or action.*~~

9. That no action at law or other proceeding shall be taken or continued against the Receiver and Manager including without limiting the generality of the foregoing, seizures of any or all of the property and assets of Got, without leave of this Honourable Court first being obtained.

~~*10. That all persons, firms and corporations be and they are hereby enjoined from disturbing or interfering with the utility services to Got including but not limited to the furnishing of gas, heat, electricity, water, telephones, (including present telephone numbers), or any other utility of any kind furnished up to the present date to Got with respect to the undertaking, property and assets of Got hereby brought under the possession, custody and control of the Receiver and Manager, and all such persons, firms and corporations are hereby enjoined from disturbing, interfering with the supply of or disconnecting any such utility or service to the Receiver and Manager so long as the Receiver and Manager makes payment of the current rate (and not any arrears) for the utilities used by him from the date of his possession, custody and control, except upon further order of this Court.*~~

~~*11. That the Receiver and Manager is empowered to borrow monies not exceeding in the aggregate the principal sum of $250,000.00 for the purpose of protecting and preserving the property, assets and undertaking of Got, and for the purpose of managing and carrying on the business of Got, and for the purpose of performing its duties hereunder and as security therefor and every part thereof, the whole of the property, asset and undertaking of Got subject to this Order shall stand charged with payment of the monies borrowed by the Receiver and Manager together with interest thereon in priority to the claims of all creditors of Got, and in priority to the debts incurred by the Receiver and Manager but not in priority to the fees and disbursements of the Receiver and Manager.*~~

~~*12. That all sums authorized to be borrowed by this Order shall be in the nature of revolving credit and the Receiver and Manager may pay off and reborrow within the limits of the authority hereby conferred so long as the aggregate principal sum borrowed does*~~

~~*not exceed $250,000.00.*~~

~~*13. That the Receiver and Manager is authorized to issue a receipt or certificates for any sums borrowed by it pursuant to this Order.*~~

~~*14. That the Receiver and Manager is authorized in its discretion, instead of issuing Receivers Certificates, to borrow on the security of such certificates and in connection therewith to execute hypothecations or pledges thereof containing such terms and conditions as it sees fit.*~~

15. That the Receiver and Manager is authorized to pay out of any funds in its hands, ~~*including funds borrowed pursuant to paragraph 11 of this Order,*~~ such debts of Got, which have priority to the claim of the Plaintiff herein, and any such debts of Got, as are required to be paid in order to properly maintain or carry on the business and undertaking of Got.

16. That the Receiver and Manager shall be at liberty to proceed to sell~~*all of*~~ the assets of Got, in the ordinary course of Got's business ~~*either by way of private sale, public auction or tender, upon such terms and conditions as to advertising and payment as he may deem proper without further reference to this Honourable Court, save and except that with regard to any lands owned by Got, the Receiver and Manager shall proceed in an attempt to sell the said lands, which sale shall be subject to the approval of this Honourable Court.*~~

~~*17. That the Application made by the Receiver and Manager for the sale of the said lands shall be made with notice to Got, and to all parties with encumbrances registered against the Certificates of Title to the said lands such notices to be deemed given upon being mailed by single registered mail to the address given by the said encumbrancers in the said encumbrance as filed against the said lands.*~~

18. That the Receiver and Manager shall be at liberty if in its judgment it is necessary or desirable, without further reference to this Honourable Court:

~~*(a) to lease or mortgage the undertaking, property or assets of Got or any part or parts thereof, without having any time appointed for redemption and without waiting for the determination of any inquiries or accounts which may be directed herein or in the future, provided that the rent or proceeds of any mortgage shall be paid to the Receiver and Manager;*~~

~~*(b) to extend the time for payment of any monies due to Got with or without security and to settle or compromise any such indebtedness;*~~

(c) to take steps for the preservation or *realization* of the undertaking, property and assets of Got, which shall include, without limiting the generality of the foregoing, the right to make payments to persons having prior mortgages, charges or encumbrances on properties against which Got may hold mortgages, charges or encumbrances;

(d) to purchase or lease such machinery and equipment as may be necessary for the commencement, improvement and enhancement of the operations of Got; and

(e) to enter into any agreements or incur obligations reasonably incidental to the exercise of the aforesaid powers.

18. That the Receiver and Manager may, upon notice to Got and to such creditors of Got as it deems advisable, from time to time, and in its sole discretion, apply to this Court for directions and guidance in the discharge of its duties as Receiver and Manager ~~*and specifically may apply to this Court to increase the amount the Receiver and Manager is empowered to borrow pursuant to paragraph 11 of this Order.*~~

19. The Receiver and Manager, upon notice to Got and to such creditors of Got as it deems advisable, from time to time, shall pass accounts and pay the balance in its hands as this Court may direct. The Receiver and Manager may pay itself in respect of its services and disbursements as Receiver and Manager reasonable amounts either monthly or at such longer intervals as it deems appropriate, which amount shall constitute advances against its remuneration when fixed by this Court.

20. That the Receiver and Manager may apply to this Court from time to time, upon notice to Got and to such creditors of the Defendant as it deems advisable, to approve a distribution of the net proceeds of sale or other disposition of the property, assets and undertaking of Got, to the Plaintiff, or to such other persons as may appear entitled thereto.

21. That the Plaintiff is to be at liberty to apply in this action upon notice to Got and to such creditors of Got as it deems advisable, to have the accounts of Ernst passed by this Honourable Court.

22. That Ernst shall be entitled to act as agent of the Plaintiff to realize upon any security held by the Plaintiff in support of the indebtedness of Got to the Plaintiff, including any general assignments of debts and security under the Bank Act (Canada).

23. That the further consideration of this action is adjourned and that liberty is reserved for any party to this action or any person interested herein to apply to this Court for any order or other relief as may be advised upon *2 clear days* notice or such other time as this Court may direct to the other party or parties in this action and any other interested persons as this Court may direct.

24. The Plaintiff shall be at liberty to apply from time to time for the portions of this order that have at this date be deleted or being premature.

1997 ABCA 136, 1997 CarswellAlta 235, [1997] 6 W.W.R. 715, [1997] A.J. No. 373...

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders
At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding

Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair

and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order

in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

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Statutes considered:

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s. 47 — considered

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s. 47(2) [rep. & sub. 2007, c. 36, s. 14(2)] — considered

s. 47(2)(c) — considered

s. 65.13 [en. 2005, c. 47, s. 441] — considered

s. 65.13(7) [en. 2007, c. 36, s. 27] — considered

s. 183(2) — considered

s. 193 — considered

s. 195 — considered

s. 243 — considered

s. 243(1) — considered

s. 243(1)(c) — considered

s. 243(2) “receiver” — considered

s. 244(1) — considered

s. 246 — considered

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

s. 36(6) — considered

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34
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s. 21 — considered

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s. 63 — referred to

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Generally — referred to

s. 100 — considered

s. 101 — considered

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Generally — referred to

s. 159 — considered

s. 160 — considered

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s. 66(4) — considered

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R. 31 — considered

R. 31(1) — considered

R. 126 — considered

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

S.E. Pepall J.A.:

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a

vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment

under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why

the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36

("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
>
> (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
>
> (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held

complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to

extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework

understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that

> practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court

to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could

not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this

multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national

receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List])[6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J.

stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing

sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added):

Bankruptcy and Insolvency General Rules, C.R.C. c. 368, r. 126 (”BIA Rules”).

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court’s jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court’s jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court’s inherent jurisdiction formed the basis of the court’s power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver

selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order

terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be

extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient

weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of

> royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019

MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a

condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an

order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> > (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
> >
> > (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
> >
> > (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
> >
> > (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
> >
> > (5) The respondent will not be prejudiced by extending the time;
> >
> > (6) There is an arguable ground or grounds of appeal;
> >
> > (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R.

(3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land*

Titles Act for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**
I agree.

***Grant Huscroft J.A.*:**
I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

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