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• ADVICE AND DIRECTIONS — A COURT OFFICER'S ROLE IN THE FACE OF COMPETING INTERESTS •

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Mitch Vininsky

Both model receivership orders and the *Bankruptcy and Insolvency Act* specifically authorize the court officer to apply for advice and directions to deal with matters affecting the administration of an estate. While there are numerous instances when it is appropriate to bring such an application, an open question is whether it is appropriate for the court officer to take it a step further and make a recommendation in all instances. A recent judgement by the Supreme Court of British Columbia addresses an issue often facing court officers in the context of disputes among competing stakeholders: take a position or frame the matter for the court and let each stakeholder make its case?

BACKGROUND

The receivership of Forjay Management Ltd.[1] dealt with a 92-unit condo development which was placed in receivership in October, 2017. At the time, the units had been pre-sold but none of the sale agreements had closed. In a majority of cases, it turned out that the units had been sold multiple times leaving the question of which, if any, agreements were enforceable and binding. Deposits totalling $1.4 million were held in trust by Forjay's counsel. The development was subject to three tranches of mortgages in the aggregate of $50 million. Part of the Receiver's realization efforts involved reviewing the terms of the sale agreements to determine the rights and obligations of both the seller and the purchasers, including the economics of completing the sale contracts versus disclaiming them.

The Receiver brought a motion for advice and directions with respect to the validity of the sale

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contracts and whether it should complete 40 of them which it considered to be "without issue", meaning that they were valid based on certain characteristics the Receiver considered appropriate and represented fair value at the time they were signed. The Receiver recommended that it be authorized to complete these agreements notwithstanding that the value of the underlying units had increased by an estimated 46% (or $5.4 million) since the original contract dates.

DECISION

A four day hearing was held during which the Receiver and two competing groups of stakeholders presented evidence. They were: a) the purchasers and the Superintendent of Real Estate as regulator, who supported the Receiver's recommendation; and b) the mortgagees and Forjay's principal, who opposed the recommendation and argued that the agreements should be disclaimed and the units remarketed so they could benefit from the appreciation in the value of the units.

Madam Justice Fitzpatrick released her decision on April 4, 2018 and decided in favour of the mortgagees. She directed the Receiver to disclaim the pre-sale contracts and to remarket the units. Her rationale focused largely on the rights contained in the mortgage agreements and their priority vis-à-vis the sale contracts which, among other things, did not create an interest in the land. Thus the dispute was largely a legal one.

The Court did not accept the Receiver's recommendation and made several comments as to the role of a Receiver in the context of litigation. Among other things, the Court commented that:

a) In those circumstances, where other parties are in the fray, I think it would have been best for the Receiver to have provided facts as known to it and thought to be relevant to a determination, but otherwise to have remained neutral as to the result"; and
b) "given the level of conflict on the issue, neutrality would have been a better course of action, after providing all necessary facts to the parties and the Court that inform that analysis and setting forth considerations on the issue".

Ultimately the Court determined that, other than the unchallenged facts in the materials filed by the Receiver, "the Receiver's recommendations should not be afforded any deference".

The Court was clear to distinguish this case from one where a Receiver deals with a business issue and its judgement is afforded deference. For example, a reference was made to Ravelston Corp. where Justice Doherty of the Ontario Court of Appeal commented that:

> "Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests… The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner… . If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision".

In the case of Forjay, the Court narrowed the scope as being a complex legal review of the validity and enforceability of pre-sale contracts where the Receiver has "no particular expertise in that regard and was not tasked by the Court with a determination of the issue". As a result, the guidance to the Receiver was to set out the facts and remain neutral.

SO WHEN IS A RECOMMENDATION BY A COURT OFFICER APPROPRIATE?

While the Receiver was criticized for making a recommendation in this instance, the practice point is not for a Receiver, or any court officer, to remain neutral in all situations. To the contrary, judges often look to their court-appointed officer for a recommendation rather than merely a recitation of facts. There is no framework as to the preferred approach. Arguably, it would be more helpful for a judge hearing a dispute to have the benefit of the facts, an analysis of the key arguments from each litigant, the implications of deciding in favour of one versus another and the court officer's perspective on the most appropriate result from a commercial perspective if germane to the issue.

Disputes are commonly a combination of business and legal issues, so it is difficult to suggest that the court officer look to the nature of the dispute to decide how to proceed. As well, while the court officer itself may not have the expertise to address the legal issue, its counsel, also a court officer, would presumably have the skill set required to consider the issue and formulate an opinion. Interestingly, Madam Justice Fitzpatrick's approach in Forjay was similar to another decision in Ravelston Corp.[2] where Mr. Justice Farley commented that:

> "there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property."

Some factors that may be helpful for a court officer to consider when deciding whether to make a recommendation as part of a motion for advice and directions are:

a) The sophistication of the parties — are the competing interests properly represented and capable of making their own arguments? When litigants to a dispute are well represented and no ethical issues are involved, the court officer's role can be to ensure that they key facts are before the court. There is no need to take a position. This is in contrast to when one party, perhaps due to financial resources, overwhelms the other parties. Then it might be appropriate for the court officer to get involved to level the playing field, while not necessarily taking an adversarial role;

b) The amount at stake — if an immaterial amount is at issue then the court officer might wish to take a position in order to streamline the process. The main consideration here is to respect the court's time and keep costs down, particularly when

the financial consequences of an issue are not significant;

c) Nature of the dispute — if it is purely a legal issue or an issue beyond the expertise of the court officer where no business judgement is applied then relying on the expertise of counsel representing the stakeholders may be appropriate, as was the case in Forjay;

d) The language in prior court orders — has the court authorized its officer to investigate a particular matter and to make a recommendation in that regard? If not, the court officer may wish to consider seeking advice and directions before it undertakes an investigative process. This issue was recently addressed in the context of a CCAA monitor seeking advice and directions related to a potential oppression action and contemporaneously seeking judgement against the party alleged to have committed the oppressive act, all without first being authorized by the court to proceed with the matter;

e) Direct interest of the court officer — if the matter deals with the court officer, such as its appointment or fees, it may be better to remain neutral and allow other stakeholders to take a position. The approach may vary where, for example, a party initiates an attack on the conduct of the court officer in which case the court officer would have an obligation to defend itself; and

f) The judge's preference — it may be helpful, at an appropriate scheduling appearance, to have a discussion with the judge hearing the matter about the nature of the dispute and to seek guidance as to whether a recommendation should be made before materials are filed.

[***Mitch Vininsky***, *MBA, CIRP is a Managing Director as well as a Vice-President of KSV. Mitch has extensive experience in business turnarounds and restructuring and has performed mandates in a broad range of industries.*]

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1 *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018] B.C.J. No. 592, 2018 BCSC 527.

2 *Ravelston Corporation (Re)*, [2005] O.J. No. 1643, 138 A.C.W.S. (3d) 792.

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