Court File No. CV-23-00700694-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN

FIERA FP REAL ESTATE FINANCING FUND, L.P.

Applicant

-and-

CHANCERY (OSHAWA) THE BARTLETT LIMITED PARTNERSHIP and CHANCERY (OSHAWA) THE BARTLETT GP INC.

Respondents

APPLICATION UNDER S. 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, RSO 1990, c.c. 43

BOOK OF AUTHORITIES OF THE APPLICANT

July 13, 2023

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(as of July 13, 2023)

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INDEX

LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	*Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (QL), 40 CBR (3d) 274
2.	*Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007
3.	*Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866
4.	*Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023
5.	*DUCA Financial Services Credit Union Ltd. v. 1725859 Ontario Inc., 1941275 Ontario Ltd., And 1941276 Ontario Inc.* (November 1, 2021) Toronto, Ont Sup Ct [Commercial List] CV-21-00668237-00CL (Order Appointing Receiver and Endorsement)
6.	*RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205
7.	*BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953
8.	*Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511
9.	*Re, Lambert,* [1994] 119 DLR (4th) 93, 20 OR (3d) 108
10.	*Fairbanx Corp v Royal Bank of Canada*, 2010 ONCA 385
11.	*Royal Bank of Canada v El-Bris Ltd,* 2008 ONCA 601
12.	*Canada (Attorney General) v Fairmont Hotels Inc,* 2016 SCC 56
13.	*Bridging Finance Inc v 1033803 Ontario Inc, 2023* ONSC 1721 (March 14, 2023) Toronto, Ont Sup Ct [Commercial List] CV-18-608978-00CL (Endorsement)
14.	*Third Eye Capital Corp v Dianor Resources Inc,* 2019 ONCA 508
15.	*2056706 Ontario Inc v Pure Global Cannabis Inc,* 2021 ONSC 5533
16.	*Royal Bank of Canada v Soundair Corp,* [1991] 83 DLR (4th) 76, 4 OR (3d)
17.	*CCM Master Qualified Fund v blutip Power Technologies,* 2012 ONSC 1750
18.	*Kingsett Mortgage Corp and Dorr Capital Corp v Stateview Homes (Minu Towns) Inc et al,* (June 5, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00698576-00CL (Endorsement)

TAB 1

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

Bank of Nova Scotia v. Freure Village on Clair Creek

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

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

Blair J.

Judgment: May 31, 1996
Docket: none given

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

***Blair J.*:**

1 There are two companion motions here, namely:

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

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

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

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

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

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

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

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

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

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

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

Receiver/Manager

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

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

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

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

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

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

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

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

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

Motions granted.

TAB 2

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

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

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

Newbould J.

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

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

***Newbould J.*:**

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

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

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

Events leading to demand for payment

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

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

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up

to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

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

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

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

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

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

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale

leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

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

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

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

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

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

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

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

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

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

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

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

(b) Court appointed receiver

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

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

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

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

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

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a

private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

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

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

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

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

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
>
> . . .
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

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

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

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

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

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

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

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

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured.

Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

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

Application granted.

TAB 3

2013 ONSC 6866
Ontario Superior Court of Justice [Commercial List]

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.

2013 CarswellOnt 16639, 2013 ONSC 6866, 235 A.C.W.S. (3d) 683

Elleway Acquisitions Limited, Applicant and The Cruise Professionals Limited, 4358376 Canada Inc. (Operating as Itravel2000.com) and 7500106 Canada Inc., Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: November 4, 2013
Docket: CV-13-10320-00CL

Counsel: Jay Swartz, Natalie Renner, for Applicant
John N. Birch, for Respondents
David Bish, Lee Cassey, for Grant Thornton, Proposed Receiver

***Morawetz J.*:**

1 At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

2 Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"), without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

3 The application was not opposed.

4 The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of £17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

5 Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

6 Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately £3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

7 Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

8 Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

9 It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

10 Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

11 itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

12 The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

13 Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

14 The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

15 Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

16 Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the "Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

17 Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

18 Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

19 Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

20 If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

21 The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

22 The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

23 This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

24 Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

25 Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

26 In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]) at para. 10

27 Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]) at paras. 50 and 75; *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (Ont. S.C.J. [Commercial List]) at para. 18; *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, [2011] O.J. No. 671 (Ont. S.C.J.) at para. 27. I accept this submission.

28 Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village*, *supra*, at paras. 10-12; *Canada Tire*, *supra*, at para. 18; *Carnival National Leasing*, *supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15.

29 Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

30 It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

(a) the potential costs of the receivership will be borne by Elleway;

(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;

(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;

(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and

(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

31 It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

32 Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

33 Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

34 Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

TAB 4

2013 ONSC 7023
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Sherco Properties Inc.

2013 CarswellOnt 16848, 2013 ONSC 7023, 235 A.C.W.S. (3d) 682

Bank of Montreal, Applicant and Sherco Properties Inc., Sherk Farm Limited, Cosher Properties Inc., and Donald Sherk, Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: December 3, 2013
Docket: CV-13-10244-00CL

Counsel: S.D. Thom, for Applicant
R.B. Moldaver, Q.C., for Respondents

***Morawetz J.*:**

1 This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

2 Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

3 The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

4 The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

5 Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

6 Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

7 In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

8 As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

9 Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

10 Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

11 In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

12 The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

13 The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

14 In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

15 At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

16 Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

17 As of September 9, 2013, interest arrears total approximately $124,346.79.

18 In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;

(b) 325 Estate Court: $59,596.49.

19 The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

20 On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

21 On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

22 The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

23 The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

24 Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

25 The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

26 The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

27 Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

28 Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the

secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

29 In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

30 The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;

(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;

(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and

(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

31 The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

32 From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

33 Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

34 Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers 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.

40 Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Sask. Q.B.) where Estey J. (as he then was) reasoned as follows:

> ...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.).

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

(a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

(b) the terms of the mortgages permit the appointment of a receiver upon default;

(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

48 In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

49 In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

50 I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

51 However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

52 In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

53 The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

54 The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

55 The Bank is also entitled to its costs on this application.

Application granted.

TAB 5

Court File No. CV-21-00668237-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 1st
	)	
JUSTICE CAVANAGH	)	DAY OF NOVEMBER, 2021

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

- and -

1725859 ONTARIO INC., 1941275 ONTARIO LTD., AND 1941276 ONTARIO INC.

Respondents

ORDER
(Appointing Receiver)

THIS MOTION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing msi Spergel inc. as receiver (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of 1725859 Ontario Inc., 1941275 Ontario Ltd., and 1941276 Ontario Inc. (collectively, the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, and of the real property described at Schedule “A” to this Order (collectively, the “Real Property”), was heard this day by judicial videoconference via Zoom at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Ivan Bogdanovich sworn August 24, 2021 and the Exhibits thereto, the Pre-filing report of msi Spergel inc. as the Proposed Receiver of the Debtors and on hearing the submissions of counsel for the Applicant, no one appearing for the Respondents

although duly served as appears from the affidavit of service of Corey Taylor sworn September 27, 2021, and Lindsay Provost dated October 26, 2021 on reading the consent of msi Spergel inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that, as is provided in the Order of this Court dated November 1, 2021, that service of the Applicant's Application Record on the Debtors by the manner as detailed in such Order, is validated.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, msi Spergel inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof, and including the Real Property (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary

course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating

such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required.

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(q) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this

paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including

without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, including, but not limited to, any illness or bodily harm resulting from a party or parties contracting COVID-19, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider

necessary or desirable, provided that the outstanding principal amount does not exceed $100,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://www.spergelcorporate.ca/engagements/>'.

26. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

27. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors, or any of them.

29. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

30. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

32. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Digitally signed by
Mr. Justice Cavanagh

Justice, Ontario Superior Court of Justice

Commercial List

SCHEDULE "A"

REAL PROPERTY

1725859 Ontario Inc.

UNIT 17, LEVEL 2, TORONTO STANDARD CONDOMINIUM PLAN NO. 2534 AND ITS APPURTENANT INTEREST; SUBJECT TO AND TOGETHER WITH EASEMENTS AS SET OUT IN SCHEDULE A AS IN AT4291912; CITY OF TORONTO (PIN 76534-0030 LT)

1941275 Ontario Ltd.

PCL 4-1, SEC 43M753 ; LT 4, PL 43M753 ; BRAMPTON (PIN 14244-0287 LT)

1941276 Ontario Inc.

PT LTS 4 & 5, E OF HURONTARIO ST & N OF QUEEN ST, PL BR2, PT 1, 43R6799 ; BRAMPTON (PIN 14124-0046 LT)

SCHEDULE "B"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that msi Spergel inc., the receiver (the "Receiver") of the assets, undertakings and properties of 1725859 Ontario Inc., 1941275 Ontario Ltd., and 1941276 Ontario Inc. (collectively, the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof and including the real property described at Schedule "A" to the Order, as defined below (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

msi Spergel inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

Electronically filed / Déposé par voie électronique : 02-Nov-2021
Toronto Superior Court of Justice / Cour supérieure de justice

DUCA FINANCIAL SERVICES CREDIT UNION LTD. -and- 1725859 ONTARIO INC., *et al.*

Applicant Respondents

Court File No. CV-21-00668237-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Applicant

Court File Number: CV-21-00668237-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

AND

1725859 ONTARIO INC., 1941275 ONTARIO LTD., and 1941276 ONTARIO INC.

Respondents

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Timothy Hogan and Rob Danter for Applicant		
Sanjeev Mitra for proposed receiver, msi Spergel inc.		
Sumit Tangri for Amit Lekhi as Estate Trustee for the Estate of Vijay Lekhi		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

Date of Hearing: November 1, 2021

ENDORSEMENT

[1] The Applicant, DUCA Financial Services Credit Union Ltd. ("DUCA"), moves for (i) an order validating service of the application materials in respect of its application for appointment of a receiver, and (ii) an order appointing msi Spergel inc. as Receiver (the "Receiver") , without security, of all of the assets, undertakings and properties of the Respondents 1725859 Ontario Inc. ("859"), 1941275 Ontario Ltd. ("275"), and 1941276 Ontario Inc. ("276") (collectively, the "Debtors") acquired for or used in relation to a business or businesses carried on by the Debtors, and of the real property described in Schedule "A" to the appointment order (the "Property").

Motion for Order validating service

[2] Aneel Jackson Shaukat ("Mr. Shaukat") is the sole officer and director of each of the Respondents, and is a guarantor of the obligations of the Respondents to DUCA.

[3] On December 17, 2020, Mr. Shaukat provided DUCA a Personal Net Worth Form in which he stated his address was 22 Banks Drive, Brampton, Ontario. A title search of the Banks property shows that it was transferred from Jackson Shaukat and Nargis Shaukat to 5022278 Ontario Inc. ("502"). The corporate profile report for 502 lists Mr. Shaukat as the sole officer and director of 502. A Ministry of Transportation Report against Mr. Shaukat lists his address as the Banks property. A Canada Revenue Agency notice of assessment lists Mr. Shaukat's address as the Banks property.

[4] On September 9, 10, and 12, 2021, a process server attended the Banks property, a residential property, to serve the Respondents but was unable to deliver a copy of the motion materials to a resident there.

[5] On October 15, 2021, a process server left copies of the Application Record for each of the Respondents at the front door of the Banks Property and on October 18, 2021, mailed copies of the Application Record by regular mail to each of the Respondents at the Banks property.

[6] On September 22, 2021, a process server mailed a copy of the Application Record to each of the Respondents at their registered office address, 200-1920 Yonge Street, Toronto, Ontario.

[7] On the Personal Net Worth Form provided by Mr. Shaukat to DUCA, his email address was shown. On October 20, 2021, Timothy Hogan, counsel for DUCA, sent an email to Mr. Shaukat at this email address providing details of the application to be heard on November 1, 2021, the attempted service of the Application Record on the Respondents, and he attempted to speak with him by calling the telephone number provided on the Personal Net Worth Form. There was no response to this email and it did not bounce back as undeliverable.

[8] On October 21, 2021, Corey Taylor, a process server, swore an affidavit of attempted service which detailed his attempts to serve the Application Record. These are set out in the supporting affidavit for the motion to validate service at para. 15.

[9] On October 22, 2021, the deponent of the affidavit delivered in support of the motion for an order validating service received an email from Nikola Grguric of Elite Property Management Inc., property manager of the 859 property, who confirmed that Mr. Shaukat is the "off-site owner" and the address they have on record for him is the Banks property.

[10] October 26, 2021, copies of the Application Record were couriered to the addresses of the properties owned by the three Respondents, the 859 property, the 275 property, and the 276 property.

[11] I am satisfied on the evidence before me that the Application Record came to the notice of Mr. Shaukat. DUCA also complied with rule 16.03 (6) of the *Rules of Civil Procedure* with respect to service on a corporation by an alternative to personal service.

[12] I make an order pursuant to rule 16.08 of the *Rules of Civil Procedure* validating service.

Application to appoint receiver

[13] The Debtor, 859, is the owner of real property municipally known as 629 King Street West, Suite 217, Toronto, Ontario comprising a residential condominium unit (the "859 Property"). DUCA holds a first priority charge over the 859 Property (the "859 Mortgage").

[14] There are two subsequent mortgagees of the 859 property, being 1226460 Ontario Inc. ("122 Ontario") and Dominic Nano ("Nano"), which charges were granted without the knowledge or consent of DUCA.

[15] There are property tax arrears owing in relation to the 859 property as at July 7, 2021: (a) for the tax year 2021, the sum of $27.25; and (b) for the tax year 2020, the sum of $1,315.46.

[16] The Debtor, 275, is the owner of real property municipally known as 3 Glenmanor Drive, Brampton, Ontario, a residential property (the "275 Property").

[17] DUCA holds a first priority charge over the 275 Property (the "275 Mortgage").

[18] There are three subsequent mortgagees of the 275 Property, being 122 Ontario, Nano, and Vijay Lekhi ("Lekhi"), which charges were granted without the knowledge or consent of DUCA.

[19] Lekhi is deceased and is represented by Amit Lekhi, as Estate Trustee for the Estate of Vijay Lekhi. The Lekhi Estate has commenced enforcement proceedings as against the 275 Property, and issued statutory notices to 275, including a Notice of Sale under Mortgage/Charge to 275. The Lekhi Estate has commenced an action naming 275 as a defendant in a proceeding in the Ontario Superior Court of Justice at Brampton.

[20] There are property tax arrears owing in relation to the 275 Property, as at July 7, 2021: (a) for the tax year 2021, the sum of $5,379.37; and (b) for the tax year 2020, the sum of $2,832.23.

[21] The Debtor, 276, is the owner of real property municipally described as 50 Queen Street East, Brampton, Ontario, a commercial property (the "276 Property"). The three properties, together, are referred to as the "Real Properties").

[22] DUCA holds a first priority charge over the 276 Property (the "276 Mortgage").

[23] There are two subsequent mortgagees of the 276 Property, being 122 Ontario and Nano, which charges were granted without the knowledge or consent of DUCA.

[24] There are property tax arrears owing in relation to the 276 Property as at July 7, 2021: (a) for the tax year 2021, the sum of $27,009.75; and (b) for the tax year 2020, the sum of $29,125.56.

[25] As of August 23, 2021, the Debtors were indebted to DUCA in the amount of $2,826,327.15 plus accruing interest and DUCA's continuing costs of enforcement (the "Obligations"), in respect of certain financing advanced to the Debtors pursuant to the terms of the Commitment Letter dated June 6, 2018, as amended by way of Amendment to Commitment dated June 22, 2018 (collectively, the "Letter Agreement"). The credit facility established by the Letter Agreement, upon which funds were advanced by DUCA to the Debtors, is a mortgage loan in the sum of $2,900,000. The Mortgage Loan matured on August 30, 2021.

[26] The Obligations are secured by, among other things, (a) a General Security Agreement from the Debtors dated June 22, 2018 (the "GSA"); (b) collateral Charge/Mortgage from 859 in the principal sum of $2,900,000 as governed by a schedule of additional provisions attached thereto (the "Charge Provisions"); (c) assignment of rents from 859 dated June 22, 2018; (d) assignment of condominium voting rights dated June 22, 2018 from 859 to DUCA with regard to the 859 Property; (e) collateral charge/Mortgage from 275 and 276 in the principal sum of $2,900,000 over the 275 and 276 Properties (the "275 Mortgage" and the "276 Mortgage" and, collectively with the 859 Mortgage, the "Mortgages") as governed by the Charge Provisions; and (f) assignment of rents from 275 and 276 dated June 22, 2018.

[27] The Financing is governed by, among other things, the terms and conditions contained within the Letter Agreement which include (i) that the Debtors would pay, when due, all taxes levied against the Real Properties; (ii) that the Debtors would pay, when due, all amounts owing to any government authority which, if unpaid, would give such authority recourse for such amounts ranking in priority to the security; (iii) that the Debtors would not register any encumbrances on the Real Properties aside from the Mortgages; (iv) that DUCA would have the right to terminate the Letter Agreement and seek full repayment of the Obligations on the occurrence of any of the following: (a) in the sole opinion of DUCA, a material adverse change in the condition of any of the Real Properties, the Borrowers, or the actual or anticipated revenues from any of the Real Property; and (b) the Debtors become subject to any insolvency proceedings; and (v) that the non-compliance with any terms of the Letter Agreement constituted a Default by the Debtors thereunder, and that on such Default, DUCA was entitled, among other things, to appoint a Receiver over the Real Properties.

[28] DUCA has registered financing statements as against the Debtors pursuant to the provisions of the *Personal Property Security Act* (Ontario) to perfect its security interest in the personal property of the Debtors secured under the GSA.

[29] By letter dated May 31, 2021 (the "Default Letter"), DUCA advised the Debtors of certain of the Defaults and stated that absent payment in full of the Obligations within 30 days, DUCA would commence enforcement proceedings as against the Debtors. The Debtors failed to repay the Obligations within 30 days of the Default Letter, which constitutes a further default under the financing.

[30] As a result of the continuing defaults, DUCA delivered to each of the Debtors a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244 (1) of the *Bankruptcy and Insolvency Act* ("BIA"), each dated July 16, 2021. All statutory notice periods under the demands have expired, and the Debtors have failed to cure the defaults.

[31] The Charge Provisions and the Letter Agreement grant DUCA the power to appoint a Receiver over the Real Properties, as a result of the defaults.

[32] The GSA grants DUCA the right to appoint a Receiver over all personal property of the Debtors secured by the GSA, as a result of the defaults of the Debtors under the financing.

[33] msi Spergel inc. has consented to act as Receiver.

[34] Subsection 243(5) of the BIA provides that an application under subsection 243(a) of the BIA is to be filed in a court having jurisdiction in the judicial district of the "locality of the debtor", which is defined in s. 2 of the BIA. The debtors are Ontario companies with registered addresses in Toronto. One of the three properties is in Toronto. I am satisfied that this application is properly before the Ontario Superior Court of Justice (Commercial List).

[35] Section 244 (1) of the BIA requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security. DUCA sent the demands together with its Notice of Intention to Enforce Security pursuant to the BIA to the Debtors on July 16, 2021. Any applicable notice periods have expired.

[36] Section 101 of the *Courts of Justice Act*, as amended, provides for the appointment of a receiver where it is "just and convenient". Section 243 (1) of the BIA also provides that on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.

[37] The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is a key factor, and transforms the appointment of a receiver from an extraordinary remedy to relief that is more granted as a matter of course, especially in cases in which the circumstances further support such an appointment. This relief is less extraordinary when dealing with a default under a mortgage. See *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List), paras. 28-29; *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C. (Commercial List)), at para. 20.

[38] When the factors in *Confederation Life* are considered, I am satisfied that DUCA has shown that it is just and convenient to appoint a receiver for the following reasons:

a. the Debtors contractually agreed to the appointment of a receiver.

b. The loan agreement is in default, demand was made on the indebtedness, and the applicable notice periods have elapsed.

c. DUCA is concerned that the Debtors do not have the working capital needed to repair or maintain the Real Properties. In such circumstances, there is a risk that the realizable value of the Property would continue to diminish.

d. The Debtors' liquidity crisis will continue to worsen in the absence of action. A receiver will be able to take the necessary steps to preserve the Property, including conducting an orderly sale process that will generate recoveries for creditors.

e. DUCA has lost confidence in the Debtors' management. This is described more fully in the supporting affidavit filed for the receivership application.

f. The Applicant is not the only creditor of the Debtors. No creditor has come forward to oppose the receivership application. The Receiver will be able to properly and equitably deal with the interests of creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues including any competing claims that may arise in respect of the Debtors at the Property.

[39] The terms of the proposed receivership order are substantially the same as the terms of the Commercial List model receivership order.

[40] For these reasons:

a. I am satisfied that an order validating service should be made; and

b. I am satisfied that it is just and convenient to appoint a Receiver.

[41] Orders to issue in form of attached Orders signed by me.

Digitally signed by
Mr. Justice Cavanagh

Cavanagh J.

November 1, 2021

TAB 6

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 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.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured

> creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

TAB 7

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

***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.

TAB 8

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

***Farley J.*:**

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details

of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a $20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> **Appointment to Enforce Rights**
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the

defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note*: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

TAB 9

1994 CarswellOnt 300
Ontario Court of Appeal

Lambert, Re

1994 CarswellOnt 300, [1994] O.J. No. 2151, 119 D.L.R. (4th) 93, 20 O.R. (3d) 108, 28 C.B.R. (3d) 1, 50 A.C.W.S. (3d) 900, 74 O.A.C. 321, 7 P.P.S.A.C. (2d) 240

Re bankruptcy of JOSEPH PHILLIPE GILLES LAMBERT

Grange, Doherty and Weiler JJ.A.

Heard: February 16-18, 1994
Judgment: September 29, 1994
Docket: Doc. CA C8364

Counsel: *Edward M. Hyer*, for appellant, General Motors Acceptance Corporation of Canada Limited.
Rosemary Fisher-Cobb, for respondent, trustee in bankruptcy.

The judgment of the court was delivered by *Doherty J.A.*:

I. The Issue [1]

1 When will an error in the contents of a financing statement render the statement invalid and the security interest it represents unperfected as against third parties? The answer depends on the reach of s. 46(4) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (P.P.S.A.) which reads:

> A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

II. Facts

2 Mr. Lambert purchased a motor vehicle under the terms of a conditional sales contract. The vendor sold the contract to the appellant (GMAC). GMAC registered its security interest in the vehicle by filing a financing statement as provided in the P.P.S.A. The financing statement referred to the debtor as Gilles J. Lambert. This was the name used by Mr. Lambert when he signed the conditional sales contract and was also the name used to identify the owner of the vehicle in the records of the Ministry of Transportation and Communication. Unfortunately, it is not Mr. Lambert's proper name. His name, as shown on his birth certificate, is Joseph Phillipe Gilles Lambert. The financing statement correctly identified Mr. Lambert's date of birth and correctly set out the Vehicle Identification Number (the V.I.N.).

3 Subsequent to the registration, Mr. Lambert made an assignment in bankruptcy and his trustee took possession of the motor vehicle. GMAC filed a proof of claim contending that it was a secured creditor with a security interest in the motor vehicle. At some point subsequent to the assignment in bankruptcy, the trustee acquired a copy of the GMAC financing statement. It identified the vehicle as "consumer goods".

4 The trustee caused its solicitor to inquire into the claim of GMAC. To do so, she turned to the computerized registration system established under the P.P.S.A. That system made three inquiries available. A searcher could conduct an individual specific debtor name inquiry (a specific debtor inquiry), an individual non-specific debtor name inquiry (a non-specific debtor inquiry) and a vehicle number inquiry (a V.I.N. search). To conduct the specific debtor inquiry, a searcher must enter into the computer the debtor's first name, middle initial, last name and date of birth. This search retrieves only financing statements in which the

debtor's first name, middle initial, last name and date of birth as set out in the financing statement exactly match the data entered by the searcher. The non-specific inquiry requires the searcher to enter the debtor's first and last name. It reveals all financing statements where the debtor is described by that first and last name regardless of the middle initial, if any, or the date of birth shown in the financing statement. A V.I.N. search is made by entering the V.I.N. only and retrieves all financing statements in which the collateral is described by the same V.I.N. entered by the searcher regardless of the name of the debtor. [2] The V.I.N. search is available only where the collateral is a motor vehicle. The V.I.N. must be recorded in the financing statement where the motor vehicle is classified as consumer goods. Where the motor vehicle is not so classified, the V.I.N. may be included in the financing statement.

5 The trustee's solicitor, relying on the name on Lambert's birth certificate, made individual specific inquiries using the names Joseph P. Lambert and Joseph G. Lambert and Lambert's birth date. She also made an individual non-specific search using the name Joseph Lambert. None of these searches revealed the financing statement filed by GMAC since it referred to the debtor as Gilles J. Lambert. The solicitor did not conduct a V.I.N. search, although the trustee had access to that number. A V.I.N. search would have revealed the GMAC financing statement.

6 The trustee moved for a declaration that the GMAC security interest was not perfected and was, therefore, not effective against the trustee in bankruptcy. The trustee submitted that the errors in the recording of the debtor's name in the financing statement were fatal to the perfection of that interest as against the trustee. GMAC maintained that the errors were cured by s. 46(4) of the P.P.S.A. since the trustee should have performed a V.I.N. search and had he done so, he would not have been misled by the errors in the debtor's name. Farley J. found in favour of the trustee. His reasons are now reported at (1991), 2 P.P.S.A.C. (2d) 160 (Ont. Bktcy.).

III. Analysis

7 But for s. 46(4), there would be little difficulty applying the terms of the P.P.S.A. to this fact situation.

8 Section 19(*b*) of the P.P.S.A. provides that a security interest is perfected when all steps required for perfection under the P.P.S.A. have been completed. Section 23 of the P.P.S.A. declares that registration perfects the security interest in all types of collateral. Perfection by registration requires the registering of a financing statement (s. 45). The financing statement must be in the prescribed form (s. 46(2)). The prescribed form is set out in O. Reg. 372/89 [now R.R.O. 1990, Reg. 912]. Section 16 of that regulation provides:

> 16. (1) The name of a debtor who is a natural person shall be set out in the financing statement to show the first given name, followed by the initial of the second given name, if any, followed by the surname.

9 Sections 3(7), (8) and (9) of the same regulation are also relevant:

> (7) If the collateral includes a motor vehicle and the motor vehicle is classified as consumer goods, the motor vehicle shall be described on line 11 or 12 on the financing statement or in the appropriate place on a motor vehicle schedule.
>
> (8) If the collateral includes a motor vehicle and the motor vehicle is not classified as consumer goods, the motor vehicle may be described on line 11 or 12 on the financing statement or in the appropriate place on a motor vehicle schedule.
>
> (9) The description of the motor vehicle on line 11 or 12 or on a motor vehicle schedule shall include the vehicle identification number, the last two digits of the model year, if any, the model, if any, and the make or the name of the manufacturer.

10 GMAC's financing statement complied with the relevant parts of s. 3 of the regulation, but did not comply with s. 16 in that it incorrectly stated both Lambert's first name and his middle initial. Accordingly, GMAC's financing statement was not in the prescribed form and but for the possible effect of s. 46(4) of the P.P.S.A., GMAC's security interest in the vehicle was not perfected.

11 Section 20(1)(*b*) of the P.P.S.A. declares that an unperfected security interest in any collateral is not effective against a trustee in bankruptcy. Again, setting aside s. 46(4) of the P.P.S.A., it would followthat since GMAC's security interest was not registered in accordance with the Act and hence not perfected, it was ineffective as against the trustee in bankruptcy. But for s. 46(4) of the P.P.S.A., the trustee was entitled to the declaration made by Farley J.

12 Does s. 46(4) of the P.P.S.A. alter this result? For convenience, I will repeat the section:

> (4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

13 Two features of s. 46(4) are non-controversial. First, it is potentially applicable to any error in a financing statement: *Re Weber* (1990), 78 C.B.R. (N.S.) 224 at p. 227 (Ont. S.C.). Secondly, an error in a financing statement does not per se invalidate that statement or impair the security interest claimed by the statement. The validity of the financing statement is unaffected by the error unless the party seeking to invalidate the financing statement demonstrates that "a reasonable person is likely to be misled materially by the error".

14 Interpreting s. 46(4) becomes more difficult once one ventures beyond these two propositions. Some trial courts in this province have approached s. 46(4) by looking to the effect of the error in the financing statement on the party challenging the security. Cases taking that view include: *Fritz (Trustee of) v. Ford Credit Canada Ltd.* (1992), 15 C.B.R. (3d) 311 at p. 314 (Ont. Bktcy.); *Prenor Trust Co. of Canada v. 652729 Ontario Ltd.* (1992), 4 P.P.S.A.C. (2d) 139 at pp. 141-142 (Ont. Gen. Div.); *Canamsucco Road House Food Co. v. Lngas Ltd.* (1991), 2 P.P.S.A.C. (2d) 203 at p. 208 (Ont. Gen. Div.); *General Motors Acceptance Corp. of Canada Ltd. v. Northway (Trustee of)* (1992), *(*sub nom. *General Motors Acceptance Corp. of Canada v. Stetsko)* 8 O.R. (3d) 537 at pp. 541-542 (Gen. Div.) [hereinafter "*Stetsko*"]; *Re Rose* (1993), 16 O.R. (3d) 360 (Bktcy.).

15 In *Fritz*, supra, the debtor's name had been incorrectly spelled on the financing statement, but the V.I.N. was accurately recorded. The trustee performed only a specific debtor inquiry. That inquiry did not retrieve the financing statement. A V.I.N. search would have located the financing statement. The trustee had been told by the debtor that the automobile in question was pledged to the creditor. Chadwick J. found that the mistake in the debtor's name constituted an error in the financing statement. He then turned to s. 46(4) of the P.P.S.A. In holding that the creditor had a valid security interest, Chadwick J. said at p. 314:

> The "reasonable person" that is referred to in considering subs. 46(4) is not an imaginary person but the person who is challenging the validity of the security agreement. In this case, the trustee in bankruptcy had actual notice of the interests of Ford Credit Canada Limited at the time of the assignment in bankruptcy. He was informed by the bankrupt that the 1989 Ford Tempo was fully secured by Ford Canada Limited. The name search under the P.P.S.A. by the trustee was only for the purpose of determining whether there were any errors in the registration of the documentation and not for the purpose of a bona fide purchaser.
>
> It is obvious from the facts in this case that the trustee was not materially misled as a result of the incorrect registration.

16 In *Stetsko*, supra, a creditor placed the wrong birth date of the debtor in the financing statement. The trustee was told by the debtor of the creditor's secured interest in the automobile, but he conducted only a specific debtor inquiry. That inquiry did not retrieve the creditor's financing statement because of the error in the birth date. In holding that the creditor's interest remained perfected as against the trustee Maloney J. referred, with approval, to the analysis of s. 46(4) found in *Canamsucco*, and said at p. 542:

> in trying to determine whether the "reasonable person" is likely to be misled one can only look to: (1) who that person is, (2) what knowledge he may have had, and (3) how he may be affected by it. ...

17 On this view of s. 46(4), the error in the financing statement is of no consequence if the party challenging the statement had knowledge of the security interest, or if that party acting reasonably, given its knowledge, could have located the financing

statement using the various searches available under the P.P.S.A. This approach has some attraction, especially in cases where the trustee in bankruptcy is seeking to take advantage of an error in the financing statement. In those cases, the trustee appears more as an opportunist pouncing on a windfall than as a vulnerable prospective creditor or purchaser seeking the protection of reliable registration system: Zeigel, "The New Provincial Chattel Security Law Regimes" (1991) 70 Can. Bar Rev. 681 at pp. 715-716. The subjective approach may be said to do "justice" in cases involving the trustee in bankruptcy in that it denies the trustee the windfall.

18 I cannot, however, agree with this interpretation of s. 46(4). By using the reasonable person standard, the Legislature intended that the test provided in s. 46(4) should be an objective one. To limit the inquiry to the effect of the error on the party challenging the security is to impose a personal or subjective test peculiar to that party. Furthermore, this interpretation substitutes a test based on actual prejudice for the reasonable person standard set out in the section. As written, s. 46(4) does not require evidence that the error actually misled any person.

19 The language of s. 46(4) may be usefully compared to that found in s. 9(2) of the P.P.S.A.:

> (2) A security agreement is not unenforceable against a third party by reason only of a defect, irregularity, omission or error therein or in the execution thereof unless the third party is actually misled by the defect, irregularity, omission or error.

20 Section 9(2) expressly declares that a security agreement is not unenforceable by virtue of an error in that agreement unless "the third party is actually misled by the ... error". The language of s. 46(4) which specifically targets financing statements stands in marked contrast to the subjective language of s. 9(2). The approach taken in *Fritz*, supra, *Stetsko*, supra, and similar cases is appropriate to the language of s. 9(2), but not the very different language found in s. 46(4).

21 The statutory history of s. 46(4) is also informative on this point. I need not detail that history as it is fully chronicled elsewhere. [3] It is sufficient for my purposes to observe that s. 47(5) of the P.P.S.A., R.S.O. 1980, c. 375, the predecessor section of 46(4), set out an actual prejudice test as part of its scheme for distinguishing between errors in financing statements which invalidated the statement and those which did not: *Re Charles* (1990), 73 O.R. (2d) 245 at p. 249 (C.A.). In 1984, the Minister's Advisory Committee on the *Personal Property Security Act* (the Catzman Committee) recommended that the curative provisions in the Act be amended to provide for a reasonable person standard in evaluating the effect of errors in financing statements and security agreements: Ontario, *Report of the Minister's Advisory Committee on the Personal Property Security Act*, 1984 at pp. 13, 27-28. A similar recommendation was made by the Committee in 1986, although that recommendation was limited to financing statements. The recommendation of the committee was opposed by those who preferred a subjective, actual prejudice test. At first it appeared that the government of the day would support the subjective approach. An early draft of the proposed amendments to the P.P.S.A. included the following:

> A financing statement ... is not invalidated nor is its effect impaired by reason only of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error has actually misled someone. [4]

22 However, the Bill as eventually introduced adopted the Committee's recommendation. That recommendation proposed a curative proviso in the same words as are now found in s. 46(4).

23 The genealogy of s. 46(4) is remarkably complete. There is no need to speculate about how the section ended up as it did. Two competing approaches were put forward and their respective merits debated over several years. In the end, a standard determined by reference to the probability of a reasonable person being materially misled won out over the subjective actual prejudice test favoured by others. With respect, the approach to s. 46(4) taken in *Fritz, Stetsko* and similar cases is closely aligned to the approach the Legislature considered and rejected when it opted for the language of s. 46(4). Whatever the merits of the arguments in favour of an actual prejudice test, those arguments were made before the appropriate forum and found wanting. They cannot be resurrected under the guise of statutory interpretation.

24 Support for the conclusion that the reasonable person referred to in s. 46(4) cannot be equated with a person in the position of the party seeking to invalidate the financing statement is found in *Kelln (Trustee of) v. Strasbourg Credit Union Ltd.* (1992), 89 D.L.R. (4th) 427 (Sask. C.A.). Section 66(1) of the P.P.S.A., S.S. 1979-80, c. P-6.1 provides:

> The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is seriously misleading.

25 This section applies to financing statements registered under the Saskatchewan Act. If anything, the language of s. 66(1), which does not contain any specific reference to the reasonable person, is more susceptible to the subjective actual prejudice approach than is s. 46(4) of the P.P.S.A. Despite that arguable ambiguity, the Saskatchewan Court of Appeal unanimously held that s. 66(1) sets out a purely objective test. The court specifically rejected trial decisions in Saskatchewan which had considered the effect of the error from the vantage point of the party challenging the validity of the financing statement. Bayda C.J.S. at p. 430, speaking only for himself, held that the application of the curative proviso was to be determined by asking:

> whether a reasonable person using the registration and search systems put in place by the Act is apt by reason of the omission and the circumstances surrounding it to end up believing that something important is so when in fact it is not so.

26 Vancise J.A. at p. 442, writing for himself and Wakeling J.A., adopted the question posed by Professor Cuming as the appropriate approach:

> 'Would the defect, irregularity, omission or error be seriously misleading to any reasonable person within the class of persons for whose benefit registration or other methods of perfection are required?'

27 Trial courts in this province, including Farley J. in this case, have also rejected the approach taken in *Fritz* and *Stetsko* in favour of one which looks to the hypothetical users of the search facilities provided by the registration system. These cases include: *Armstrong, Thomson & Tubman Leasing Ltd. v. McGill Agency Inc. (Trustee of)* (1993), 15 O.R. (3d) 292 at pp. 297-298 (Bktcy.); *Re Haasen* (1992), 8 O.R. (3d) 489 at p. 499 (Bktcy.); *Re Ghilzon* (1993), 21 C.B.R. (3d) 71 at pp. 73-74 (Ont. Bktcy.); *Re Weber*, supra, at p. 243; *Re Woolf* (1992), 15 C.B.R. (3d) 292 at pp. 298-300 (Ont. Bktcy.); *Adelaide Capital Corp. v. Integrated Transportation Finance Inc.* (1994), 16 O.R. (3d) 414 at pp. 428-429 (Gen. Div.). *Weber* was cited with approval by the Divisional Court in *656956 Ontario Ltd. v. General Electric Capital Equipment Finance Inc.* (1992), 8 O.R. (3d) 481 at pp. 485-486.

28 Professor Zeigel and Mr. Denomme in their recent text, *The Ontario Personal Property Security Act: Commentary and Analysis* (1994) also favour the objective approach to s. 46(4). After a comparison of the present section and its predecessor, they write at pp. 361-362:

> As noted, s. 46(4) implements an objective test — would "a reasonable person" be "misled materially" by the error or omission? If the question is answered "yes", it matters not whether the party attacking the erroneous statement, or indeed anyone else, was actually misled. The reason for the use of such a test is to maintain the integrity of the registration system and to avoid costly litigation; registrants must have such a test in mind and attempt always to complete registrations so that no reasonable person could be so misled. If they fail to do so, it will not matter that, fortuitously, no one can be found who actually reviewed and relied upon the erroneous portion of the statement. This will provide an incentive to registrants to ensure that registrations are correct and complete and will result in a more reliable and useful system.
>
> A continuing problem in the jurisprudence in this area is the tendency to render fact-specific decisions which, while seeming to be more fair in the particular case, introduce uncertainties which serve to weaken the structure and purpose of the registration system. There is an understandable reluctance to deprive secured parties of perfected security interest for what seem like minor and technical errors in financing statements or financing change statements. This has led some courts to seek to do justice as between a registrant and a party challenging the registration by finding that the challenger

has not been prejudiced by the error. It bears repeating that the plain words of s. 46(4) require an objective enquiry into whether "a reasonable person is likely to be misled materially" by the defect in question.

29 Later, after a consideration of *Kelln*, supra, and the conflicting authority in Ontario, the authors conclude at pp. 364-365:

> With respect to registration errors, the initial question posed by the statute is "would a reasonable person have been misled materially by this error?" The answer to this question cannot depend on the facts of a particular case — to allow it to do so leads to random results. The registration process, insofar as it is under the control of the registrant, should be very carefully monitored for errors because it is not possible to predict, at the date of registration, who may later access the information or for what purpose. Therefore, to the extent an onus should be placed on anyone it should be placed on the registrant in order to preserve the reliability of the registration system.

30 Without adopting the ultimate conclusions reached in *Kelln* and the supporting Ontario authorities, or all of the reasons put forward by Zeigel and Denomme in support of their position, I do agree that s. 46(4) sets out an objective test. The inquiry dictated by s. 46(4) cannot focus on a particular party, but must look to the broader class of persons who may have cause to use the search facilities of the registration system. In looking to that broader class of persons, one must determine, not the existence of actual prejudice, but the probability of some member of that class of persons being materially misled by the error. As s. 46(4) lays down an objective test, a party challenging the security on the basis of errors in the financing statement need not demonstrate actual prejudice to that party or anyone else. The trustee in bankruptcy may rely on an error in a financing statement to invalidate a secured interest claimed in that statement if the trustee or other third party can show that the error in the financing statement was likely to materially mislead a reasonable person.

31 My conclusion that s. 46(4) creates an objective test which requires an assessment of the error's impact on those persons who might use the search facilities of the registration system does not resolve this appeal. It remains to provide a concrete formulation of that test.

32 I begin with the purpose of s. 46(4). The section is designed to preserve the integrity of the registration system provided by the P.P.S.A. That system has two constituencies: those who register financing statements; and those who search the system for prior registrations. The integrity of the overall system must address the interests of both groups. Section 46(4) seeks to maintain the system's integrity by distributing the impact of errors, no matter how unavoidable,made in financing statements between the two groups. An interpretation of s. 46(4) which is too forgiving of such errors places too much of the burden on prospective creditors and purchasers (searchers). An interpretation which is too unforgiving of those errors places too much of the burden on creditors (registrants). In either event, the integrity of the registration system suffers. Section 46(4) should be interpreted, to the extent that its language permits, so as to assign the burden of the error in a manner which best promotes the overall integrity of the system.

33 I turn next to the context in which s. 46(4) exists. Its reach and limitations can be understood only in the framework of the registration system established under the P.P.S.A. and the purposes for which that system is used. Professor McLaren, in his text, *Secured Transactions in Personal Property in Canada*, 2nd ed. (1992), at p. 30 — 2 [looseleaf, § 30.01[1]] provides a succinct description of the purposes of the system:

> The personal property security registration system provides the vehicle to permit registration of a security interest and a non-possessory repair or storage lien. *It also provides information about the transaction and a means whereby a person who is intending to purchase personal property or to lend money on the security of personal property can determine whether the owner has granted a security interest in the property as security for a debt*. This informational function is accomplished by providing a mechanism by which a search of registrations under the Act may be made.
>
> The purpose of the registration system is to provide enough information to enable a person searching the system to know whom to contact to obtain information regarding a secured transaction. It is for this reason that the registration system is referred to as a notice-filing system. ...
>
> [Emphasis added.]

34 The purpose underlying the search function of the registration system is particularly important to the interpretation of s. 46(4). As Professor McLaren properly points out, the inquiry or search function exists to provide information to prospective buyers and lenders who are purchasing property or taking property as collateral for a loan. The putative purchaser or lender wants to know whether there are any prior claims on the property which could affect the decision to buy the property or accept it as collateral.

35 In my view, the "reasonable person" in s. 46(4) is a person using the search facilities of the registration system for their intended purpose, that is, to find out whether personal property to be purchased or taken as collateral is subject to prior registered encumbrances. To assess the potential effect of an error in a financing statement one must assume that the property which is the subject of the flawed financing statement is the property targeted by the inquiry made by the prospective purchaser or lender. In this case, therefore, the question becomes — would a potential purchaser of the motor vehicle referred to in the financing statement, or a person considering taking that motor vehicle as security be materially misled by the error in a previously registered financing statement? [5] This articulation of the test accords with the purpose of the inquiry function of the system, and gives meaning to the requirement that the error be "likely to mislead materially". Unless the effect of the error is addressed in the context of a potential purchase or loan involving the property specified in the financing statement, I am unable to see how an error in that financing statement could be "likely to materially mislead" a prospective purchaser or lender.

36 In so describing the purpose of the search function of the system, I am not unaware that it has other uses in the commercial world. Some potential creditors may do a P.P.S.A. search as part of their inquiry into the credit worthiness of a potential borrower. Those creditors will not be interested in the status of any particular property, but will be looking for any information that may assist in assessing the potential borrower's overall debt situation and creditworthiness. In describing the reasonable person for the purposes of s. 46(4), I would distinguish between a use to which the P.P.S.A. system can be put and the purpose for which the system exists. The system was not designed as a credit inquiry service, although it can provide information which will assist in determining creditworthiness. That same incidental use exists with respect to information stored in various other data banks established for a myriad of other purposes.

37 The preservation of the integrity of the P.P.S.A. registration system requires that those who use the system for its intended purpose be protected from errors made by other users where those errors are likely to mislead materially. In my view, the same protection should not be extended to those who put the system to some different use which while commercially beneficial is not the purpose for the system. In my view, the reasonable person in s. 46(4) is not the person using the search facility as part of a general inquiry into a prospective borrower's creditworthiness.

38 The "reasonable person" using the inquiry function of the registration system for the purpose described above must also be regarded as a person who is familiar with the search facilities provided by the system. That is not to say that the standard is that of the most sophisticated and skilled user. The standard must be that of a reasonably competent user of the system: *Re Millman* (1994), 17 O.R. (3d) 653 (Bktcy.). That reasonable user would be aware of the various searches available in the system and the product produced by each. Furthermore, the reasonable user must be taken to know that potential security interests in motor vehicles may be retrieved through two discrete searches of the system, one using the name of the debtor and the other the motor vehicle's V.I.N.

39 Having identified the reasonable person in s. 46(4) as a potential purchaser or lender seeking to locate prior encumbrances on the targeted property, and as a reasonably competent user of the search function of the registration system, I turn now to the information which that reasonable person could be expected to have when making his or her inquiry. No one suggests that the reasonable person would not be able to get the name and birth date of the vendor or borrower through the relevant records. Clearly, he or she would be able to obtain that information: *Re Haasen*, supra, at p. 500. The reasonable person, as a potential purchaser or lender would not, however, necessarily have access to the names and birth dates of prior owners of the motor vehicle. These prior owners may have encumbered the vehicle. Financing statements giving notice of those encumbrances will be registered under the name of the prior owner and perhaps under the V.I.N.

40 In my opinion, the potential purchaser or lender acting reasonably would also obtain the V.I.N. of the motor vehicle. He or she would be in a position to require access to the motor vehicle as a condition of the purchase or loan. Access to the motor vehicle means access to the V.I.N. since it is found on a plate attached to the vehicle's dashboard. Furthermore, a reasonably prudent purchaser or lender familiar with the registration system would appreciate that the V.I.N. could be used to search for prior encumbrances on the vehicle, particularly those registered against prior owners of the vehicle whose identity was unknown to the potential purchaser or lender. Fixed with this knowledge, the reasonable person would realize the importance of the V.I.N. and would take advantage of his or her position as a purchaser or lender to require access to the V.I.N.

41 Would the reasonable person, having access to the seller or borrower's name (and birth date) and the V.I.N. of the motor vehicle, use both sources of information to conduct two searches of the registration system? With respect to the contrary view, I have no doubt that a reasonable person in possession of the information needed to conduct the two searches would in fact conduct both searches. The reasonable person would want to know about any prior encumbrances registered against the motor vehicle and would take all reasonable steps to locate notice of any prior encumbrance in the system. As a reasonable user of the registration system, he or she would know that prior encumbrances for motor vehicles could be registered under the debtor's name, the V.I.N., or both. A name search might not locate all prior encumbrances. A V.I.N. search might not locate all prior encumbrances if the motor vehicle was not classified as consumer goods for the purposes of a prior transaction. By performing the two searches, the reasonable user would increase the probability of recovering all prior encumbrances. The added protection would come at minimal cost. [6] Any reasonable user would spend the few dollars required for the added information and comfort provided by two independent searches of the registration system.

42 Those who have held that the reasonable person in s. 46(4) would conduct only a specific debtor name search have emphasized the importance to the registration system of using the debtor's correct name in the financing statement. For example, Donnelly J. in *Re Ghilzon*, supra, said at p. 74: "The integrity of the registration system is name dependent." No doubt this observation is accurate with regard to personal property other than motor vehicles. But where motor vehicles are involved, the integrity of the registration system does not depend only on accurately recording the debtor's name in the financing statement. Indeed, the V.I.N. search function exists specifically because a name-dependent system for motor vehicles would be inadequate and would leave potential purchasers and lenders vulnerable to encumbrances placed on the motor vehicle by prior owners of the motor vehicle. In the case of motor vehicles, the registration system is not name-dependent. Rather, it provides for identification of prior registrations by the combined access to the system afforded by name and V.I.N. searches.

43 An approach to s. 46(4) which excludes errors in the debtor's name from those which are curable by s. 46(4) harks back to the language of the former curative proviso (s. 47(5)) which declared that only clerical errors or errors in immaterial or non-essential parts of the financing statement were curable under that provision: *Re Weber*, supra, at pp. 228-229. The debtor's name is clearly a material and essential part of the financing statement: *Re Bellini Manufacturing & Importing Ltd.* (1981), 32 O.R. (2d) 684 at pp. 692-693 (C.A.). The present curative proviso does not, however, fix on the part of the financing statement in which the error occurred, but instead looks to the effect of the error on the reasonable person. The present provision may cure any error no matter where it occurs in the financing statement, if that error is not likely to mislead materially a reasonable person. An error may occur in a material part of the financing statement, but may not, in light of additional information, found in the same financing statement and available to the reasonable person, materially mislead that person. Case law under the prior provision identifying the materiality of the debtor's name to the financing statement does not assist in deciding whether the reasonable person referred to in the current section would conduct more than a specific debtor search.

44 Proponents of the single-search approach also rely on the absence of any requirement in the P.P.S.A. that more than one search be done: *Re Weber*, supra, at p. 228. The P.P.S.A. does not require that any search be done. A search for prior registered interests is triggered by self-interest, not by any statutory obligation. The nature of the search to be expected from a reasonable person reflects the extent to which a reasonable person would go to protect his or her interests. The absence of any statutory provision requiring one or more searches is of no consequence.

45 In summary, the reasonable person in s. 46(4) has the following attributes:

He or she is a reasonably prudent prospective purchaser or lender who looks to the registration system of the P.P.S.A. to provide notice of any prior registered claims against the property he or she is proposing to buy or take as collateral for a loan.

He or she is conversant with the search facilities provided by the registration system and is a reasonably competent user of those facilities.

Where the property to be bought or taken as collateral is a motor vehicle, the reasonable person will obtain the name and birth date of the seller/borrower as well as the V.I.N. of the motor vehicle.

Where the property is a motor vehicle, the reasonable person will conduct both a specific debtor name search and a V.I.N. search.

46 Bearing this reasonable person in mind I move to the final question. Is that reasonable person "likely to be misled materially" by a financing statement which contained an error in the debtor's name, but accurately set out the V.I.N.? The purpose for which the reasonable person uses the search function of the registration system provides the key to determining when it can be said that the reasonable person would be materially misled by an error in a financing statement. The reasonable person uses the system to find prior registered secured interests in the property in question. If the error in the financing statement results in the reasonable person not retrieving that financing statement from the system, then the reasonable person will probably be misled materially. If despite the error, the reasonable person as defined above will still retrieve the flawed financing statement from the system, then the error in the financing statement is not likely to mislead materially.

47 A reasonable person would not likely be misled materially by an error in a financing statement relating to the debtor's name if that same financing statement accurately set out the V.I.N. That financing statement would come to the attention of the reasonable person through a V.I.N. search despite the error in the name. The reasonable person would, therefore, be put on notice of the security interest referred to in the financing statement and could proceed accordingly. This conclusion accords with that reached in *Ford Credit Canada Ltd. v. Percival Mercury Sales Ltd.*, [1986] 6 W.W.R. 569 (Sask. C.A.).

48 The result would be very different if the financing statement incorrectly set out the debtor's name and did not contain the V.I.N., as could be the case if the motor vehicle had not been classified as consumer goods for the purposes of the transaction giving rise to the financing statement. In that situation, the error in the debtor's name would be fatal since the reasonable person conducting both a specific debtor search and a V.I.N. search could not locate the financing statement. That is, however, not this case. This financing statement did not include the V.I.N., and the impact of the error in the debtor's name must be assessed in that light. It supports the purpose behind the registration system to hold that a creditor who includes information in the financing statement which potentially permits a subsequent searcher to locate the financing statement through two independent means is in a better position than a creditor who chooses to limit itself to the bare essentials required by the regulations.

49 My conclusion would also be different if the V.I.N. was improperly recorded in the financing statement and the debtor's name was accurately set out. In that situation, a reasonable person could well be materially misled by the error in the financing statement. Consider this example. P agrees to purchase a car from V. The car had been previously owned by X, who pledged it to Y. Y registered a financing statement correctly identifying X as the debtor, but incorrectly setting out the V.I.N. of the motor vehicle. P, proceeding as I have held a reasonable purchaser would, conducts a specific debtor search in the name of V (his vendor) and a V.I.N. search using the proper V.I.N. The two searches conducted by P would not reveal Y's financing statement, because of the error made by Y with respect to the V.I.N. This error would therefore, probably materially mislead P since it would leave him unaware of Y's claim to a prior security interest in the motor vehicle. My conclusion that an error in the V.I.N. even when coupled with a correct identification of the debtor would not be curable under s. 46(4) is consistent with the result in *Kelln*, supra.

50 Further reference to *Kelln* is necessary. In that case, the V.I.N. was improperly recorded in the relevant financing statement, but the debtor's name was accurately recorded. The court held that the error could not be cured by the Saskatchewan equivalent of s. 46(4) of the P.P.S.A. As indicated above, I agree with that result. Vancise J.A. went on to hold that an error in the debtor's

name where the V.I.N. was properly recorded would be equally fatal. In doing so, he appears to have rejected the same Court's holding in *Ford Credit Canada Ltd.*, supra. Vancise J.A. and I part company at this point.

51 Vancise J.A. observes at p. 443 that an error in a financing statement is not curable if that error would result in "the failure to properly register or retrieve the information from the register concerning the collateral". I agree with this comment, except I would limit the concern to the proper retrieval of the information.

52 Vancise J.A. goes on at pp. 443-444 to hold:

> ... Thus the conclusion is that the failure to include both of the mandatory registration-search criterion [sic] where it is required will result in the registration being seriously misleading and render the security interest unperfected.
>
> As noted, the reason for such objective interpretation is to provide a consistent approach to the registration and perfection of security interests.
>
> The failure to include the debtor's name on a financing statement where there is already a serial number which correctly describes the collateral should render the security interest unperfected. In other words, where there is a requirement for both criterion [sic] the failure to include one is seriously misleading and the failure to comply renders the registration invalid. If one or both of the mandatory registration-search criteria contain errors which do not prevent the proper identification or retrieval of the financing statement, the error is not seriously misleading and the security interest should be perfected.

53 This analysis proceeds on the basis that only a single search need be performed by the prospective purchaser or lender. Consequently, an error in either the name or the V.I.N. which prevented a person conducting either, but not both of those searches from locating the financing statement would be materially misleading.

54 I reach a different result than Vancise J.A. because, for the reasons I have already set out, I proceed on the premise that the prospective purchaser or lender would have access to both the seller/borrower's name and the V.I.N., and would conduct both searches. An error in a financing statement would probably be materially misleading only if the error caused the financing statement to escape the net cast by the combined reach of both searches.

55 Vancise J.A. quite properly supports his approach on the basis of the certainty and predictability it achieves. My approach borrows from his, save for the different assessment of the searches a reasonable person would conduct, and achieves the same consistency and predictability. In my estimation, it also more effectively preserves the integrity of the registration system by more fairly balancing the interests of secured creditors and prospective purchasers and lenders. A creditor's secured interest should not fail as against third parties by virtue of an error in the financing statement, if that error would not preclude retrieval of the financing statement by a prospective purchaser or lender taking reasonable steps to protect his or her interest and making reasonable use of the search facilities provided by the registration system.

56 I would hold that the trustee has not established that the error in the GMAC financing statement would probably have misled materially a reasonable person. The financing statement is therefore not invalidated and GMAC's security interest in the motor vehicle is perfected.

IV. The Order

57 GMAC did not commence its appeal within the time period permitted by the statute. It was, however, out of time by only a few days and had formed the intention to appeal within the specified time period. The trustee does not allege any prejudice arising from the delay. I would grant the necessary extension of time for the service and filing of the notice of appeal. I would also allow the appeal, set aside the order of Farley J. and substitute an order declaring that, as against the trustee, GMAC has a perfected security interest in the motor vehicle.

58 GMAC is entitled to its costs both in this Court and in proceedings before Farley J. Costs before Farley J. should be in the amount fixed by him.

Appeal allowed.

Footnotes

1 The same issue was raised in *Re Woolf* (File #C13753) [(1992), 15 C.B.R. (3d) 292 (Ont. Bktcy.)], *Re Tanzer* (File #C13690) [(1992), 4 P.P.S.A.C. (2d) 195 (Ont. Gen. Div. [Commercial List])] and *Re Haasen* (File #C12153) [(1992), 13 C.B.R. (3d) 94 (Ont. Bktcy.)]. The appeals were heard together and these reasons reflect the arguments advanced in all four cases.

2 The searcher may also request additional registrations containing similar V.I.N. numbers: *Personal Property Security Registration and Enquiry Guide*: Ministry of Consumer and Commercial Relations 1993 at pp. 70-71.

3 Zeigel, "Protecting the Integrity of The Ontario Personal Property Security Act" (1987-88) 13 Can. Bus. L.J. 359; Zeigel, "Personal Property Security Legislative Activity, 1986-88" (1989) 15 Can. Bus. L.J. 108 at pp. 112-115.

4 Reproduced in Zeigel, "Protecting The Integrity of The Ontario Personal Property Security Act", supra, n. 2 at p. 368.

5 Apart from the protection afforded by the registration system, purchasers who buy from dealers are protected by s. 28(1) of the P.P.S.A.; see McLaren, supra, at p. 30 — 18.2 [looseleaf, § 30.02[4][a]].

6 We were informed by counsel that each additional search costs $10.

TAB 10

2010 ONCA 385
Ontario Court of Appeal

Fairbanx Corp. v. Royal Bank

2010 CarswellOnt 3562, 2010 ONCA 385, [2010] O.J. No. 2226, 16 P.P.S.A.C. (3d) 96, 189 A.C.W.S. (3d) 849, 262 O.A.C. 251, 319 D.L.R. (4th) 618, 68 C.B.R. (5th) 102

IN THE MATTER OF the bankruptcy of Friction Tecnology Consultants Inc. in the City of Toronto, in the Province of Ontario

Fairbanx Corp. (Applicant / Appellant) and Royal Bank of Canada, Perry Krieger & Associates Inc., Marketing Impact Limited and The Evercare Company Canada Inc. (Respondents / Respondents)

Doherty, K. Feldman, E.A. Cronke JJ.A.

Heard: April 7, 2010
Judgment: May 28, 2010
Docket: C51186

Proceedings: affirming *Fairbanx Corp. v. Royal Bank* (2009), 2009 CarswellOnt 6098, 15 P.P.S.A.C. (3d) 265, 57 C.B.R. (5th) 310 (Ont. S.C.J.)

Counsel: Simon Morris for Appellant
James C. Davies, R. Del Vecchio for Respondent, Royal Bank of Canada

***K. Feldman J.A.*:**

1 The appellant is in the business of factoring accounts receivable. It attempted to register its assignment of accounts agreement with the debtor under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*"), but spelled the debtor's name incorrectly. The respondent bank later lent money to the same debtor, registering its general security agreement against the debtor's correct name. The debtor went bankrupt and a priority dispute arose. The appellant appeals from the order of the application judge, which held that the appellant's security interest was unperfected and that the bank's perfected security took priority over the appellant's unperfected interest in the accounts.

2 For the reasons that follow, I would dismiss the appeal.

Facts

3 In 2005, Fairbanx Corp. entered into an agreement entitled "Purchase of Accounts Receivable Agreement" with Friction Tecnology Consultants Inc. (the "debtor"), a supplier of plastic injection moulding. The correct spelling of the debtor's name is "Friction Tecnology Consultants Inc.", spelling "tec[h]nology" without the "h". However, the debtor carried on its business using an incorrect spelling of its name: "Friction Tec*h*nology Consultants Inc." (Emphasis added). It used this incorrect spelling to enter the agreement with Fairbanx and spelled its name that way on its letterhead and invoices.

4 Fairbanx registered a financing statement under the *PPSA* against the debtor, spelling its name incorrectly with the "h". On an ongoing basis, Fairbanx purchased specific accounts receivable from the debtor, paid a discounted amount for each account, received an assignment of the account, gave notice of the assignment to the party that owed the account, and proceeded to collect or attempt to collect and retain the monies owed on each such account.

5 In late 2007, the debtor approached the bank for a loan. At that time, the bank conducted a *PPSA* search under the incorrect spelling of the debtor's name and found Fairbanx's registration. In January 2008, the bank agreed to proceed with the loan to the debtor and instructed its secured transactions personnel operating through its head office to conduct the appropriate searches in order to allow the bank to obtain a first charge against the debtor under the *PPSA*. The bank searched under the correctly spelled name of the debtor. The search disclosed three creditors but not Fairbanx. Before advancing any funds, the bank obtained postponement agreements from the three registered creditors and, on January 22, 2008, it advanced a revolving demand facility to the debtor. The bank registered its financing statement as a first charge under the *PPSA*, using the proper spelling of the debtor's name without the "h".

6 Because the bank had prior knowledge of the debtor's relationship with Fairbanx, as a condition of its loan, the bank required the debtor to cease factoring its accounts receivable with Fairbanx. There is no evidence on the record that the factoring actually ceased. In fact, the two accounts in issue in this application were factored after the date of the bank's agreement and before the debtor's bankruptcy on March 31, 2009.

Issues

7 Fairbanx raises two issues on the appeal, both of which were argued before the application judge:

> (1) Is the factoring agreement an absolute assignment of accounts that is not subject to the *PPSA*?
>
> (2) Is Fairbanx's registration under the incorrectly spelled name of the debtor nevertheless valid under s. 46(4) of the *PPSA*, thereby standing in priority to the bank's security?

Analysis

Issue 1: Is the Factoring Agreement an Absolute Assignment of Accounts That Is Not Subject to the PPSA?

8 Fairbanx argues that a factoring assignment of an account is effectively a sale of that account because when an account is factored, it is assigned absolutely to the transferee with no reversionary right in the transferor. Fairbanx relies on s. 53(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 (the "*CLPA*") for the proposition that an absolute assignment is subject only to equitable rights. Section 53(1) provides:

> 53(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

9 Fairbanx acknowledges, however, that ss. 2(a)(ii) and (b) of the *PPSA* provide that the *PPSA* applies to every transaction that in substance creates a security interest, including an assignment that secures the performance of an obligation (s. 2(a)(ii)) and also a transfer of an account or chattel paper even where it does not secure performance of an obligation (s. 2(b)).

10 Those sections read:

> 2. Subject to subsection 4(1), this Act applies to,
>
> > (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
>
> . . . . .

(ii) an assignment, lease or consignment that secures payment or performance of an obligation;

(b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and....

11 The concept of the *PPSA* applying to a transfer of accounts where the transfer does not secure the performance of an obligation, i.e. an absolute transfer, is difficult to reconcile conceptually with the purpose of the Act, which is to provide a priority system for lenders who take security over the borrower's assets. However, application of the Act to a transfer of accounts is in fact necessary for the effective operation of the *PPSA* to ensure that one system of priorities based on notice through registration and searches, applies to all transactions that affect entitlement to a borrower's assets. The effect is that anyone who intends to lend money and to take security on the assets of a debtor, including on its accounts receivable, will be able to ascertain, by searching under the *PPSA*, whether and to what extent those assets have already been encumbered in any way.

12 In Ronald C.C. Cuming, Catherine Walsh, Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005), the authors explain the policy rationale for extending the registration requirement to the assignment of accounts, at p. 90:

> Endemic to each type of transaction is the potential for third-party deception and the consequent commercial disruptions that this entails.... In the case of a transfer of an account, the transferor retains apparent control of the account even though she no longer owns or has any interest in it. By bringing these transactions within the scope of the registration and priority rules of the PPSA, third parties are placed in the position of being able to discover the existence of these interests before dealing with a[n]... assignor.

13 To the extent that there may be a conflict between the application of the *CLPA* and the *PPSA* respecting an assignment of accounts under a factoring arrangement, that conflict is resolved by s. 73 of the *PPSA*, which provides that in the case of any conflict between the *PPSA* and any other Act except the *Consumer Protection Act*, *2002*, the applicable provision of the *PPSA* prevails. The *PPSA* therefore applies to the assignment of accounts.

14 In this case, Fairbanx tried to register its assignment under the *PPSA*. Had it done so effectively, it would have had priority over the bank's subsequently acquired interest in the debtor's accounts. However, because Fairbanx's registration was ineffective by virtue of the incorrect spelling of the debtor's name, the bank's properly perfected security interest ranked ahead of Fairbanx's interest in the accounts. This remains the case even though value was paid and all steps were taken to achieve an absolute assignment of the two accounts that are in issue in this application. The assignment did not remove those accounts from the security interest of the bank, which applied in this case, on the date of the debtor's bankruptcy.

Issue 2: Is Fairbanx's Registration under the Incorrectly Spelled Name of the Debtor Nevertheless Valid under s. 46(4) of the PPSA, Thereby Standing in Priority to the Bank's Security?

15 In the alternative, Fairbanx argues that its registration against the misspelled name of the debtor is effective by virtue of s. 46(4) of the *PPSA*. That section provides:

> 46(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

16 Fairbanx argues that because the debtor effectively carried on business under the incorrectly spelled "Friction Technology Consultants Inc.", a reasonable person would search under that name and therefore would not be materially misled by Fairbanx's error in registering under that name. The evidence of that proposition is in this record: the respondent bank did in fact search under that name and found Fairbanx's registration. Therefore, the bank, unarguably a reasonable person, was not materially misled.

17 The leading case on the effect of s. 46(4) of the *PPSA* is this court's decision in *Lambert, Re* (1994), 20 O.R. (3d) 108 (Ont. C.A.), leave to appeal to S.C.C. refused, (1995) (S.C.C.). There the court reviewed both the legislative history of the section

and the history of the case law that applied it. Importantly, that history clarified that a creditor's subjective knowledge of the existence of a financing statement or its registration is irrelevant. The test is an objective one - whether a reasonable person would be materially misled by an error.

18 Another important feature of s. 46(4) is that a registered financing statement with an error is *prima facie* effective. It only loses its effect if a reasonable person would be materially misled by the error. Therefore, the meaning and effect of that qualifier must be analyzed in the context of the purpose of the registration system and the importance of maintaining the integrity of that system.

19 In his text, *Secured Transactions in Personal Property in Canada*, 2d. ed., looseleaf (Scarborough: Carswell, 1989), Professor Richard H. McLaren describes the purpose of the *PPSA* registration system in the following way, at para. 30.01:

> The personal property security registration system provides the vehicle to permit registration of a security interest and a non-possessory repair or storage lien. It also provides information about the transaction and a means whereby a person who is intending to purchase personal property or to lend money on the security of personal property can determine whether the owner has granted a security interest in the property as security for a debt. This informational function is accomplished by providing a mechanism by which a search of registrations under the Act may be made.
>
> The purpose of the registration system is to provide enough information to enable a person searching the system to know who to contact to obtain information regarding a secured transaction. It is for this reason that the registration system is referred to as a notice-filing system.

20 Consequently, when a person searches under the debtor's name and finds registrations of financing statements and financing change statements, those registrations contain information about the secured transaction, about the debtor, about the security and about the lender. Some of that information may contain an error. For example, a financing statement may contain an outdated address of the debtor. A new creditor who knows the current address of the debtor could be materially misled about whether the registration is against the same debtor. Under s. 46(4), a court would have to determine whether a reasonable person would be so misled. Arguably, the person who conducts the search could make further inquiries using the information available from the search in order to try to ascertain whether the debtor at the new address is the same person or entity as at the previous address. On the other hand, there might be reasons in a particular case why that would not be possible, or if possible, might not be reliable. It would ultimately be for the court to decide, based on the objective criteria, whether a reasonable person would be materially misled about the identity of the debtor in that case.

21 However, where the error in the registered financing statement is in the debtor's name, no registration will be disclosed by a search of the correct name [1] . Therefore, the error in the debtor's name will not come to the attention of the person searching. In those circumstances, s. 46(4) cannot properly apply because the issue of whether the error would materially mislead a reasonable person never arises where the person searching does not find the registration that contains the error.

22 But even where the reasonable person who searches finds the registration against the incorrectly spelled name of the debtor, either by specifically searching that name as occurred in this case, or because the certificate discloses the registration under s. 43(3), that person may not be able to know whether the misspelled name is an error or the proper spelling of the name of another similarly named person or corporation.

23 In either case, the curative provision does not apply to validate the error. The reason is that s. 46(4) maintains the effect of a financing statement registered with an error as a perfected security interest of the registering creditor against the secured assets of the named debtor. If the name of the debtor is incorrect on the registered financing statement, then the registration will not perfect the creditor's security interest in the assets of the correctly named debtor. Of course, the creditor still has an unperfected security interest which ranks behind all properly perfected security interests in the same collateral.

Conclusion

24 In the result, I would dismiss the appeal with costs to the respondent bank fixed at $7,000, inclusive of disbursements and G.S.T.

***Doherty J.A.*:**

I agree.

***E.A. Cronke J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 Subject to s. 43(3), which allows the Registrar to include in the search certificate a search of similar names.

TAB 11

2008 ONCA 601
Ontario Court of Appeal

Royal Bank v. El-Bris Ltd.

2008 CarswellOnt 5098, 2008 ONCA 601, 169 A.C.W.S. (3d) 165, 298
D.L.R. (4th) 281, 46 C.B.R. (5th) 161, 50 B.L.R. (4th) 161, 92 O.R. (3d) 779

Royal Bank of Canada (Plaintiff / Appellant) and El-Bris Limited and James Ellis aka Jim Ellis (Defendants / Respondent)

J. Laskin, R.P. Armstrong, J. MacFarland JJ.A.

Heard: June 24, 2008
Judgment: September 3, 2008
Docket: CA C47126

Proceedings: affirming *Royal Bank v. El-Bris Ltd.* (2007), 2007 CarswellOnt 9262 (Ont. S.C.J.)

Counsel: Duncan M. MacFarlane, Q.C., J. Ross MacFarlane for Appellant
Myron W. Shulgan, Q.C. for Respondent

***J. Laskin J.A.*:**

A. Overview

1 The respondent, James Ellis, was the president and sole shareholder of El-Bris Limited. His company had developed land and built homes for many years. The appellant, Royal Bank of Canada (RBC), was the company's banker. In late 1992, RBC agreed to increase its loan to El-Bris from $200,000 to $700,000. Ellis gave security for this loan increase to his company. He personally guaranteed the loan. He also pledged to the bank a $700,000 collateral mortgage on property that he owned.

2 Over the ensuing decade the company's borrowing from RBC increased to about $3.5 million. By 2003, however, El-Bris had become insolvent. RBC called the loan and claimed against Ellis under its security. Ellis paid RBC $700,000 and asked for a discharge of the collateral mortgage and a release of his guarantee. RBC gave Ellis a discharge of the mortgage but demanded an additional $700,000 under his guarantee. When Ellis refused to pay this additional amount, RBC sued both him and El-Bris. RBC claimed that Ellis's obligation under the collateral mortgage was separate from his obligation under his guarantee. Ellis defended by asserting that he gave the collateral mortgage as support for or security for his guarantee, and that the discharge of the one discharged his obligation under the other. He sought rectification of both the mortgage and the guarantee to give effect to his position.

3 The trial judge, E. Ducharme J., granted judgment against the insolvent company, El-Bris. However, he dismissed RBC's action against Ellis. He accepted that ordinarily the terms of the "mortgage and the guarantee on their face would have bound Mr. Ellis to pay El-Bris's entire debt to the monetary limit of each security instrument". Nonetheless, he concluded that both the documentary and oral evidence showed the parties' common intention that the collateral mortgage stand as security for Ellis's guarantee. Or, as the trial judge persuasively put it: "I find that in offering to advance El-Bris's line of credit by $700,000.00, neither the bank nor Mr. Ellis intended to create a personal obligation on the part of Mr. Ellis in the amount of $1,400,000.00". He granted a declaration that Ellis's guarantee obligation was extinguished by the payment of $700,000 to RBC in 2003.

4 RBC's principal submission on appeal is that the trial judge erred by failing to give effect to the words of the documents, each of which expressed a separate payment obligation. RBC contends that an experienced businessman such as Ellis should not be able to use the remedy of rectification to avoid an obligation clearly spelled out in the documents he signed. Moreover,

RBC says that Ellis has failed to satisfy the four prerequisites to rectification set out by the Supreme Court of Canada in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.).

5 Ellis submits that the declaratory relief extinguishing his obligation under the guarantee was grounded in the trial judge's factual findings and that RBC has not shown any basis to interfere with these findings. Alternatively, Ellis submits that his obligation under the guarantee was discharged because RBC materially varied the terms of its loan to El-Bris without Ellis's consent.

6 The trial judge did not deal with Ellis's alternative submission, and I do not need to do so either. I would not give effect to RBC's submission and would therefore dismiss its appeal. Although the trial judge did not use the word "rectification" in his reasons, his findings of fact convincingly supported Ellis's claim for rectification. These findings of fact are, as Ellis contends, reasonably supported by the evidence and I would therefore defer to them. Indeed, on this record, accepting RBC's position would produce an inequitable and unfair result.

B. Discussion

1. Background

7 Ellis lived in Windsor, Ontario. In the early 1980s his company began banking with RBC at its Windsor branch office. Ellis dealt with the bank's account manager, Robert Langley, who is now retired. At the end of 1992, Ellis and Langley negotiated an increase in El-Bris's operating line of credit to $700,000. [1]

8 RBC asked for and obtained security for its loan both from El-Bris and Ellis. El-Bris pledged to the bank a $750,000 floating debenture, the company's common shares registered in Ellis's name and money due under a mortgage it held on a 30-unit apartment building in Windsor. El-Bris also assigned to RBC a $500,000 term insurance policy on Ellis' life. Ellis gave the bank the two pieces of security that are the subject of this litigation: a $700,000 collateral second mortgage on property he owned in Windsor, and his personal guarantee for $700,000. Ellis signed both documents on the same day, February 12, 1993. [2]

9 The collateral mortgage did not contain a term stating that Ellis was giving the mortgage in support of his guarantee. Instead, it contained the standard charge terms, which included a covenant to pay and a provision, clause 30, that the charge was in addition to any other security held by RBC.

> 30. Other Security — The Charge is in addition to and not in substitution for any other security held by the Chargee including any promissory note or notes for all or any part of the monies secured hereunder, and it is understood and agreed that the Chargee may pursue its remedies thereunder or hereunder concurrently or successively at its option. Any judgment or recovery hereunder of under any other security held by the Chargee for the monies secured by the Charge shall not affect the right of the Chargee to realize upon this or any other security.

10 Similarly, the guarantee Ellis signed — which appears to be a standard bank guarantee — did not refer to the collateral mortgage. Instead, it simply required Ellis to pay on demand El-Bris's liability to RBC up to $700,000 plus interest.

11 Thus, by their terms, and as RBC claims, the collateral mortgage and guarantee imposed on Ellis separate and independent obligations to pay the bank $700,000 plus interest on El-Bris's default. The trial judge recognized that, under ordinary circumstances, this would have been so. However, the trial judge did not consider this case to be the "ordinary or usual case". He rejected the bank's claim "that the mortgage and the guarantee are or were ever intended to be discrete, independent documents" (para. 38).

12 The trial judge concluded that the documents did not accurately reflect the agreement Ellis and RBC had made. In substance, he rectified these documents to reflect their agreement that the collateral mortgage was security for Ellis's guarantee. That is why the trial judge declared that, as Ellis had paid RBC $700,000 to discharge the collateral mortgage, he had no further obligation under his guarantee.

2. The Remedy of Rectification

13 Rectification is an equitable remedy designed to ensure that one party is not unjustly enriched at the expense of another. A court will rectify an inaccurately drawn written agreement so that it conforms to the agreement the parties intended to make. In *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327 (Ont. C.A.) at 336, Robins J.A. explained the remedy's underlying rationale, while acknowledging that rectification cannot be used to correct every mistake.

> The remedy of rectification is available only in certain defined circumstances and cannot be invoked to correct every mistake. In principle, rectification is permitted, not for the purpose of altering the terms of an agreement, but to correct a contract which has been mistakenly drawn so as to carry out the common intention of the parties and have the contract reflect their true agreement. The remedy is normally granted only where the mistake is mutual or common to the contracting parties.

14 RBC, however, argues that to obtain an order for rectification Ellis must show more than a common intention. He must also satisfy *Sylvan's* four prerequisites to rectification. I do not agree.

15 *Sylvan* was a case of unilateral mistake. The party seeking rectification, because of his own negligence, had mistakenly signed an inaccurately drawn document. Binnie J., writing for court, set out four prerequisites for parties seeking rectification for unilateral mistake: (i) a previous oral agreement inconsistent with the written document; (ii) the other party knew or ought to have known of the mistake and permitting that party to take advantage of the mistake would amount to unfair dealing; (iii) the document can be precisely rewritten to express the parties' intention; and (iv) each of the first three prerequisites must be demonstrated by convincing proof.

16 The case before us is not a case of unilateral mistake. On the trial judge's reasonable view of the record, it is a case of common mistake: when entering into the written agreement neither party intended to create two independent $700,000 obligations. Both thought the obligations were connected

17 The prerequisites in *Sylvan* do not apply to cases of common or mutual mistake. The following statement by Binnie J. para. 31 of *Sylvan* clarifies the scope of the application of the prerequisites: "The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met." *Sylvan*, in effect, broadened the circumstances in which courts could rectify a unilateral mistake, allowing rectification subject to the "demanding preconditions" outlined above. It left untouched the circumstances, under the "traditional rule," in which courts could rectify a mutual or common mistake. See also John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at 555-62; *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810 (Ont. C.A.) at paras. 76-85 (discussing *Sylvan* but not applying the *Sylvan* preconditions to a case of mutual mistake).

3. Application

18 Although the trial judge did not use the word "rectification," his main finding clearly supports his use of what was in effect the remedy of rectification. At para. 39 of his reasons, the trial judge said:

> I find that when Mr. Ellis and Mr. Langley consummated their agreement in February, 1993 their common intention was for the collateral mortgage on the Goyeau Street property he owned to stand as security for his guarantee in the event he defaulted on the latter. I make this finding without the slightest doubt or reservation. To put the matter another way, I find that in offering to advance El-Bris's line of credit by $700,000.00, neither the bank nor Mr. Ellis intended to create a personal obligation on the part of Mr. Ellis in the amount of $1,400,000.00.

19 This paragraph echoes the rationale for rectification discussed in *Downtown King West*. As I noted earlier, in that case Robins J.A. said that rectification is permitted "to correct a contract which has been mistakenly drawn so as to carry out the common intention of the parties and have the contract reflect their true agreement." See also *H.F. Clarke Ltd. v. Thermidaire*

Corp., [1973] 2 O.R. 57 (Ont. C.A.) at 64-65, rev'd on other grounds [1976] 1 S.C.R. 319 (S.C.C.). In altering the agreement to reflect the parties' clear "common intention" that the collateral mortgage was to secure the guarantee, this is what the trial judge did.

20 The only remaining question is: Was the trial judge's finding of common intention reasonable? In my view, the answer is yes. The finding of common intention is reasonably supported by the documents, the oral evidence of the parties, and even by the parties' later conduct.

(a) The documentary evidence

21 The following aspects of the documentary evidence support the trial judge's finding of common intention.

- Ellis signed the collateral mortgage and guarantee at the same time.
- He signed them in exchange for RBC's agreement to loan or give his company a line of credit of $700,000.
- The maximum amount of Ellis's obligation to RBC under the collateral mortgage and under the guarantee was the same and was identical to the amount of the bank's loan: $700,000.
- The collateral mortgage and the guarantee bore the same rate of interest: RBC prime plus 0.75 percent.
- Both a letter of undertaking under the *Construction Lien Act* and a *Planning Act* certificate prepared by the bank and signed by Ellis in connection with the loan to El-Bris described the $700,000 collateral mortgage as "for James W. Ellis", not for the benefit of El-Bris. The wording suggests that the mortgage was to support an obligation of Ellis to the bank, and his only obligation to the bank was under his guarantee.

22 At para. 40 of his reasons the trial judge summarized the import of the documentary evidence.

> I have read carefully both the mortgage and the guarantee. As I have earlier said, Mr. Ellis signed them on the same day and limited them in the same principal amounts and rates of interest. Moreover, they were part of and followed from his negotiation with the bank leading to the bank's offer to increase the company's line of credit by $700,000.00, precisely the amount specified in each security. In these circumstances, it is clear to me beyond all doubt that the documents were and were intended to be, in effect, mirror images of one another, complementary elements of a unitary undertaking or commitment, the purpose of which was to give the bank the comfort it needed in exchange for increasing El-Bris's operating line by $700,000.00. The preponderance of the oral evidence adduced at the trial merely reinforces this conclusion.

23 I agree with this paragraph of the trial judge's reasons.

(b) The oral evidence

24 Ordinarily parol evidence at odds with the terms of a written agreement is inadmissible. Evidence relevant to claims for rectification is an exception to this rule. A court may admit parol evidence to determine whether to rectify the terms of a written agreement to conform to the real intention of the parties. See *Chant v. Infinitum Growth Fund Inc.* (1986), 28 D.L.R. (4th) 577 (Ont. C.A.) at 580, Robins J.A.

25 In determining that the words of the collateral mortgage and guarantee did not accord with the true intention of the parties the trial judge relied on Ellis's testimony. Ellis testified that he and Langley intended to treat the mortgage as "support for the guarantee". The trial judge found Ellis to be an "honest, honourable and fair" witness. On the critical issue of the parties' intention, he accepted Ellis's evidence.

26 Nonetheless, RBC argues that the trial judge erred in permitting Ellis to avoid his obligations "based solely on his own uncorroborated testimony". There are three answers to the bank's argument.

27 First, a court may order rectification even if the testimony of the party seeking rectification is not corroborated by documentary evidence. See *Sylvan*, *supra*, at para. 43.

28 Second, in this case Ellis's evidence was not uncorroborated. The documentary evidence that I have already outlined confirmed his evidence. Putting it the other way around, as the trial judge did, "the preponderance of the oral evidence adduced at trial merely reinforces this conclusion" — that is, the conclusion the trial judge drew from the documents themselves.

29 Third, the evidence of Langley, the bank's account manager at the time, is consistent with Ellis's evidence. As the trial judge pointed out, the two people who could speak directly to what the parties intended were Ellis and Langley. Langley had virtually no recollection of his dealings with Ellis. But on cross-examination, after having looked at the documents, he conceded that "it would be fair to conclude" that the collateral mortgage was given to support the guarantee.

30 Having reviewed the documents and oral evidence, the trial judge at para. 43 repeated his finding that Ellis's obligation to RBC was limited to $700,000.

> In summary, then, I have no hesitation in finding that the business arrangement struck by Mr. Langley and Mr. Ellis called for the bank to increase El-Bris's line of credit by $700,000.00, in exchange for which Mr. Ellis was required to provide a personal guarantee limited to the amount of $700,000.00, supported by a collateral second mortgage in the same amount. In other words, it was emphatically not the intention of the parties that in exchange for a $700,000.00 line of credit for El-Bris Mr. Ellis would create a personal guarantee in the amount of $1,400,000.

31 I am not persuaded that the trial judge's finding is unreasonable.

(c) Later conduct

32 Although unnecessary to the trial judge's finding of common intention, the trial judge concluded that the parties' later conduct was consistent with that finding. Evidence of later conduct consistent with a claim for rectification is relevant and admissible. See *Bercovici v. Palmer* (1966), 59 D.L.R. (2d) 513 (Sask. C.A.), aff'd (1966) 59 D.L.R. (2d) 516 (Sask. C.A.).

33 On March 18, 2003, Ellis's lawyer sent a letter to RBC's senior account manager in London, Ontario, who now had responsibility for the El-Bris account. The letter stated Ellis's intent to pay out the collateral mortgage, which it described as a mortgage in support of Ellis's guarantee. In the letter Ellis's lawyer asked that on payment of the mortgage, the bank provide a discharge and release Ellis from his guarantee. Two days later Ellis's lawyer sent RBC a cheque for $700,000. The bank immediately deposited the cheque but it did not tell Ellis or his lawyer that it did not intend to release the guarantee. Instead, RBC waited six months before it responded in writing that "it was never intended that the guarantee would be released upon the discharge of the mortgage".

34 The terms of the letter from Ellis's lawyer, and RBC's depositing of the cheque and failing for some time to reply to the letter, are additional pieces of evidence that support the trial judge's finding.

35 I end with this. *Sylvan* and other cases warn against the floodgates. They warn against permitting rectification to be granted too readily. They caution that parties, especially experienced and sophisticated parties, cannot routinely look to this remedy to correct mistakes in signed contracts.

36 However, the trial judge's decision in this case does not open the floodgates. Rather, his decision turns narrowly on its facts. To return to the trial judge's central theme: to permit RBC to collect $1,400,000 on its security for a $700,000 loan amounts to unfair dealing. It would unjustly enrich the bank at Ellis's expense.

37 I would dismiss the appeal.

C. Conclusion

38 I would dismiss the bank's appeal. The trial judge's finding that the parties intended the collateral mortgage to be security for Ellis's guarantee was reasonably supported by the evidence. Therefore, as Ellis had paid off the collateral mortgage, he was entitled to a discharge of his obligation under the guarantee. Ellis is entitled to his costs of the appeal in the amount agreed on by the parties, $13,959 inclusive of disbursements and G.S.T.

***R.P. Armstrong J.A.*:**

I agree.

***J. MacFarland J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 RBC also loaned El-Bris $75,000 for the purchase of shares.

2 Ellis signed the guarantee not in his personal capacity but as president of El-Bris. To correct this error Ellis re-executed his guarantee in January 1994. Nothing turns on this.

TAB 12

2016 SCC 56, 2016 CSC 56
Supreme Court of Canada

Canada (Attorney General) v. Fairmont Hotels Inc.

2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 2016 SCC 56, 2016 CSC 56, [2016] 2 S.C.R. 720, [2016] S.C.J. No. 56, [2017] 1 C.T.C. 149, 2016 D.T.C. 5135, 272 A.C.W.S. (3d) 525, 404 D.L.R. (4th) 201, 58 B.L.R. (5th) 171, J.E. 2016-2123

Attorney General of Canada (Appellant) and Fairmont Hotels Inc., FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. (Respondents)

McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: May 18, 2016
Judgment: December 9, 2016
Docket: 36606

Proceedings: reversing *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 45 B.L.R. (5th) 230, 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), E.A. Cronk J.A., Janet Simmons J.A., R.A. Blair J.A. (Ont. C.A.); affirming *Fairmont Hotels Inc. v. Canada (Attorney General)* (2014), [2015] 3 C.T.C. 9, 2014 CarswellOnt 17975, 2014 ONSC 7302, 36 B.L.R. (5th) 215, 2015 D.T.C. 5019 (Eng.), 123 O.R. (3d) 241, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Daniel Bourgeois, Eric Noble, for Appellant
Geoff R. Hall, Chia-yi Chua, for Respondents

Brown J. **(McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring):**

Introduction

1 This appeal concerns the conditions under which a taxpayer may ask a court to exercise its equitable jurisdiction to rectify a written legal instrument, where the effect of that instrument was to produce an unexpected tax consequence. As I will explain, this entails inquiring into the nature and particularity of the terms which the taxpayer had intended to record in the instrument, whether the instrument contains those intended terms and, if not, whether those intended terms are sufficiently precise such that they may now be included in the instrument.

2 The present case arises from a financing arrangement which the parties had intended, both at its inception and ongoing, to operate on a tax-neutral basis. Because of the particular financing mechanism chosen, an unanticipated tax liability was incurred. Both the chambers judge at the Ontario Superior Court of Justice and the Court of Appeal for Ontario granted rectification on the grounds of the parties' intended tax neutrality.

3 Without disputing that tax neutrality was the parties' intention, for the reasons that follow it is my respectful view that both courts below erred in holding that this intention could support a grant of rectification. Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement: A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at §8.229; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 817. It does not undo unanticipated effects of that agreement. While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. Moreover, these rules confining the availability of rectification are generally applicable, including where (as here) the unanticipated effect takes the form of a tax liability. To be clear, a court may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability. I would therefore allow the appeal.

Overview of Facts and Proceedings

A. Background

4 The respondent Fairmont Hotels Inc. and its subsidiaries FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. ask the Court to rectify instruments recording a complex financing arrangement made in 2002 and 2003 between Fairmont and Legacy Hotels REIT, a Canadian real estate investment trust in which Fairmont owned a minority interest. While Fairmont's aim in participating in this financing arrangement was to obtain the management contract for the two hotels which Legacy purchased with the financing, its participation exposed it to a potential foreign exchange tax liability, since the financing was in U.S. currency. With the goal of ensuring foreign exchange tax neutrality, Fairmont — through its subsidiaries FHIW and FHIS — entered into reciprocal loan agreements with Legacy, all of which were transacted in U.S. currency.

5 When Fairmont was acquired by Kingdom Hotels International and Colony Capital LLC in 2006, however, that goal of foreign exchange tax neutrality was frustrated, since this acquisition would cause Fairmont and its subsidiaries to realize a deemed foreign exchange loss, without corresponding foreign exchange gains, on the financing arrangement with Legacy. Fairmont, Kingdom Hotels and Colony Capital agreed on a "modified plan" which allowed Fairmont (but not its subsidiaries) to realize both its gains and losses in 2006, thereby fully hedging it against exposure to prospective foreign exchange tax liability. The matter of similarly protecting the subsidiaries from exposure was deferred, without any specific plan as to how that might be achieved.

6 In 2007, Legacy asked Fairmont to terminate the reciprocal loan arrangements "on an urgent basis" so as to allow for the sale of the hotels. Four days later, and on the incorrect assumption that the matter of the subsidiaries' foreign exchange tax neutrality had been secured, Fairmont complied with Legacy's request by redeeming its shares in its subsidiaries via resolutions passed by the directors of FHIW and FHIS. This resulted in an unanticipated tax liability, discovered only after the Canada Revenue Agency ("CRA") audited the 2007 tax returns of FHIW and FHIS and questioned Fairmont on those returns.

7 The respondents now seek to avoid that liability to Fairmont by asking the Court to rectify the 2007 resolutions passed by the directors of FHIW and FHIS. Specifically, they wish to convert Fairmont's share redemption into a loan whereby FHIW and FHIS will loan to Fairmont the same amount that they paid to Fairmont for the share redemption.

B. Judicial History

(1) Superior Court of Justice — Newbould J. (2014 ONSC 7302, 123 O.R. (3d) 241 (Ont. S.C.J. [Commercial List]))

8 Relying on the decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), aff'd (2000), 50 O.R. (3d) 728 (Ont. C.A.), the chambers judge allowed the application for rectification. He found that, since 2002, Fairmont had intended that its financing arrangement with Legacy be tax-neutral in effect, and that this intention subsisted after Fairmont's 2006 acquisition by Kingdom Hotels and Colony Capital (para. 32).

9 The chambers judge also found that, in light of the foreign exchange tax exposure presented to Fairmont's subsidiaries by that acquisition, Fairmont intended "at some point in the future" to address "the unhedged position of [FHIW] and [FHIS] in a way that would be tax ... neutral although they had no specific plan as to how they would do that" (para. 33). Observing (at para. 42) that the tax liability arose as a result of inadvertence by a member of Fairmont's senior management team, he said that this was not "a case in which tax planning has been done on a retroactive basis after a CRA audit", but rather a case in which a "redemption of the preference shares was mistakenly chosen as the means" to "unwind the loans on a tax-free basis" (para. 43). "[D]enial of the application to rectify would", he concluded, "result in a tax burden which Fairmont sought to avoid from the inception of the 2002 reciprocal loan arrangement" while "giv[ing] CRA an unintended gain" (para. 44). And, in any event, he noted that *Juliar* was binding on him in the circumstances (para. 41).

(2) Court of Appeal — Simmons, Cronk and Blair JJ.A. (2015 ONCA 441, 45 B.L.R. (5th) 230 (Ont. C.A.))

10 In brief reasons for judgment, the Court of Appeal affirmed the chambers judge's decision, taking note of his findings regarding Fairmont's continuing intention from 2002 that its financing arrangement with Legacy would be carried out on a tax neutral basis; that this intention subsisted after Fairmont's acquisition in 2006; that the adverse tax consequence was triggered by a mistake in 2007 on the part of a member of Fairmont's senior management; and that the purpose of the 2007 resolutions was not to redeem the shares, but rather "to unwind [the Legacy transactions] on a tax free basis" (para. 7).

11 The Court of Appeal also commented on the evidentiary burden resting on the party seeking rectification. *Juliar*, it said, "does not require that the party seeking rectification must have determined the precise mechanics or means by which [its] settled intention to achieve a specific tax outcome would be realized" (para. 10). Rather, "*Juliar* holds, in effect, that the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis" (para. 10). In this case, then, it was in the court's view unnecessary for Fairmont to prove that it had resolved to use "a specific transactional device — loans — to achieve the intended tax result" (para. 12). Rather, the chambers judge's findings regarding Fairmont's intention, coupled with *Juliar*'s direction regarding the prerequisite intention to obtain rectification, were dispositive of the application in the respondents' favour.

Analysis

A. General Principles and Operation of Rectification

12 If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).

13 Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.), at para. 56, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.), at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": *Performance Industries*, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 (Eng. V.-C.), at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries Ltd.* (at para. 31), "[t]he court's task in a rectification case is... to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

14 Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: *"M.F. Whalen" (The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109 (S.C.C.), at p. 126; McInnes, at p. 820; *Snell's Equity*, at p. 424; *Hanbury and Martin Modern Equity* (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 622.

15 In *Performance Industries Ltd.* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries Ltd.* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries Ltd.* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

B. Juliar

16 As I have recounted, both courts below considered the Court of Appeal's decision in *Juliar*, coupled with the chambers judge's findings, to be dispositive. In my respectful view, however, *Juliar* is irreconcilable with this Court's jurisprudence and with the narrowly confined circumstances to which this Court has restricted the availability of rectification.

17 In *Juliar*, the parties had, by a written agreement and in the course of the restructuring of a family business, transferred shares to a corporation in exchange for promissory notes for an amount equal to what the parties believed to be the value of the shares. Upon discovering that the promissory notes were worth more than the shares' value (resulting in the taxpaying party being assessed as having received a taxable deemed dividend), the parties sought rectification in order to convert what had originally been structured as a shares-for-promissory notes transfer into a shares-for-shares transfer (which would have been tax-deferred). For the Court of Appeal, and citing the decision of *Slocock's Will Trusts, Re* (1978), [1979] 1 All E.R. 358 (Eng. Ch. Div.), Austin J.A. held that the written agreement could be rectified as sought, citing the trial judge's finding that the parties had "a common ... continuing intention" to transfer shares in a way that would avoid immediate tax liability (para. 19). In order to achieve that objective, Austin J.A. said, the deal "had to be ... a shares for shares transaction" (para. 25).

18 This reasoning presents several difficulties. First, as many commentators have observed, it is indisputable that *Juliar* has relaxed the requirements for obtaining rectification, and correspondingly expanded the scope of cases in which rectification may be sought and granted beyond that which the governing principles allow (C. Brown and A. J. Cockfield, "Rectification of Tax Mistakes Versus Retroactive Tax Laws: Reconciling Competing Visions of the Rule of Law" (2013), 61 *Can. Tax J.* 563, at p. 571; N. Brooks and K. Brooks, "The Supreme Court's 2013 Tax Cases: Side-Stepping the Interesting, Important and Difficult Issues" (2015), 68 *S.C.L.R.* (2d) 335, at p. 385; K. Janke-Curliss et al., "Rectification in Tax Law: An Overview of Current Cases", in *Tax Dispute Resolution, Compliance, and Administration in Canada* (2013), 21:1, at pp. 21:8 and 21:9).

19 I agree with this observation. As I have stressed, rectification is available not to cure a party's error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. The parties' mistake in *Juliar*, however, was not in the recording of their intended agreement to transfer shares for a promissory note, but in selecting that mechanism instead of a shares-for-shares transfer. By granting the sought-after change of mechanism, the Court of Appeal in *Juliar* purported to "rectify" not merely the instrument recording the parties' antecedent agreement, but that agreement itself where it failed to achieve the desired result or produced an unanticipated adverse consequence — that is, where it was the product of an error in judgment. As J. Berryman observed (in *The Law of Equitable Remedies* (2nd ed. 2013), at p. 510):

> In *Juliar*, the applicants had acted directly on the advice of their accountant. The accountant made a mistake as to the nature of the business ownership and the taxes that were paid prior to the arrangement he advised his clients to pursue. This is not a case for rectification. The clients intended to use the instrument given to them by their accountant. Their motive may have been to avoid tax but that is different from their intent which was to use the very form in front of them.

20 Secondly, even on its own terms, *Juliar*'s expansion of the availability of rectification cannot be justified. By way of explanation, in the case upon which Austin J.A. relied, *Slocock's Will Trusts*, the plaintiff was the life beneficiary of her father's residuary estate, with the capital and income after her death to be paid to her issue as she should appoint. She appointed her

children to take after her death. Later, lands owned by her father's family were sold to a development company, with the proceeds to be received and distributed by a management company in which the plaintiff received an allotment of shares, proportionate to her interest in the proceeds. After taking legal advice, the plaintiff and her children decided that she should surrender by deed her life interest in those proceeds as well as her shares in the management company (pp. 359-60). The deed, however, did not faithfully record the parties' agreement, because it released only the plaintiff's shares in the management company, and not her beneficial interest in the proceeds of sale (p. 360).

21 While the outcome sought by the plaintiff and her children would have also secured a tax advantage for the children (specifically, avoidance of capital transfer tax upon the plaintiff's death), Graham J. granted rectification *not* to secure that tax advantage, but on the strength of his finding (*Slocock's Will Trusts*, at p. 361) that the deed as recorded omitted the proceeds of the sale of the lands, thereby failing to record fully the terms of the parties' original agreement. This was, therefore, an unremarkable application of rectification to cure an omission in the instrument recording an antecedent agreement. Nothing in *Slocock's Will Trusts* justifies *Juliar*'s modified threshold for granting rectification solely to avoid an unanticipated tax liability. *Slocock's Will Trusts* simply confirmed that, provided that the underlying mechanism by which the parties had agreed to seek a particular tax outcome was omitted or incorrectly recorded, and provided that all other conditions for granting rectification are satisfied, a court retains discretion to grant rectification. The focus of the inquiry remained properly fixed on whether that originally intended mechanism was properly recorded, and not on whether it achieved the desired tax outcome or resulted in a party incurring an undesired or unexpected tax outcome.

22 Subsequent English authorities confirm that *Slocock's Will Trusts* created no distinct threshold for granting rectification in the tax context. In *Racal Group Services Ltd. v. Ashmore* (1995), 68 T.C. 86 (Eng. C.A.), the English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: "... the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification" (p. 106). Similarly, the court in *Ashcroft v. Barnsdale*, [2010] EWHC 1948, [2010] S.T.C. 2544 (Eng. Ch. Div.), held that it could not rectify an instrument "*merely* because it fails to achieve the fiscal objectives of the parties to it": para. 17 (emphasis in original). See also D. Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed. 2016), at para. 4-145:

> A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties (or the grantor or covenantor) as to how the objective was to be achieved must be shown if the court is to order rectification.
>
> [Emphasis deleted.]

23 Finally, *Juliar* does not account for this Court's direction, in *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), at para. 45, that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done". While this statement in *Shell Canada Ltd.* was applied to support the proposition that a taxpayer should not be denied a sought-after fiscal objective merely because others had not availed themselves of the same advantage, it cuts the other way, too: taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better.

24 This point goes to the respondents' submission that "[r]ectification is necessary to ... avoid unjust enrichment of the Crown" (R.F., at para. 76), echoing the Court of Appeal's concern in *Juliar* (at paras. 33-34, quoting *Slocock's Will Trusts*, at p. 363) for the Crown's "accidental and unexpected windfall" and the chambers judge's concern in the present appeal (at para. 44) about the CRA's "unintended gain" and (at para. 52) the Crown's "tax windfall". With respect, the premise underlying such concerns misses the point of the inquiry, inasmuch as it concerns the CRA. Tax consequences, including those which follow an assessment by the CRA, flow from freely chosen legal arrangements, not from the intended or unintended effects of those arrangements, whether upon the taxpayer or upon the public treasury. The proper inquiry is no more into the "windfall" for the public treasury when a taxpayer loses a benefit than it is into the "windfall" for the taxpayer when that taxpayer secures a benefit. The inquiry, rather, is into what the taxpayer agreed to do. *Juliar* erroneously departed from this principle, and in so doing allowed for impermissible retroactive tax planning: *Harvest Operations Corp. v. Canada (Attorney General)*, 2015 ABQB 327, [2015] 6 C.T.C. 78 (Alta. Q.B.), at para. 49.

C. Two Further Concerns

25 Before applying the test for rectification — which test, I emphasize, is to be applied in a tax context just as it is in a non-tax context — to the facts of this appeal, I turn to two matters in need of clarification, the first of which was raised by the respondents.

(1) "Common Continuing Intention" to Avoid Tax Liability

26 The respondents argue that, in the case of a common mistake, it is unnecessary for the party seeking rectification to prove a prior agreement concerning the term or terms for which rectification is sought. Rather, they say that evidence of a "common continuing intention" — in this case, their common continuing intention that the value of the shares in FHIW and FHIS should be transferred in a way that would avoid immediate tax liability — should suffice to ground a grant of rectification.

27 This was, of course, the view of the Court of Appeal, both in *Juliar* and in the present appeal. The respondents also rely upon the decision of the English Court of Appeal in *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), in which the court (at p. 95) approved of this statement of Simonds J. in *Crane v. Hegeman-Harris Co.*, [1939] 1 All E.R. 662 (Eng. Ch. Div.):

> ... in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. ... [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. [p. 664]

28 *Joscelyne* 's statement on the sufficiency of a common continuing intention has been adopted by the Ontario Court of Appeal in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 (Ont. C.A.), at para. 77, and the Newfoundland and Labrador Supreme Court in *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.), at paras. 23 and 27. It is not immediately apparent, however, that it supports the respondents' position here. *Joscelyne* 's reference to "a common continuing intention in regard to a particular provision or aspect of the agreement", coupled with its reference to the later discovery that "the formal instrument does not conform with that common agreement", strongly suggests that — howsoever often *Joscelyne* has been taken as suggesting otherwise by Canadian courts — it does not posit that, in the case of a common mistake, anything less than a prior *agreement* with respect to the term to be rectified is sufficient to support a grant of rectification. While *Joscelyne* allows for situations in which a contract will be unenforceable until a corresponding written instrument is executed (for example, in the case of a transfer of an interest in realty) and for situations in which there may not have been agreement on all essential terms before the written instrument was executed, this does not detract from its implicit affirmation that rectification requires the parties to show an antecedent agreement with respect to the term or terms for which rectification is sought.

29 In any event, *Joscelyne* should not be taken as authorizing any departure from this Court's direction that a party seeking to correct an erroneously drafted written instrument on the basis of a common mistake must first demonstrate its inconsistency with an antecedent agreement with respect to that term. In *Shafron*, this Court unambiguously rejected the sufficiency of showing mere *intentions* to ground a grant of rectification, insisting instead on erroneously recorded *terms*. As Denning L.J. said in *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 Q.B. 450 (Eng. C.A.), at p. 461 (quoted in *Shafron*, at para. 52):

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract.

30 This Court's statement in *Performance Industries Ltd.* (at para. 31) that "[r]ectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable" is to the same effect. The point, again, is that rectification corrects the recording in an instrument of an agreement (here, to redeem shares). Rectification does not operate simply because an agreement failed to achieve an intended effect (here, tax neutrality) — irrespective of whether the intention to achieve that effect was "common" and "continuing".

31 In this regard, my colleague Justice Abella relies upon the chambers judge's finding that "when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future [it] would have to deal with the unhedged position of [FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that" (para. 33, cited by Abella J. at para. 87). In my respectful view, however, it was an error for the chambers judge to ascribe any significance to that finding. Rectification does not correct common mistakes in judgment that frustrate contracting parties' aspirations or, as here, unspecified "plans"; it corrects common mistakes in instruments recording the terms by which parties, wisely or unwisely, agreed to pursue those aspirations. While my colleague suggests that the jurisprudence of this Court undermines this reasoning (paras. 79-85), that very jurisprudence requires the party seeking rectification of an instrument to show not merely an inchoate or otherwise undeveloped "intent", but rather the term of an antecedent *agreement* which was not correctly recorded therein: *Performance Industries Ltd.*, at para. 37.

32 It therefore falls to a party seeking rectification to show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. "The court's task in a rectification case is corrective, not speculative": *Performance Industries Ltd.*, at para. 31. Where, therefore, an instrument recording an agreed-upon course of action is sought to be rectified, the party seeking rectification must identify terms which were omitted or recorded incorrectly and which, correctly recorded, are sufficiently precise to constitute the terms of an enforceable agreement. The inclusion of imprecise terms in an instrument is, on its own, not enough to obtain rectification; absent evidence of what the parties had specifically agreed to do, rectification is not available. While imprecision may justify setting aside an instrument, it cannot invite courts to find an agreement where none is present. It was for this reason that the Court in *Shafron* declined to enforce the restrictive covenant covering the "Metropolitan City of Vancouver". The term was imprecise, but there was "no indication that the parties agreed on something and then mistakenly included something else in the written contract": *Shafron*, at para. 57.

33 As is apparent from the reasons of my colleague Justice Wagner in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 (S.C.C.), on this question both equity and the civil law are *ad idem*, despite each legal system arriving at that same conclusion via different paths — the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable in the context of applying federal tax legislation. More particularly, the cautionary note struck by the Court in *Archambault c. Canada (Agence du Revenu)*, 2013 SCC 65, [2013] 3 S.C.R. 838 (S.C.C.), [hereinafter *AES*] at para. 54, regarding "common intention" as a factor in rewriting parties' agreements under art. 1425 of the *Civil Code of Québec* — which precaution is expressly relied upon by Wagner J. in *Jean Coutu Group (PJC) Inc.* (at para. 21) — is equally apposite in applying the equitable doctrine of rectification:

> Taxpayers should not view this ... as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. A taxpayer's intention to reduce his or her tax liability would not on its own constitute the object of an obligation within the meaning of art. 1373 *C.C.Q.*, since it would not be sufficiently determinate or determinable. Nor would it even constitute the object of a contract within the meaning of art. 1412 *C.C.Q.* Absent a more precise and more clearly defined object, no contract would be formed. In such a case, art. 1425 could not be relied on to justify seeking the common intention of the parties in order to give effect to that intention despite the words of the writings prepared to record it.

(2) Standard of Proof

34 The second point requiring clarification is the standard of proof. In *Performance Industries Ltd.*, at para. 41, this Court held that a party seeking rectification will have to meet all elements of the test by "convincing proof", which it described as "proof

that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard". This, as was observed in *Performance Industries Ltd.*, was a relaxation of the standard from the Court's earlier jurisprudence, in which the criminal standard of proof was applied: see *"M.F. Whalen" (The)*, at p. 127, and *Hart*, at p. 630, per Duff J.

35 In light, however, of this Court's more recent statement in *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at para. 40, that there is "only one civil standard of proof at common law and that is proof on a balance of probabilities", the question obviously arises of whether the Court's description in *Performance Industries Ltd.* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.

36 In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which *McDougall* identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged. As the Court also said in *McDougall* (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action. This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd.* (1980), [1981] 1 W.L.R. 505 (Eng. C.A.), at p. 521:

> The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.

37 In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries Ltd.* remains applicable, being (at para. 42) "to promote the utility of written agreements by closing the 'floodgate' against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification".

D. Application to the Present Appeal

38 To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.

39 A straightforward application of these principles to the present appeal leads unavoidably to the conclusion that the respondents' application for rectification should have been dismissed, since they could not show having reached a prior agreement with definite and ascertainable terms. I have already noted (1) the chambers judge's finding that, in 2006, Fairmont intended to address the "unhedged position of [FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that" (para. 33); and (2) the Court of Appeal's description of Fairmont's intention as being "to unwind [the Legacy transactions] on a tax free basis" (para. 7). It is therefore clear that Fairmont intended to limit, if not avoid altogether, its tax liability in unwinding the Legacy transactions. And, by redeeming the shares in 2007, this intention was frustrated. Without more, however, these facts do not support a grant of rectification. The error in the courts below is of a

piece with the principal flaw I have identified in the Court of Appeal's earlier reasoning in *Juliar*. Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.

40 Relatedly, the respondents do not show how Fairmont's intention, held in common and on a continuing basis with FHIW and FHIS, was to be achieved in definite and ascertainable terms while unwinding the Legacy transactions. The respondents' factum refers to "the original 2006 plan", but that plan was not only imprecise: it really was not a plan at all, being at best an inchoate wish to protect, by unspecified means, FHIW and FHIS from foreign exchange tax liability.

41 The respondents' application for rectification therefore fails at the first hurdle. They show no prior agreement whose terms were definite and ascertainable.

Conclusion and Disposition

42 I would allow the appeal, with costs in this Court and in the courts below.

***Abella J.* (dissenting) (Côté J. concurring):**

43 I agree that there is no adjustment to the test for rectification if the context is a tax case. With respect, however, I do not agree that the test was not met in this case.

44 The doctrine of rectification has many strands. The jurisprudence addresses errors in the transcription and implementation of documents, different types of mistakes, the rights of third parties, and how the remedy applies in various legal contexts. A coherent approach to all of these strands flows from the underlying theory that parties should not be prevented from having their true intentions implemented because of these errors. It is, after all, an equitable remedy that seeks to prevent the unfairness that results from enforcing a mistake, including the unfairness inherent in unjust enrichment and windfalls.

45 I see the approach applied by my colleague as unduly narrowing its scope. A common, continuing, definite, and ascertainable intention to pursue a transaction in a tax-neutral manner has usually satisfied the threshold for granting rectification. The additional requirement that the parties clearly identify the precise mechanism by which they intended to achieve tax neutrality, and how that mechanism was mistakenly transcribed in a document, has the effect of raising the threshold and frustrating the purpose of the remedy. It also has the regrettable effect of imposing a narrower remedy in the common law than exists under civil law.

46 The Application Judge concluded that the intention of the parties had been mistakenly implemented and that rectification was justified. The Court of Appeal agreed. As do I. Based on the factual findings and the applicable jurisprudence, the threshold has been met. I would dismiss the appeal.

Background

47 Fairmont Hotels Inc. is a hotel management company. In 2002 and 2003, Fairmont agreed to help Legacy Hotels REIT, a Canadian real estate investment trust in which it owned a minority interest, finance the purchase of two hotels in Washington, D.C. and Seattle, Washington. For tax reasons, Legacy did not directly purchase the hotels. Instead, Legacy and Fairmont created a complex reciprocal loan structure, set up in U.S. dollars, whereby Legacy and Fairmont loaned each other money through their subsidiary corporations. The reciprocal loan structure was designed so that no foreign exchange gains or losses would be realized by Fairmont or its subsidiaries. It was expected to remain in place for 10 years.

48 In 2006, two companies, Kingdom Hotels International and Colony Capital LLC, purchased Fairmont. Fairmont's tax advisors realized that the change of control would immediately cause Fairmont and its subsidiaries to experience net foreign exchange losses. Fairmont's advisors, in a memo dated March 3, 2006, therefore initially proposed a plan to protect Fairmont and its subsidiaries from those losses. Under this plan, the reciprocal loan structure could later be unwound with a preferred share redemption without triggering any taxable foreign exchange gains. But the tax advisors of Kingdom Hotels and Colony Capital expressed concern that this plan would create other tax problems.

49 Fairmont, Kingdom Hotels, and Colony Capital eventually agreed on a *modified* plan, described in a memo dated March 23, 2006, in which Fairmont would realize certain accrued foreign exchange gains and losses while protecting itself from new gains and losses going forward. This modified plan did not address Fairmont's subsidiaries, which, due to the acquisition, would no longer be protected from foreign exchange exposure. Fairmont was aware that its subsidiaries' exposure would result in a taxable foreign exchange gain if the reciprocal loan structure was later unwound with a share redemption. Since the reciprocal loan structure was to remain in place for several more years, Fairmont decided that, at a later date, it would determine how to unwind the structure without a share redemption so that no accrued gains or losses would be triggered.

50 In 2007, Legacy asked Fairmont to end the reciprocal loan agreement ahead of schedule so that it could sell the two hotels it had acquired in 2003. Fairmont's Vice-President of Tax, under the mistaken impression that it was the initial March 3, 2006 plan that had been implemented, instructed the directors of Fairmont's subsidiaries to pass resolutions that would unwind the reciprocal loan structure with a share redemption. The directors passed these resolutions implementing the redemption of the preferred shares on September 14, 2007.

51 The share redemption would have been tax-neutral if the initial plan had in fact been the plan that was implemented. The result of the mistake was to trigger a significantly larger tax liability.

52 Fairmont learned of this mistake after an audit by the Canada Revenue Agency. It applied to the Ontario Superior Court of Justice to rectify the September 14, 2007 directors' resolutions that had authorized the preferred share redemption. Newbould J. allowed rectification of these resolutions on the grounds that Fairmont never intended to redeem the preferred shares and always intended to unwind the reciprocal loan structure on a tax-neutral basis.

53 The Ontario Court of Appeal unanimously dismissed the appeal (Simmons, Cronk, and Blair JJ.A.).

Analysis

54 Rectification is a centuries-old equitable remedy that gave courts discretion to correct "errors in integration" if signed documents did not reflect the true intention of the parties: see John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 589; see also Geoff R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 188-89. Where such an error occurs, "[t]he court will therefore put the agreement right ... to conform with the parties' true intentions" (S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at p. 240).

55 The available judicial discretion to retroactively implement the parties' true intention has been described as follows:

> The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done. ...

(*H.F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57 (Ont. C.A.), at p. 65, per Brooke J.A., rev'd on other grounds, (1974), [1976] 1 S.C.R. 319 (S.C.C.), at pp. 323-24. See also Waddams, at pp. 240-41; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 776; McCamus, at p. 587.)

56 While the remedy of rectification had been historically confined to cases of mutual mistake, in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.), this Court expanded its scope to include circumstances where the mistake was unilateral.

57 The rationale for the remedy is that no one should be allowed "to take unfair advantage of another's mistake": Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (7th ed. 2007), at p. 299; see also Hall, at pp. 190-91. In accordance with this purpose, rectification "should not be circumscribed by anomalous or artificial rules, but should be applied where appropriate in order to give better effect to equitable doctrines": I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 632.

58 The test for rectification requires courts to assess the true intention of the parties:

> In order for rectification to be available, it is necessary to identify a "true agreement" which precedes (and is not accurately recorded by) the written instrument. Such an agreement may itself be contained in a written instrument; but it may be oral, and need not itself have contractual force.

(*Snell's Equity* (31st ed. 2005), by John McGhee, ed., at p. 332. See also Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 820; Angela Swan and Jakub Adamski, *Canadian Contract Law* (3rd ed. 2012), at pp. 772-73; Goff and Jones, at p. 295; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at pp. 621-22 and 630; *Mitchell v. MacMillan* (1980), 5 Sask. R. 160 (Sask. C.A.), at para. 8; *Reed Shaw Osler Ltd. v. Wilson* (1981), 17 Alta. L.R. (2d) 81 (Alta. C.A.), at p. 89; *Bryndon Ventures Inc. v. Bragg* (1991), 82 D.L.R. (4th) 383 (B.C. C.A.), at pp. 402-3; *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.), at para. 23; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 (Ont. C.A.), at para. 77.)

59 Nor does the parties' prior intention have to amount to a fully enforceable agreement: *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), followed in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (Ont. H.C.), aff'd (1980), 26 O.R. (2d) 746 (Ont. C.A.). As Brown J. explained in *Graymar Equipment (2008) Inc. v. Canada (Attorney General)* (2014), 97 Alta. L.R. (5th) 288 (Alta. Q.B.):

> Rectification is available ... even where the parties have not concluded an agreement, so long as there is sufficiently convincing evidence that the parties had arrived upon a common intention. [para. 36]

(See also *Snell's Equity* (33rd ed. 2015), by John McGhee, at pp. 424-25; McCamus, at p. 558; Waddams, at p. 243.)

60 But the intention does have to be sufficiently clear and certain that courts can correct the error without resorting to speculation about what the parties had wanted to do in the first place: see *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72 (B.C. C.A.).

61 While parties seeking rectification must provide evidence of what they actually intended, they are not required to provide "an expressed antecedent agreement in order to found a successful claim": *Peter Pan Drive-In Ltd.*, at p. 296. Courts have long recognized that "the exact form of words in which the common intention is to be expressed is immaterial" (*McLean v. McLean* (2013), 118 O.R. (3d) 216 (Ont. C.A.), at para. 46, citing *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560 (Eng. & Wales C.A. (Civil)), at para. 34; see also *Co-operative Insurance Society Ltd. v Centremoor Ltd.*, [1983] 2 E.G.L.R. 52, at p. 54, per Dillon L.J.; *Snell's Equity* (33rd ed. 2015), at pp. 426-37). In other words, as Professor Swan explains:

> ... it is "sufficient if [the party] establishes a common continuing intention in regard to the particular provision in question". There is no need to hedge the remedy about with requirements that are no more than technical and to require precise agreement on every point in the actual agreement to prevent the court from giving relief where it is clearly justified in doing so to prevent injustice. [Footnote omitted; p. 773.]

62 What matters instead is that the substance of the intention "can be ascertained with a reasonable level of comfort": *Performance Industries Ltd.*, at para. 47. In ascertaining these intentions, courts are free to make logical inferences based on the evidence before them. In *McLean*, for example, a husband and wife transferred property to their son and daughter-in-law. The wife later sought rectification of the memorandum of agreement that contained the terms of the transfer, claiming that the total purchase price was incorrect. The Ontario Court of Appeal rectified the memorandum even though it was not immediately obvious what the correct price was supposed to be. The court deduced the correct price based on "the totality of the evidence", noting that "[o]nly when the related documents are considered as a whole does the intention of the parties emerge": paras. 60 and 62. Similarly, in *Royal Bank v. El-Bris Ltd.* (2008), 92 O.R. (3d) 779 (Ont. C.A.), a business owner mistakenly signed a personal guarantee for $700,000 *and* a collateral mortgage for the same amount, when he had only intended to create one debt obligation. The Ontario Court of Appeal allowed rectification of both the guaranteed loan and the mortgage based on the true intention of the parties, even though the mechanics of the necessary corrective transactions had never been previously set out.

63 Whether a mistake is unilateral or mutual, rectification is, ultimately, an equitable remedy that seeks to give effect to the true intention of the parties, and prevent errors from causing windfalls. The doctrine is also "based on simple notions of relief against unjust enrichment", namely, that it would be unfair to rigidly enforce an error that enriches one party at the expense of another: Waddams, at p. 240. As Professor Waddams notes, "[t]he doctrine is a far-reaching and flexible tool of justice" (p. 243). (See also McInnes, at pp. 820-21; Fridman, at pp. 782-83; *El-Bris*, at paras. 13 and 36; *McLean*, at para. 73; Patrick Hartford, "Clarifying the Doctrine of Rectification in Canada: A Comment on *Shafron v KRG Insurance Brokers (Western) Inc*." (2013), 54 *Can. Bus. L. J*. 87, at p. 88.)

64 The common law principles of rectification were recently applied in *KRG Insurance Brokers (Western) Inc. v. Shafron*, [2009] 1 S.C.R. 157 (S.C.C.). *Shafron* involved an employment contract that included a restrictive covenant, prohibiting Mr. Shafron from working as an insurance broker in the "Metropolitan City of Vancouver" for three years after his employment with KRG Western ended. "Metropolitan City of Vancouver" was not a legally defined term, but Mr. Shafron thought it referred to the City of Vancouver, while KRG Western thought it referred to the larger Greater Vancouver Regional District.

65 KRG Western applied to rectify the contract by substituting "Greater Vancouver Regional District" for "Metropolitan City of Vancouver", to prevent Mr. Shafron from working as an insurance broker in the suburb of Richmond. The Court held that rectification was unavailable because KRG Western could not establish that there had been a prior agreement in which "Metropolitan City of Vancouver" was defined in sufficiently precise terms.

66 While I acknowledge that rectification seems most often to have been granted in the context of agreed upon terms having been *transcribed* incorrectly, since unjust enrichment can also result from a mistake in *carrying out* the intention of the parties, the remedy is also available to correct errors in implementation. Courts have, as a result, granted rectification where a corporate transaction was conducted in the wrong sequence (*GT Group Telecom Inc., Re* (2004), 5 C.B.R. (5th) 230 (Ont. S.C.J. [Commercial List]), where an underlying calculation in a contract was incorrect (*Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.* (1981), 27 A.R. 411 (Alta. C.A.)), and where the requisite steps of an amalgamation were not correctly carried out (*Prospera Credit Union, Re* (2002), 32 B.L.R. (3d) 145 (B.C. S.C.)).

67 Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*, [1954] O.W.N. 822 (Ont. C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray* (1974), [1975] 2 S.C.R. 354 (S.C.C.), this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Ltd. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (Ont. H.C.), at p. 766, aff'd (1990), 72 O.R. (2d) 703 (Ont. C.A.): "... the proper test is whether the third party relied on the document as executed and took action based on that document." (See also McCamus, at p. 595; Spry, at pp. 630-31; *Kolias v. Condominium Plan 309 CDC* (2008), 440 A.R. 389 (Alta. C.A.); *Carlson v. Big Bud Tractor of Canada Ltd.*. (1981), 7 Sask. R. 337 (Sask. C.A.), at paras. 24-26.)

68 This is consistent with one of the underlying purposes of rectification, namely to prevent unjust enrichment: Waddams, at p. 240; *El-Bris*, at paras. 13 and 36; *McLean*, at para. 73. Just as rectification can prevent one party from enforcing an error and being unjustly enriched by the other's mistake, rectification can also prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall. This theory was on display in *Love v. Love*, [2013] 5 W.W.R. 662 (Sask. C.A.). The Saskatchewan Court of Appeal allowed the rectification of a life insurance contract, in which a husband had designated his wife as the beneficiary of his life insurance policy. When the couple divorced, the husband completed a new form to designate his son as the policy's beneficiary instead of his former wife. He filled the paperwork out incorrectly. After he died, the former wife and the son both attempted to claim the proceeds of the insurance policy. The court rectified the contract to reflect what it saw as the husband's true intention, namely to designate his son as the beneficiary.

69 This brings us to the tax context.

70 Allowing the tax authorities, a third party, to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounts to unjust enrichment. Businesses and individuals are legally entitled to structure their affairs in a way that minimizes their tax burden. The General Anti-Avoidance Rule in s. 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for example, permits transactions that are primarily designed to avoid taxes so long as they do not circumvent the *Act* in an abusive manner: *Copthorne Holdings Ltd. v. R.*, [2011] 3 S.C.R. 721 (S.C.C.), at para. 32. There is, as a result, an inherent unfairness in enforcing errors in transcription or implementation that result in allowing the tax authorities to collect a windfall.

71 It is true that a taxpayer should expect to be taxed based on what is actually done, not based on what could have been done (*Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), at para. 45), but this principle does not deprive equity of a role where what a party or parties genuinely intended to do was transcribed *or* implemented incorrectly.

72 On the other hand, parties should not be given *carte blanche* to exploit rectification for purposes of engaging in retroactive tax planning. Courts will not permit parties to undo decisions simply because they have come to regret them later. Allowing parties to rewrite documents and restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes is not consistent with the equitable principles that inform rectification.

73 As the trial judge noted in *Kanji v. Canada (Attorney General)* (2013), 114 O.R. (3d) 1 (Ont. S.C.J. [Commercial List]), "[t]ax-driven claims for rectification must be approached with care since common sense tells us that most taxpayers would like to minimize the amount of tax they must pay to the government": para. 36. The British Columbia Court of Appeal expressed similar views in *Pallen Trust, Re* (2015), 385 D.L.R. (4th) 499 (B.C. C.A.), when it said:

> Carrying out a fact-focussed analysis should ensure that the "social evil" of aggressive tax avoidance can, where it is just to do so, be appropriately disincentivized, and on the other hand that where the taxpayer's conduct has been reasonable ... he or she is not unfairly penalized. ... [para. 53]

74 How then should rectification be seen in the tax context? In my view, the two most helpful common law cases on rectification in the tax context were decided by the Ontario Court of Appeal. In *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (Ont. C.A.), a purchaser utilized a company she owned to buy property, intending to minimize her personal income tax. She erroneously thought that her company was an Ontario company and assumed that she would pay the residential land transfer tax rate of 2 percent. The company, it turned out, was subject to the higher rate of 20 percent. This mistake resulted in a liability of $1.7 million instead of $84,745. The court denied rectification on the grounds that this was an "attemp[t] to rewrite history in order to obtain more favourable tax treatment" (p. 742). The purchaser intended the transaction to minimize her income tax — which it did — and was simply caught off-guard by land transfer tax consequences.

75 A different result occurred in *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (Ont. C.A.). Two couples co-owned a company through which they operated a convenience store chain. They decided to split the business into two separate corporations so that each couple could operate independently. They mistakenly believed, based on an erroneous assumption by their tax advisor, that this would not trigger any immediate income taxes. When it did, they applied for rectification. Austin J.A. granted the remedy, stating:

> ... the true agreement between the parties here was the acquisition of the half interest in the ... tobacco business ... in a manner that would not attract immediate liability for income tax.
>
> . . . . .
>
> ... The plain and obvious fact ... is that the proposed division had to be carried out on a no immediate tax basis or not at all. [paras. 25-27]

76 The Court of Appeal distinguished this case from *Bramco* on the grounds that the couples' intention to avoid income tax was a primary and continuing objective of the transaction, whereas in *Bramco* the concern over the land transfer tax arose only after the transaction had been completed.

77 I am aware that this distinction has attracted some negative commentary: Lionel Smith, "Can I Change My Mind? Undoing Trustee Decisions" (2008), 27 *E.T.P.J.* 284, at pp. 289-90; Swan and Adamski, at pp. 768-69. But in my view, the Court of Appeal's decision to allow rectification in *Juliar* can easily be explained by — and flows seamlessly from — the factual findings of the Application Judge in that case. In particular, the decision to grant rectification resulted from the factual finding that the Juliars had a continuing, ascertainable intention to pursue the transaction on a tax-free basis or not at all. Seen in this way, *Juliar* did not relax the standards for rectification in the tax context. Rather, it represents a straightforward application of the test for rectification: see Joel Nitikman, "Many Questions (and a Few Possible Answers) About the Application of Rectification in Tax Law" (2005), 53 *Can. Tax J.* 941, at p. 963.

78 Nor do I accept the floodgates concern that courts will be unable to distinguish between legitimate mistakes and attempts at retroactive tax planning. Those courts which have applied *Juliar* appear to have very comfortably recognized the distinction. Sometimes rectification was granted (see *McPeake v. Canada (Attorney General)*, [2012] 4 C.T.C. 203 (B.C. S.C.), at paras. 21-22 and 46; *Slate Management Corp. v. Canada (Attorney General)*, 2016 ONSC 4216 (Ont. S.C.J. [Commercial List]), at paras. 10 and 16 (CanLII); *Fraser Valley Refrigeration, Re*, [2009] 6 C.T.C. 73 (B.C. S.C.), at paras. 22-24 and 48, aff'd (2009), 280 B.C.A.C. 317 (B.C. C.A.)). But at other times, it was denied because, while the parties had a general desire to minimize their tax burden, they could not prove that the tax objective was an intended and fundamental aspect of the transaction: *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.* (2015), 128 O.R. (3d) 1 (Ont. S.C.J.), at paras. 32 and 40-41; *Binder v. Saffron Rouge Inc.* (2008), 89 O.R. (3d) 54 (Ont. S.C.J.), at paras. 16-18 and 22-25; *Aboriginal Diamonds Group Ltd., Re*, 2007 NWTSC 37 (N.W.T. S.C.), at paras. 38-43 (CanLII); *Zhang v. Canada*, 2015 D.T.C. 5084 (B.C. S.C.), at paras. 21 and 34; *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)* (2014), 443 Sask. R. 172 (Sask. Q.B.), at paras. 417 and 424-25; *JAFT Corp. v. Jones* (2014), 304 Man. R. (2d) 86 (Man. Q.B.), at paras. 31, 39 and 43-44, aff'd (2015), 323 Man. R. (2d) 57 (Man. C.A.); *Capstone Power Corp. v. 1177719 Alberta Ltd.*, 2016 BCSC 1274 (B.C. S.C.), at paras. 27-54 (CanLII); *Kanji*, at paras. 22 and 33.

79 This brings us to this Court's most recent, and in my view most pertinent, discussion of rectification in the tax context in the companion appeals of *AES* and *Riopel*: *Archambault c. Canada (Agence du Revenu)*, [2013] 3 S.C.R. 838 (S.C.C.). Although LeBel J. expressly declined to comment on *Juliar* because he was applying the *Civil Code of Québec*, he took an approach to the rectification of tax planning errors consistent with *Juliar*.

80 In *AES*, the company underwent a reorganization which involved transferring 25 percent of its shares to a subsidiary. It intended that this transaction be tax-neutral, but AES's advisors made an error when calculating the value of the shares, resulting in a large, unintended, and entirely avoidable tax liability. Similarly, in the companion appeal of *Riopel*, a couple attempted to amalgamate two companies. To minimize taxes, they structured the amalgamation in a particular sequence of transactions that involved selling shares, and issuing new shares and promissory notes. The couple's tax advisors erroneously enacted the sequence out of order, resulting in a significant tax liability. LeBel J. explained that under the *Code*, if the true intention is erroneously expressed in writing, courts will rectify the mistake as long as the intention was sufficiently precise:

> ... the dispute in the two appeals before us necessarily concerns the [Agence du revenu du Québec] and the [Canada Revenue Agency]. Because of their situations, it must be asked whether they can rely on acquired rights to have an erroneous writing continue to apply even though the existence of an error has been established and it has been shown that the documents filed with the tax authorities are inconsistent with the parties' true intention.
>
> ... For now, therefore, what must be determined is the true nature of the operations transacted in *AES* and *Riopel*. ... This Court must decide whether the parties' juridical acts, which led to the notices of assessment, are consistent with their true common intention and whether the tax authorities are entitled to have an erroneous declaration of intention continue to apply. [paras 44-46]

81 Rectification was granted in both *AES* and *Riopel* based on these principles. As LeBel J. explained, "the agreements between the parties in both appeals were validly formed in that ... they provided for obligations whose objects were sufficiently determinable": para. 54.

82 LeBel J. concluded that "the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent": *AES*, at para. 52. In other words, the tax authorities were not entitled to get a windfall from the errors. But he also warned that these principles do not allow parties to engage in retroactive tax planning:

> Taxpayers should not view this recognition of the primacy of the parties' internal will — or common intention — as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. [para. 54]

83 The requirements for rectification in the tax context articulated in *AES* are, in my respectful view, functionally equivalent to the test under the common law. Civil law and common law rectification in the tax context are clearly based on analogous principles, namely, that the true intention of the parties has primacy over errors in the transcription or implementation of that agreement, subject to a need for precision and the rights of third parties who detrimentally rely on the agreement.

84 That means that there is no principled basis in either the common or civil law for a stricter standard in the tax context simply because it is the government which is positioned to benefit from a mistake. The tax department is not entitled to play "Gotcha" any more than any other third party who did not rely to its detriment on the mistake.

85 Notably, both *AES* and *Riopel* involved errors of implementation: the error in *AES* was a faulty calculation and the error in *Riopel* was that a complex transaction was conducted in the wrong sequence. The application of rectification in these circumstances clearly confirms that rectification is *not* confined only to correcting terms that were omitted, accidentally added, or articulated incorrectly in a written document, but is no less available when the parties' true intention is erroneously implemented.

86 In the case before us, as the Application Judge noted, this was not a situation where Fairmont merely misapprehended the consequences of unwinding the reciprocal loan structure with a share redemption. Newbould J. made explicit findings of fact that Fairmont had a continuing intention *never* to unwind the reciprocal loan structure by redeeming the preferred shares, because doing so would trigger taxable exchange gains or losses. The parties, he concluded, were aware that unwinding the reciprocal loan structure with a share redemption would trigger a substantial tax liability, and expressly agreed in emails and in-person discussions that "no redemption of the preferred shares should occur at any time". They agreed to decide at a later date what the exact mechanics of unwinding the reciprocal loan structure in a tax-neutral way would be.

87 Relying on this evidence, Newbould J. concluded that

> there was a continuing intention on the part of Fairmont from the time of the 2002 loan arrangements with Legacy that the loan arrangements would be carried out with a view to being tax and accounting neutral *and a continuing intention from the time of the 2006 transaction in which control of Fairmont passed to the purchaser of its shares that the preference shares of [Fairmont's subsidiaries] would not be redeemed in light of the modified plan that was carried out at that time*.
>
> I also think a fair conclusion from the evidence ... that when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future they would have to deal with the unhedged position of [Fairmont's subsidiaries] in a way that would be tax and accounting neutral although they had no specific plan as to how they would do that.
>
> [Emphasis added.]
>
> ((2014), 123 O.R. (3d) 241, at paras. 32-33)

88 Newbould J. was accordingly satisfied that Fairmont had an unwavering intention to unwind the reciprocal loan structure in a way that ensured that any foreign exchange gains and losses would be offset against each other:

> In this case, the intention of Fairmont from 2002 was to carry out the reciprocal loan arrangements with Legacy on a tax and accounting neutral basis so that any foreign exchange gain would be offset by a corresponding foreign exchange loss.

> When control of Fairmont changed in 2006, that intention did not change and when the loan unwind occurred in 2007, that intention did not change....
>
> I do not see this as a case in which tax planning has been done on a retroactive basis after a [Canada Revenue Agency] audit. The purpose of the 2007 unwind of the loans was not to redeem the preference shares of [Fairmont's subsidiaries], but to unwind the loans on a tax-free basis. The redemption of the preference shares was mistakenly chosen as the means to do so. [paras. 42-43]

89 This means that Fairmont was not attempting to change its original intention because of unanticipated tax consequences. It *had* anticipated the tax consequences of unwinding the reciprocal loan structure with a preferred share redemption, and it rejected this course of action.

90 Fairmont was found by Newbould J. to have always had a clear, continuing intention to unwind the reciprocal loan structure on a tax-neutral basis and never to redeem the preferred shares. But, by mistake, the preferred share redemption terms were included in the directors' resolutions. This is exactly the kind of mistake rectification exists to remedy. Once Newbould J. was satisfied of the true intention of the parties, he was entitled to give effect to it by allowing the replacement loan arrangement terms to be inserted into the directors' resolutions.

91 To require an exhaustive account of how the transaction was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context. As Newbould J. explained, denying the application to rectify the agreement in these circumstances would "give [the Canada Revenue Agency] an unintended gain because of the mistake": para. 44. There is no basis for permitting a windfall to the Canada Revenue Agency that no other third party would have been entitled to.

92 I would dismiss the appeal with costs.

Appeal allowed.

Pourvoi accueilli.

TAB 13

CITATION: Bridging Finance Inc. v. 1033803 Ontario Inc., 2023 ONSC 1721
COURT FILE NO.: CV-18-608978-00CL
DATE: 20230314

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO INC.

Applicant

AND:

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

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

BEFORE: Osborne J.

COUNSEL: *Jeremy Opolsky, Scott Bomhof & Jake Babad*, for the Applicant

Michael Farace, Asim Iqbal & Paul Guaragna, for the Respondents

HEARD: March 14, 2023

ENDORSEMENT

Overview

[1] KSV Restructuring Inc. ("KSV" or the "Receiver") brings this motion in its capacity as Court-appointed Receiver and Manager of 1033803 Ontario Inc. ("803") and 1087507 Ontario Limited for advice and directions as to whether, effectively, the Receiver is entitled to Holdback proceedings for the benefit of creditors, and whether it can proceed with the Lien Action and the Delay Action (defined below) and defend any counterclaim brought by MOD Developments (197 Yonge) Limited Partnership ("MOD") in those proceedings.

[2] The motion came about as a result of the Receiver seeking to recover, for the benefit of the estate, funds held back by MOD related to construction services performed.

[3] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise specified.

Background and Context

[4] 803 operated a concrete forming business under the name of Forma-Con Construction "Forma-Con"). It provided services to construction projects in and around the Greater Toronto Area. 803 is owned by the Aquino family and is related to Bondfield Construction Company Limited which was a general contractor with projects across Ontario. Both of those entities were members of the Bondfield Group of Companies (the "Bondfield Group").

[5] 803 was incorporated in 1993 but began operating the Forma-Con concrete forming business in or around 2016.

[6] Also part of the Bondfield Group was another company, 1428508 Ontario Limited ("508"). 508 was incorporated in 2000 and the sole shareholder was Mr. Steven Aquino. On December 20, 2014, the shares of 508 were transferred, retroactively, to 803, with the result that 508 became a wholly-owned subsidiary of 803. Until 508 was dissolved, it, too, carried on business under the name Forma-Con.

[7] This motion, and indeed broader litigation, arises out of a construction project located at 197 Yonge St., Toronto, known as the Massey Tower (the "Massey Tower Project" or the "Project"). Forma-Con provided concrete pouring and framing work as part of the construction of the Project.

The Massey Tower Agreement

[8] On December 19, 2014, an agreement was entered into between MOD and "Forma-Con Construction (a division of 142850**2** Ontario Limited)" (the "Massey Tower Agreement") (emphasis added).

[9] Pursuant to the Massey Tower Agreement, Forma-Con was to provide concrete forming services for the Project as noted above.

[10] However, there was a mistake in the naming of the parties to the Massey Tower Agreement in that it described Forma-Con Construction as a division of 142850**2** ("502") rather than the proper and intended party, 50**8**.

[11] 502 was never part of the Bondfield Group and carried on a business known as Second Floor Ltd. "(Second Floor"). It was incorporated on July 6, 2000. Second Floor ceased carrying on business and the corporation was cancelled on February 19, 2007, seven years before the Massey Tower Agreement was executed. 502 simply had nothing whatsoever to do with the Project.

[12] 502 had a different registered address and administrator than 508. Its registered address is not related to any of the entities in the Bondfield Group and the administrator was never an employee or director of any entity in the Bondfield Group.

[13] Pursuant to the Massey Tower Agreement, an unrelated entity, Tucker HiRise Construction Inc. ("Tucker"), was appointed Construction Manager. Forma-Con effectively liaised through Tucker as its primary point of contact for work on the Project. In particular, the Massey Tower Agreement provided that all communications between Forma-Con and MOD were to be forwarded through Tucker.

[14] 508 performed all Forma-Con work on the Project from the date of the Massey Tower Agreement (December 19, 2014) until December 31, 2016.

[15] 508 submitted progress billings in excess of $8,700,000 to MOD. MOD paid these billings in full (save for the required holdback).

[16] No billings were ever submitted by, or paid to, 502.

[17] All progress billings included a WSIB Clearance Certificate certifying the compliance of Forma-Con with its WSIB obligations. Each of those Certificates describes the parties to the Massey Tower Agreement as MOD and "142850**8** Ontario Limited/Forma-Con Construction" (emphasis added).

[18] Forma-Con's general liability insurance, required pursuant to the terms of the Massey Tower Agreement, was maintained and paid for by 508. As required according to the terms of the Massey Tower Agreement, MOD received an insurance certificate dated October 30, 2015 confirming that the insurance was issued in favour of "Forma-Con Construction, a Division of 1428508 Ontario Limited".

[19] Apparently, no one ever noticed the error in the naming of the party in the Massey Tower Agreement as 502 rather than 508. MOD never took the position that the Massey Tower Agreement was invalid, nor did it ever object to 508 providing services under the Massey Tower Agreement. Essentially, the Massey Tower Agreement was performed by both parties for approximately two years without incident or complication - 508 provided the concrete forming services, and MOD paid 508 for those services.

[20] It is common ground on this motion that the concrete forming services were performed and delivered pursuant to the Massey Tower Agreement at a fixed payable value of $23,084,770. The Holdback represents 10% of this amount or, net of taxes, $2,038,704.26.

The Dissolution of 508 and Assignment to 803

[21] As it turns out, a resolution approving the dissolution of 508 was passed on December 31, 2014. It provided that the property of 508 was to be distributed to 803. Those two entities entered into a dissolution agreement also dated December 31, 2014 (the "Dissolution Agreement"), pursuant to which 508 assigned and transferred to 803 all of its right, title and interest in and to all of its property, assets and business.

[22] The Dissolution Agreement provided that it would not constitute an assignment or attempted assignment of any contract to which 508 was a party which was not assignable without the consent or approval of any third party and where such consent or approval had not been obtained, such that any such contracts were to be held in trust for 803 and performed by 803 in the name of 508, with all benefits derived therefrom for the account of 803.

[23] The Articles of Dissolution for 508 were, however, issued and effective almost two years later on June 21, 2016. Those Articles confirm that all of the assets of 508 were distributed to 803 pursuant to the Ontario *Business Corporations Act.*

Performance of the Massey Tower Agreement Subsequent to the Dissolution of 508

[24] 803 performed all of the Forma-Con services pursuant to the Massey Tower Agreement from January 1, 2017 until completion of the Project. 803 issued progress billings to MOD which were paid in the ordinary course (again less the required holdback) in the aggregate amount of approximately $11,700,000.

[25] Each of these progress billings included, as of March 2017, the required WSIB Clearance Certificate, and these identified the parties to the Massey Tower Agreement as "1033803 Ontario Inc./Forma-Con Construction" and MOD.

[26] Tucker, in its capacity as Construction Manager of the Project, was aware that 803 was performing the concrete forming services under the Massey Tower Agreement, at least by correspondence with Forma-Con where the issue arose as a request for clarification as to the proper name of the counterparty, but there is no evidence of formal notice of any assignment having been given.

[27] Tucker issued a revised insurance certificate in April 2017 naming as an additional insured, "Forma-Con Construction, a Division of 1033803 Ontario Ltd.".

[28] The Receiver who brings this motion was appointed by order of Justice Hainey dated November 19, 2018 (the "Receivership Order"). The Receiver determined, upon review, that there was potential value for creditors of Forma-Con if the Project was completed. In particular, the Receiver concluded that its ability to collect the funds previously held back by MOD (in the amount of $2,038,704.26) (the "Holdback") would be impaired if the Project was not completed.

[29] The Receiver therefore set about to negotiate with MOD the terms of a closeout agreement for the Project, in December 2018. It was then that MOD asserted for the first time that the Receiver lacked any standing to deal with the Massey Tower Agreement because the Receiver had no authority with respect to 502.

[30] The Receiver and MOD entered into an agreement on December 27, 2018 (the "Close-Out Agreement"), setting out the terms pursuant to which the Receiver, acting on behalf of 803, agreed to complete the concrete forming work on the Project. That Close-Out Agreement, however, specifically provided that any dispute with respect to or arising from its terms was to be heard by this Court.

[31] The Receiver, on behalf of 803, performed all of the remaining work required under the Close-Out Agreement, and sent billings to MOD with respect thereto in the approximate amount of $420,000, which invoices were paid in full by MOD.

[32] Following completion of the Project in 2019, the Receiver requested payment of the Holdback (which is equal to 10% of the work performed by Forma-Con and now exceeds $2 million), and MOD refused.

[33] The Receiver registered a lien in respect of the Project and commenced a lien action in connection therewith (the "Lien Action"). The Receiver also commenced an action against MOD for amounts owing to 803 for work done in connection with the Project (the "Delay Action").

[34] MOD challenged the authority of the Receiver to pursue that Lien Action and moved to have it dismissed, in response to which the Receiver advised that it intended to bring this motion for directions in respect of the authority of the Receiver.

[35] Accordingly, the Receiver seeks advice and direction on the following questions:

a. Is 508 the proper party to the Massey Tower Agreement (rather than 502)?

b. Is the Holdback "Property" within the meaning of the Receivership Order?

c. Was the Massey Tower Agreement assigned at law or in equity from 508 to 803?

d. Is MOD estopped from asserting that the current party to the Massey Tower Agreement is 502 or 508?

e. In the alternative, is the Massey Tower Agreement held in trust for 803 with the result that 803 is entitled to the benefits thereunder?; and

f. is the Receiver entitled to continue to pursue claims against MOD in the Lien Action and the Delay Action and defend any counterclaims brought by MOD?

[36] If the above questions are answered affirmatively, the Receiver seeks an order:

a. rectifying the Massey Tower Agreement by changing the name effectively to 508;

b. declaring that the Holdback is "Property" within the meaning of the Receivership Order";

c. declaring that the Massey Tower Agreement was assigned law or in equity from 508 to 803;

d. declaring that MOD is estopped from asserting or claiming that the party to the Massey Tower Agreement is either 502 or 508;

e. in the alternative, declaring that the Massey Tower Agreement is held in trust for 803, and 803 is entitled to the benefits thereunder; and

f. declaring that the Receiver is entitled to pursue claims against MOD in both the Lien Action and the Delay Action and defend any counterclaims.

Positions of the Parties and Analysis

[37] When the Receiver sought to recover the Holdback for the benefit of creditors, MOD refused. It opposes this motion on the same basis.

[38] This motion is brought to determine the authority of the Receiver to bring and defend the relevant claims and counterclaims concerning the Holdback. The merits of those Holdback claims will be determined in separate proceedings and are not the subject of this motion.

[39] I also observe that there is no issue on this motion that:

a. the Massey Tower Agreement was performed and the concrete forming services were provided:

b. pursuant to the terms of the Massey Tower Agreement, MOD was required to release the Holdback to Forma-Con no later than 60 days after the contract was completed (Article A – 5.1); and

c. the Receiver is seeking to recover the Holdback for the benefit of the creditors of Forma-Con.

[40] Accordingly, the main issues on this motion are these:

a. should the Massey Tower Agreement be rectified to reflect 508 rather than 502 as a party?

b. is 803 a party to the Massey Tower Agreement by assignment or successorship? and

c. is MOD estopped from taking the position that 803 is not a party to the Massey Tower Agreement?

Rectification and The Limitation Period

[41] First, MOD submits that the party to the Massey Tower Agreement was plainly 502 and not 508, the predecessor of 803.

[42] Moreover, MOD submits that, since 508 filed Articles of Dissolution on June 6, 2016 based on its Dissolution Resolution dated December 31, 2014 yet continued to submit applications for payment and WSIB clearance certificates to MOD up until December 20, 2016, its conduct was wrongful in that it submitted documentation that amounted to successive misrepresentations as it was no longer an existing entity. The result, submits MOD, is that 508 lacks clean hands and is therefore not entitled to equitable relief.

[43] The Receiver takes the position that since it is conceded by MOD that the description of the party in the Massey Tower Agreement was a mistake, the contract should be rectified to reflect 508 as the proper and intended party.

[44] In my view, the Massey Tower Agreement should be rectified to reflect 508 rather than 502.

[45] I find that it is beyond any serious dispute that both parties intended from the outset that 508 was to be the named party, and the naming of 502 was the result of a simple clerical mistake.

[46] MOD agrees and concedes that the naming of 502 was a mistake. Its affiant on this motion, Aidan Ball, stated in his affidavit that "…… it appears that 1428502 due to an error was not properly named in the Contract and should have been named as 1428508" (para. 27). He conceded the same point on cross-examination (Q 279-80).

[47] Even without that admission, however, I would have reached the same conclusion. As submitted by the Receiver, and as summarized above, 502 never had anything to do with the Massey Tower Agreement, Forma-Con, or the Project. MOD does not put forward any evidence that it did.

[48] I am satisfied that the four elements established by the Supreme Court of Canada in *Canada (AG) v. Fairmont Hotels Inc.,* 2016 SCC 56 at para. 14 have been met here:

a. The parties had reached a prior agreement, the terms of which are definite and ascertainable;

b. the agreement was still effective when the instrument was executed;

c. the instrument fails to report accurately that prior agreement; and,

d. if rectified as proposed, the instrument would carry out the agreement.

[49] The parties intended, at the time the agreement was made and throughout the relevant period during which it was performed, that Forma-Con would perform the concrete pouring services for the Project. Moreover, and precisely as intended since it was the skill and expertise of 508 that MOD desired, 508 in fact performed those concrete pouring services for the Project without incident or complication for two years from December 19, 2014 until December 31, 2016.

[50] All of this is consistent with the undisputed fact that the parties intended to name 508 as "Trade Contractor" and in fact properly referred to that party as Forma-Con, but the clerical error was made in describing Forma-Con as a division of 502 rather than 508.

[51] For all of the above reasons, I am satisfied that rectification is appropriate and, if granted, the Massey Tower Agreement would properly reflect the intention of the parties or, as the Supreme Court of Canada expressed it, "the instrument would carry out the agreement".

[52] However, that is not the end of this issue since, albeit belatedly as asserted in its factum for the first time, MOD also submits on this motion that the Receiver's request for rectification of the

Massey Tower Agreement is a request for equitable relief to which the *Limitations Act, 2002*, S.O. 2002, c.24 Sched. B, applies.

[53] MOD takes the position that the claim was discovered by the Receiver on December 21, 2018 when it received a letter of the same date from counsel to MOD advising that the Receivership Order related to two companies, neither of which was the counterparty to the Massey Tower Agreement. MOD's Amended Statement of Defence and Counterclaim served on July 15, 2019 was to the same effect.

[54] Accordingly, MOD submits that, taking into account the adjustments to the applicable limitation period brought about by the extensions related to the Covid 19 pandemic, the Receiver should have brought its claim for rectification on or before January 15, 2022. Since its Notice of Motion is dated September 8, 2022, the claim ought to be statute-barred.

[55] The Receiver submits that it is not out of time since it position was first advanced in the Lien Action when it asserted its right to the Holdback, with the result that the Notice of Motion did not advance a new claim.

[56] The Court of Appeal for Ontario has been clear that a new cause of action is not asserted if the [new claim] arises out of the same facts previously pleaded and no new facts are relied upon, or amounts simply to different legal conclusions drawn from the same set of facts or to simply provide particulars of an allegation already pleaded or additional facts upon which the original right of action is based: *Klassen v. Beausoliel*, 2019 ONCA 407 ("*Klassen*") at para. 29, citing with approval, Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186.

[57] The Court in *Klassen* went on to observe that it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies (para. 30), and that the Court may refuse an amendment where it would cause non-compensable prejudice (para. 31).

[58] The Receiver's Statement of Claim in the Lien Action was issued on March 13, 2019. Through that pleading, the Receiver sought to recover the Holdback, and asserted that its rights flowed from the Massey Tower Agreement. The Receiver pleaded that it was entitled to advance the claim on behalf of 803.

[59] In its Statement of Defence, MOD defended the Lien Action precisely on the basis that the party to the Massey Tower Agreement was 502 instead of 508 and that it never entered into any contract with 803.

[60] In Reply, the Receiver expressly pleaded that the mis-naming of the counterparty was a clerical error.

[61] MOD expressly refers to and relies upon these pleadings in the Lien Action in its factum responding to this motion (see paras. 8-15).

[62] This motion for advice and directions arises directly out of the Lien Action and the Delay Action. Its purpose is to determine the threshold issue of whether the Receiver can assert claims

of, and defend claims against, 803, including the claim for the Holdback, before the parties spend the financial resources litigating the quantum of the amounts owing, again including the Holdback.

[63] I am satisfied that the *Klassen* test applies and no new cause of action is advanced on this motion. No new facts are pleaded. Moreover, there is no prejudice to MOD, let alone non-compensable prejudice. MOD has engaged on this motion in the very issue, based on the very facts, that were the subject of the Lien Action.

[64] The result, since the Lien Action was commenced well within time, is that the relief sought on this motion is not statute-barred.

The Effect of the Assignment and Dissolution Agreement

[65] MOD submits that 803 is not a party to the Massey Tower Agreement even as successor to 508, as a result of the corporate reorganization described above, pursuant to which 508 was dissolved in 2016. MOD's position is, effectively, that any assignment by agreement between 803 and 508 is invalid because MOD did not provide its consent as was expressly required in writing pursuant to the terms of the Massey Tower Agreement (Supplementary Conditions, Section GC 1.4.1). Such consent was neither sought nor granted.

[66] Moreover, MOD argues that the Receiver's position that 803 is a successor to 508 (with the result that no assignment was necessary) cannot succeed since according to the terms of Dissolution Agreement, 508 assigned to 803 its contracts, with the result that 803 is an assignee of certain contracts but not a successor. MOD submits that 508 was dissolved and assigned its assets to 803; 508 and 803 were not amalgamated.

[67] The Receiver argues that the Massey Tower Agreement was validly assigned from 508 to 803 and in any event, since 803 is the successor in law of 508, no consent was required for that assignment in any event.

[68] The Receiver argues in the alternative that, if consent was required, MOD had notice of the assignment, did not object, and through its actions and conduct consented to or otherwise accepted the assignment, which acceptance was relied upon by 803 to continue to provide services under the Massey Tower Agreement.

[69] In the absence of that acceptance by MOD, or if MOD had objected or declined to honour the Massey Tower Agreement on the basis that the assignment from 508 to 803 was invalid or for any other reason, 803 would not have continued to perform services under the Massey Tower Agreement.

[70] Finally, the Receiver argues that in any event, pursuant to the terms of the Dissolution Agreement, any rights under the Massey Tower Agreement which were not assigned to 803 are held in trust for 803 and can be performed by 803 in the name of 508, with all benefits derived therefrom being for the account of 803.

[71] The Massey Tower Agreement by its terms permitted an assignment, but only by written consent, such consent not to be unreasonably withheld (GC 1.4.1). At the same time, the enurement clause provides that [the terms of the Agreement] enure to the benefit of and are binding upon

successors and assigns (A-9.1). No consent is required for the Massey Tower Agreement to enure to the benefit of and be binding upon a successor.

[72] As noted, MOD submits that the required consent to an assignment was never requested nor given. The Receiver was obviously not involved at the relevant time but concedes that it cannot find any evidence of a request for consent to an assignment. The fact that the Receiver does not have all of the facts relating to the events that occurred before its appointment in the first place, is perhaps not surprising in the circumstances of this case.

[73] Notwithstanding the lack of a formal request for consent to assignment, it seems clear that the issue of the identity of the party did arise in the context of an electronic mail exchange between the Bondfield Group and Tucker (the Construction Manager of the Project for MOD) in April, 2017.

[74] The representative of Tucker, in response to an electronic mail message from the Bondfield Group referencing 803, inquired as to whether the company had been sold or whether the crane was owned by another entity and noted that: "previous certificates were to …… 508". This exchange is quoted from and relied upon in the factum of MOD (see para. 38) in support of its argument that the Receiver conceded that there were no additional emails (i.e., that there was no additional evidence regarding consent to the assignment).

[75] All of that in turn follows on a lengthy submission by MOD, repeated in argument on this motion, about the activities and alleged activities at and within the Bondfield Group and involving certain of its then principals who were members of the Aquino family and particularly John Aquino. I observe, however, that it is precisely as a result of the alleged misconduct and unlawful activity involving the Bondfield Group that the Receiver was appointed in the first place and now seeks to recover what assets it can for the benefit of its creditors.

[76] However, consent is not required pursuant to the terms of the enurement clause, since the Massey Tower Agreement is binding on "successors" as well as assigns.

[77] For the purposes of the Massey Tower Agreement then, is 803 the corporate successor of 508?

[78] The Receiver relies on the observations of Côté, Brown and Rowe JJ, in their dissenting reasons, although not on this point, (from the majority of four) in *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60 at paras. 159-160 ("*Resolute FP Canada*"), as to what constitutes a corporate successor:

> [159] Like the majority at the Court of Appeal, we are of the respectful view that the motion judge made a palpable and overriding error in concluding that the enurement clause extended the benefit of the Ontario Indemnity to successor owners of the Dryden Property (i.e., successors-*in-title*). In our view, the term "successors" clearly refers only to *corporate* successors. It is worth noting that this clause is a standard contractual term — that is, "boilerplate" — that solicitors use in order to protect their clients' interests and expectations (see *Canadian Contract Law,* at pp. 741-42). Certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect.

> [160] In *National Trust Co. v. Mead*, 1990 CanLII 73 (SCC), [1990] 2 S.C.R. 410, this Court observed that, "[w]hen used in reference to corporations, a 'successor' generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation" (p. 423). Indeed, this common understanding of the term "successor" has been recognized in considering enurement clauses like the one at issue here (see C. L. Elderkin and J. S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (1998), at pp. 250-51; M. H. Ogilvie, "*Re-defining Privity of Contract: Brown v. Belleville (City)*" (2015), 52 *Alta. L. Rev*. 731, at p. 736). Again, bearing in mind that the object of contractual interpretation is to discern the parties' objective *intentions,* the commonly accepted meaning of that term provides a helpful starting point to considering what the parties understood the words in the enurement clause to mean.

[79] As noted above in these reasons, the Dissolution Agreement provided according to its terms that all of the assets of 508 were distributed to, and became the property of, 803 or in the alternative were held in trust. 803 assumed all of the rights and burdens of 508.

[80] Moreover, the cross-examination of Steven Aquino conducted October 7, 2022 on his affidavit sworn August 11, 2022 in support of the Receiver's motion includes a lengthy exchange about the intentions of the parties with respect to the reasons for the dissolution resolution and related steps. To quote from the factum of MOD at para. 29:

> "the reason there was a dissolution resolution passed for 508 on December 31, 2014 was that we were considering the sale of a property that is owned or held within 803 that would have resulted in the group being exposed to a large capital gains expenditure. Whereas 508 had had losses in its operations that would have been utilized to offset the gains realized in the sale of the property. So we -- it was decided to amalgamate the two companies for tax planning purposes (questions 77 to 79, pages 22 to 23); …. He does not know why nobody on behalf of 508 or 803 did not tell anyone at MOD Developments or Tucker Hi-Rise Construction that this dissolution of 508 had taken place by way of a dissolution resolution signed on December 31, 2014 (question 79, page 23); …… He does not believe that dissolution information that 508 was dissolved on December 31, 2014 was sent to MOD Developments and Tucker Hi-Rise (question 89, page 23); …… when he stated in paragraph 11 of his August 11, 2022 that "Following the dissolution of 508 from December 2016 through to completion of the Massey project, 803 was the proper party to the Massey Tower project agreement and it was the proper party who was required to perform the work.", he believed that 803 was a proper party to the Contract because 803 was doing the work (question 112, page 34)"

[81] On cross-examination, Mr. Ball for MOD agreed that MOD wanted to contract with the Forma-Con entity, irrespective of the numbered company behind it (Q 291). According to him, what mattered to MOD was that it was the Forma-Con entity that was doing the work; was contractually obligated to do the job; with the management that MOD knew at Forma-Con; with the expertise that MOD knew that Forma-Con had; and with Forma-Con's equipment, all with the result that the numbered company behind Forma-Con did not matter (Q 291 – 296).

[82] In my view, to the extent that there is evidence of the intentions of the parties to the Massey Tower Agreement in the somewhat unusual and challenging circumstances of this case, it is to the effect that the intention of the parties was to have Forma-Con perform the concrete forming obligations under the Massey Tower Agreement.

[83] It is also my view that it was the intention of the Bondfield Group that 803 would assume all of the benefits and burdens of the contracts to which 508 was a party, and 803 was the party performing the concrete forming services on the Project in any event (through its division, Forma-Con). MOD clearly sought and understood that it was dealing with "Forma-Con", and in fact it was dealing with Forma-Con, whether as a division of 508 rather than 502 (the mistake) or whether as 803 in turn as a corporate successor of 508 within the meaning contemplated by the Supreme Court of Canada.

[84] I am satisfied that 803 is a successor of 508 as described in *Resolute FP Canada* above for the purposes of an enurement clause like the one at issue here: it is another corporation which, "through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation".

[85] Accordingly, I find that for the purposes of the Massey Tower Agreement, 803 was the successor of 508.

[86] I am not prepared to find however, as argued in the alternative by the Receiver, that MOD in fact did formally consent to the assignment through the correspondence and actions of its Construction Manager, Tucker. Consistent with the failure of either party to realize the mistake that had been made, when the representative of Tucker was informed in April 2017 that the relevant entity operating as Forma-Con was in fact 803 and not 508, his response was: "okay, I'll get it changed" referring to the insurance certificates which he then set about to amend as he had undertaken to do (Motion Record, Tab 2.AA, p. 682). The insurance certificates and WSIB certificates were issued in the name of 803.

[87] There is also no question that progress payments were submitted by, and paid to, 803.

[88] I discuss these facts and others in the section below entitled "Estoppel", and in my view they are relevant to this motion but do not in my view amount to an express consent to an assignment of the Massey Tower Agreement.

[89] Rather, to me they reflect what I have already found above; namely, that the parties jointly thought in April, 2017 as reflected in the email exchange noted above that a clerical error had been made and conducted themselves in all respects as if the clerical error had not been made, just as they had done throughout the performance of the Massey Tower Agreement. As I say, that is a relevant fact, but it does not in my view amount to an express consent to an assignment of the contract as that was contemplated by the parties. Simply put, neither MOD nor its Construction Manager Tucker adverted to the fact that Tucker was doing anything other than correcting a clerical or typographical error.

[90] As noted, however, is not necessary for me to find that there was an express consent to the assignment, given my conclusion that 803 is the corporate successor to 508.

Estoppel

[91] In any event, if I am mistaken as to my conclusion that 803 is the corporate successor to 508 for the purposes of the Massey Tower Agreement, I would conclude for the reasons set out

below that MOD is now estopped from resiling from its position that 803 is the proper party to the contract.

[92] The Receiver submits that, from 2017 until the end of 2018, Forma-Con and MOD (including its Project Manager, Tucker), acted on the shared assumption that 803 was the party to the Massey Tower Agreement. MOD objected to 803 as a counterparty only once the Receiver was appointed and sought to recover the Holdback. Equity, through the doctrine of estoppel by convention, does not permit one party to reside from a shared assumption.

[93] The Receiver submits that it entered into the Close-Out Agreement to preserve the claim of 803 to the Holdback, and as noted, would not have undertaken the work required to fulfil its obligations under the Massey Tower Agreement without an express understanding that the Holdback was an asset of 803. It submits that it in fact performed the work, and MOD benefited from the completion of that work, all with the result that MOD is now estopped from resiling from the shared understanding that 803 was the party to the Massey Tower Agreement.

[94] MOD submits that estoppel does not apply since MOD was not aware of the dissolution of 508 as of December 31, 2014 or that 803 was the proper contractual counterparty, with the result that the required element of estoppel by convention of proof that the dealings of the parties were based on a shared assumption of fact or law, even if mistaken, cannot be made out.

[95] The parties are agreed on the elements of estoppel by convention:

i) the parties' dealings were based on a shared assumption of fact or law, even if mistaken. Nevertheless, estoppel can arise out of silence (impliedly);

ii) a party must have acted in reliance on the shared assumption; and

iii) it would be unjust and unfair to allow one of the parties to resile or depart from the common assumption.

See: *Ryan v. Moore*, 2005 SCC 38 at para. 59 and *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.,* 2021 ONCA 201 at para. 144.

[96] However, they disagree on whether there was a shared assumption here; namely, that 803 was the proper contractual counterparty.

[97] In my view, the elements of estoppel by convention are made out here for the reasons set out above. The evidence of MOD was clear that it intended to contract with Forma-Con and in fact thought it was doing so; the numbered company behind Forma-Con was not relevant. The shared assumption, although mistaken, was that 803 was the counterparty. Generally, equity will not favour the party seeking to resile from the shared assumption (see *Fram-Elgin*).

[98] There is no issue that both parties acted in reliance on the shared assumption: the Massey Tower Agreement was performed according to its terms. The concrete forming services were provided, payment was made and the requisite WSIB and other regulatory documents were prepared.

[99] Finally, in my view it would be unjust and unfair to allow MOD to resile or depart from the common assumption. It is difficult to come to a different conclusion in equity. The work was done, and the Holdback is owing pursuant to the terms of the Massey Tower Agreement. There is no basis upon which to conclude that it is in any sense fair or equitable for MOD to be allowed to keep that 10% Holdback.

[100] There is no contractual basis, such as a deficiency in the work performed, that is in the evidence before me, and none is asserted. Rather, the only objection to the payout of the Holdback to the Receiver for the benefit of creditors is that set out above. There is no prejudice or detriment to MOD in finding that the Receiver should be entitled to the Holdback, in the sense that MOD is not entitled to keep the Holdback in any event: its only argument would have to be that some other party, but not the Receiver, was entitled to the funds. Yet, no other party asserts any such interest.

[101] MOD itself asserts no beneficial interest to the funds. As against that, and given my reasons above, it is difficult to conclude that in equity, the Receiver ought not to be entitled to the funds constituting the Holdback.

[102] Finally, in equity, the Receiver is seeking to recover the amounts for the benefit of creditors and it would be unfair to visit the conduct of 508 or its principals, whatever that may amount to in law, on the Receiver or the creditors for whose benefit it seeks to recover the funds. I accept the submissions of MOD that the dissolution of the company was not disclosed at the time and nor were the articles registered until some considerable period of time later. However, that does not change my conclusion on this point. The alleged misconduct of the company and its principals was in large part the very basis for the appointment of the Receiver in the first place.

[103] MOD is estopped from taking the position as it did following the Receivership Order that the Receiver is not entitled to the Holdback.

Result and Disposition

[104] For all of the above reasons, the Receiver has been successful on this motion. The Massey Tower Agreement is rectified to reflect 508 as the proper party to the Massey Tower Agreement, 803 is the successor to 508 for the purposes of the Massey Tower Agreement and MOD is estopped from asserting that 803 is not the proper contractual counterparty. It follows that the Holdback is "Property" as defined in the Receivership Order, and the Receiver is entitled to pursue claims and defend counterclaims in the Lien Action and the Delay Action.

[105] Both parties provided submissions on costs. The Receiver seeks partial indemnity costs in the amount of $134,250.09, inclusive of fees, disbursements and taxes. MOD's partial indemnity costs are $40,005.73 inclusive of fees, disbursements and taxes, and submits that if the Receiver is successful, it should be entitled to costs in that same amount.

[106] I have considered my jurisdiction pursuant to section 131 of the *Courts of Justice Act* and in particular the factors set out in Rule 57.01. I have reviewed the cost outlines and submissions of both parties.

[107] The Receiver was successful on the motion and is entitled to its costs. The motion was complex, factually and with respect to the legal issues the facts presented, and the disposition will affect and hopefully simplify the Lien Action and the Delay Action going forward.

[108] The issues were important, the proceeding was complex, and I think either party could reasonably expect to pay a material amount in costs if unsuccessful. I agree with the submission of the Receiver that it was important for it to seek to recover the Holdback for the benefit of creditors, particularly in circumstances where MOD asserted no beneficial interest to the funds yet refused to pay them over. The clerical error in the Massey Tower Agreement was conceded, yet the Receiver was put to considerable effort to try to forensically examine records relating to a period of time prior to its appointment, in order to assemble the evidentiary record.

[109] On the other hand, MOD submits that the time spent by the Receiver and its counsel was inordinate and unreasonable.

[110] I have reviewed the cost outlines submitted by both parties. I am satisfied that Receiver's fees are generally reasonable, as was the allocation of work to avoid duplication and distribute it properly and proportionately as between and among counsel of different levels of experience so as to maximize efficiency.

[111] Having considered the submissions of the parties, the outlines and all of the factors as noted above, the Receiver is entitled to its costs in the amount of $110,000 inclusive of fees, disbursements and taxes, payable by MOD within 60 days.

[112] Order to go in accordance with these Reasons. The parties may submit a draft order, if agreed as to form and content, to me in writing. If the parties cannot agree on the form of order, they may schedule a Chambers appointment before me through the Commercial List Office to settle the terms of same.

Osborne J.

Date: March 14, 2023

TAB 14

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 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

***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.

TAB 15

2021 ONSC 5533
Ontario Superior Court of Justice [Commercial List]

2056706 Ontario Inc. v. Pure Global Cannabis Inc.

2021 CarswellOnt 11790, 2021 ONSC 5533, 336 A.C.W.S. (3d) 84

2056706 ONTARIO INC., KOZO HOLDINGS INC., CANCOR DEBT AGENCY INC. (Applicants) and PURE GLOBAL CANNABIS INC., PURESINSE INC., 237A ADVANCE INC., 237B ADVANCE INC., SPRQ HEALTH GROUP CORP. AND THE GREAT CANADIAN HEMP COMPANY (Respondents)

S.F. Dunphy J.

Heard: June 28, 2021
Judgment: August 16, 2021
Docket: Toronto CV-20-00638503-00CL

Counsel: Jeffrey Levine, for Secured Debenture Holders
Ryan Atkinson, Saurabh Singhal, for TS Pharmaceuticals Ltd.
Leanne M. Williams, Mitchell W. Grossell, for Receiver, Thornton Grout Finnigan LLP
Hylton Levy, Paul Denton, for Court-Appointed Receiver, A. Farber & Partners Inc.

***S.F. Dunphy J.*:**

1 On June 28, 2021, I heard the motion of TS Pharmaceuticals Ltd., the purchaser of certain assets from A. Farber & Partners Inc. as court-appointed Receiver of the Respondents. The moving party sought damages arising from the claimed failure of the Receiver to perform its obligations under an Asset Purchase Agreement (or "APA") in good faith. I dismissed the motion from the bench with reasons to follow. These are those reasons.

Overview of conclusions

2 At its core, this dispute comes down to conflicting views of the parties as to what it was the Receiver undertook to do when it entered into the APA. It ought to have been abundantly clear to the moving party Purchaser that the Receiver was not in a position to convey the various licenses and approvals necessary to grow and sell cannabis. The receivership order went to great lengths to make quite clear that the receivership applied to all of the assets of the debtors *except* those in relation to the subject cannabis licenses.

3 The Receiver fully complied with its agreements with the Purchaser. Upon entering into the APA, it agreed to negotiate in good faith and to use its best efforts to complete a complementary share purchase agreement. This second agreement was to be designed to give the Purchaser the opportunity to attempt to retain the benefit of an existing cannabis license held by one of the respondents by acquiring the shares of the license holder once it had been purged of its unwanted liabilities. Although described as a "post-closing covenant" under the APA, the Receiver began negotiating that second agreement before even obtaining court approval of the first.

4 A detailed share purchase agreement was negotiated diligently over the course of the following four weeks with no evidence of delay or lack of diligence. While both transactions were explicitly "as is, where is" transactions without warranty on the part of the Receiver as to any but very basic facts, the Purchaser failed to discover during its due diligence a basic fact that was hiding in plain sight all along: the cannabis license in question would expire in accordance with its terms the business day following the execution of the share purchase agreement and ten days before either agreement was to be presented to the court for approval.

The potential loss of a regulatory permit over which the Receiver had neither possession nor control was a circumstance that the Purchaser was responsible for discovering through its own due diligence and was not known in fact to the Receiver. No amount of best efforts or good faith following the completion of negotiations of the share purchase agreement could have prevented that license expiry from occurring the next day nor can an obligation of "best efforts to complete" a transaction imply an obligation to apply such best efforts before the transaction has even been negotiated and its terms settled. At all events, the "best efforts" that the Purchaser suggested the Receiver ought to have applied prior to the completion of negotiations lay beyond its powers under its appointing order and that position was clearly and unambiguously communicated.

Background Facts

5 Following an unsuccessful attempt to restructure pursuant to the Companies' Creditors Arrangement Act, R.S. C. 1985, c. C-36, the Receiver was appointed on May 1, 2020 over the respondents for the purpose of liquidating their assets in order to repay the applicant secured creditors. The debtors were in the cannabis business - a very closely regulated industry. The respondent Puresinse Inc. was a wholly-owned subsidiary of the Respondent Pure Global Cannabis and held a cannabis license issued by Health Canada under applicable legislation. As was subsequently discovered, that license was scheduled to expire on December 28, 2020 unless validly renewed.

6 The receivership order was carefully crafted to ensure the Receiver had no power or control over any of the debtor's regulated cannabis assets since such would potentially violate applicable federal and provincial laws regarding the ownership and control of such assets. The Receiver was directed in paragraph 2 of the Receivership Order not to take possession of any "Excluded Assets". These were defined as "any asset of the Respondents for which any permit or license issued in accordance, or in connection, with" the listed Federal and Ontario statutes governing cannabis is required.

7 Subsequent paragraphs reinforced this exclusion to avoid all possible doubt. Paragraph 3 declared the Receiver to have no authority over the undertaking of the Respondents as it relates to the Excluded Assets. Paragraph 4 ordered the Receiver not to manage, operate or carry on any business of the respondents in relation to the Excluded Assets.

8 The Excluded Assets were expressly left in the possession of the respondents. Indeed, the CCAA process (a "debtor in possession" process) remained in place with the principal of the respondents remaining as the designated "Responsible Person in Charge" (or "RPIC") under the regulations in order to remain in charge of the cannabis assets and the destruction of the cannabis inventories on hand. There were thus parallel proceedings left in place for a time.

9 The intent of the initial order to constrain the scope of the receivership so as to give a wide berth to the regulated cannabis business and its strict regulatory regime was clear and unmistakable.

10 The RPIC remained in place after the appointment of the Receiver although the individual's employment with the Respondents was not continued by the Receiver after the cannabis on hand was disposed of later in May 2020. The RPIC was the only person authorized to give directions to Health Canada in relation to the Cannabis License and to monitor and renew same. The Receiver neither controlled nor directed the actions of the RPIC.

11 As is usual in such cases, a sales process was undertakne by the Receiver in order to obtain the highest and best price for the assets being sold. A data room was established that contained, among other documents, the Cannabis License. Prospective purchasers, including the Purchaser, were given access to the data room to perform such due diligence as they thought necessary. The Cannabis License clearly indicated on its face that it had an effective date of October 22, 2019 and an expiry date of December 28, 2020. The license and its terms were also public documents available on line.

12 On November 26, 2020, the Receiver and Purchaser entered into the APA. The APA was expressly subject to court approval to be obtained in the form of an "Approval and Vesting Order". It contemplated a two-step transaction to recognize the limitations in the Receiver's authority while permitted the Purchaser latitude to attempt at least to retain the benefit of the existing Cannabis License. In the first instance, the Purchaser would purchase certain designated assets under the control of the Receiver but excluding the Excluded Assets. In the second step, the Purchaser would acquire all of the shares of the holder of the Cannabis License (the respondent PureSinse Inc.) pursuant to a subsequent share transaction but *after* PureSinse had been

purged of its unwanted liabilities through a transaction itself requiring court approval. Thereafter the Purchaser would be in a position to attempt to acquire the benefit of the Cannabis License through a change of control transaction subject always to all necessary regulatory approvals.

13 The second step of the transaction described above was characterized as a "Post-Closing Covenant" in Article 8 of the APA:

> **Article 8 POST-CLOSING COVENANT**
>
> 8.1. The Parties covenant and agree to negotiate in good faith and on a best efforts basis to complete a share purchase transaction whereby: (i) the Purchaser will acquire all of the issued and outstanding shares of PureSinse Inc., (ii) certain obligations, liabilities and claims against PureSinse Inc. will be vested out and channeled to a new corporation to be incorporated by the Vendor, as described in section 4.1, and (iii) the Parties will work cooperatively towards obtaining approval from Health Canada for the change of control contemplated by the share purchase transaction such that the Health Canada Licence will be valid and in good standing following Closing of the share purchase transaction.

14 The APA allocated the purchase price among the specific assets being conveyed (none of the purchase price being allocated to the Cannabis License). None of the representations or warranties of the Receiver applied to the status of the Cannabis License held by PureSinse. The representations and warranties given were the standard, bare-bones representations and warranties common in a receivership transaction.

15 Section 5.4 of the APA contains an extensive acknowledgement by the Purchaser of its reliance upon its own due diligence and that all Purchased Assets were being purchased "on an "as is, where is" basis *as they shall exist on the Closing Date*, subject to the terms of the Approval and Vesting Order, as applicable" (emphasis added).

16 Immediately after signing the APA, the parties began working towards negotiating the terms of the agreement required to give effect to the share purchase transaction contemplated by s. 8.1. During the course of those negotiations, the Purchaser entered into direct discussions with the RPIC in relation to the Cannabis License. The Receiver was not party to those discussions but learned from the Purchaser that the discussions were not productive and that the Purchaser was unwilling to meet the financial demands made by the RPIC as the price of his cooperation.

17 In early December 2020, the Purchaser decided to follow advice received from an expert and ask the Receiver to take steps to replace the RPIC with its own designee who would be more willing to work with the Purchaser in relation to the Cannabis License. The Purchaser asked the Receiver to take this step despite the existing limitations in paragraphs 2-4 of its appointing order, prior to finalizing or signing the share purchase agreement then in negotiation and prior to the Receiver obtaining court approval of either of the two transactions contemplated. This step was not urged as a remedy for a pending license expiry - there is no indication that either the Purchaser or the Receiver were actually aware that the Cannabis License would expire in accordance with its terms on December 28, 2020. The proposed replacement was suggested as a means to remove the potential threat of the RPIC taking steps to cancel the license unilaterally and generally to assist obtaining change of control approvals as the transaction moved forward. The Purchaser was promptly advised by the Receiver's counsel that the Receiver lacked the authority to take steps to replace the RPIC as asked.

18 Between December 4 and December 23, 2020, the Receiver and the Purchaser had numerous discussions regarding what the Receiver could and could not do in relation to the RPIC. The Receiver expressed the view that productive discussions with Health Canada in that regard would be possible only after the share purchase agreement was executed and the Receiver could advise Health Canada of the contemplated change of control. The Purchaser continued to negotiate the terms of the share purchase agreement with knowledge of this position and without negotiating for any changes to the draft share purchase agreement to require the Receiver to appoint a new RPIC.

19 On December 23, 2020, the parties entered into the Share Purchase Agreement. There can be no doubt that the SPA signed that day is the "share purchase transaction" referenced in s. 8.1 of the APA. The SPA contained no representations or warranties regarding the status or renewal of the Cannabis License nor did it require the Receiver to take any steps in relation to the appointment of an RPIC prior to closing.

20 Pursuant to the SPA, the Receiver agreed to sell the shares of the licensee PurseSinse at closing for a nominal price of $10.00. The transaction contemplated a staged closing such that certain excluded assets *and liabilities* would be vested out of PureSinse by court order immediately prior to the sale of the shares thereof to the purchaser. The assets to be transferred out did not include Permits and Licenses including any Health Canada Licenses which were to remain.

21 The SPA was subject to obtaining court approval and contained only "bare bones" receivership-type representations and warranties. Section 4.4 of the SPA provides that the sale of the shares to the Purchaser is on an "as is, where is" basis subject only to the representations and warranties contained therein. None of the Receiver's representations or warranties concerns the status of the Health Canada Licenses held by PureSinse.

22 Section 5.6 of the SPA contains the following *covenant* on the part of the Receiver:

> **5.6 Health Canada Cooperation**
>
> Prior to and after Closing, the Receiver shall work cooperatively with the Purchaser and make reasonable best efforts to assist the Purchaser with approval from Health Canada in respect of the change of control of the Company, such that the Health Canada Licence will be valid and in good standing.

23 On January 5, 2021, the Receiver learned that the Cannabis License had in fact expired unrenewed on December 28, 2020. This information was conveyed to the Purchaser the next day. There is no evidence that the Purchaser ever availed itself of the opportunity to examine the Cannabis License during its due diligence nor that it ever made inquiries into the expiry date of it despite having cannabis licensing expertise at its disposal.

24 The Receiver did not have access to the Cannabis Tracking and Licensing System maintained by Health Canada. Access to that system was delegated at all relevant times to the RPIC prior to the appointment of the Receiver and that did not change thereafter. License renewal applications can only be processed by the RPIC using that system.

25 On January 7. 2021, Hainey J. approved both the APA and the SPA. Those approvals were sought and granted based upon the Receiver's Second Report describing the process leading to both agreements, their terms and a specific discussion regarding the Purchaser's request to change the RPIC and the Receiver's position that it had no authority to do so. The approval order included an approval of the Receiver's activities and was on notice to the Purchaser. The endorsement of Hainey J. indicates that the motion was unopposed.

26 Although originally intended to be closed on January 18, 2021, the APA did not close on that date. Following various extensions consented to by the Receiver, both the APA and the SPA were later terminated by the Receiver in accordance with their terms following a default by the Purchaser arising from a failure to procure the financing needed to close the APA on time. A motion to reinstate both agreements was abandoned by the Purchaser after the Receiver agreed to reinstate the APA on terms satisfactory to both. The closing of the APA occurred on May 4, 2021. The SPA remains terminated and no subsequent attempt to reinstate it has been made.

Issues to be Decided

27 The following issues required determination:

a. Has the Receiver breached s. 8.1 of the APA?

b. Has the Receiver breached s. 5.6 of the SPA?

28 The concept of good faith performance of contractual obligations is one that the moving party Purchaser raises throughout and this will be considered in relation to both contractual obligations.

29 If the answer to either question is yes, is the Purchaser entitled to some or all of the claimed $350,000 abatement of the purchase price or damages?

Analysis and Discussion

(a) Has the Receiver breached s. 8.1 of the APA?

30 While Article 8 is given the heading "Post-Closing Covenant" in the APA, it appears that both parties began work on fulfilling this particular covenant immediately following execution of the APA without waiting for court approval or closing. Nothing turns on whether they were required to begin that negotiation effort before or after Closing. They in fact began and completed negotiations prior to court approval or closing.

31 Section 8.1 required both parties "to negotiate in good faith and on a best efforts basis to complete a share purchase transaction". The balance of s. 8.1 simply described in general terms what the transaction to be negotiated should look like. There are thus two distinct obligations created by s. 8.1: first to negotiate the transaction so-described in good faith and second to use best efforts to complete the transaction the were both required to negotiate.

32 The parties in fact negotiated an SPA and thus fulfilled the first part of the obligation imposed by s. 8.1 on December 23, 2020. The SPA agreed to by both parties that day remained subject to court approval which was intended to be sought contemporaneously with approval of the APA.

33 The terms of the SPA were by no means simple "boiler plate". Among other things, the SPA was conditional upon obtaining a relatively unusual "reverse vesting order" by which obligations of PureSinse not assumed by the Purchaser were to be vested away from PureSinse to a newco incorporated for the purpose. Prior to the SPA being finalized, there was no share purchase transaction that anyone could be obliged to use best efforts to complete. The terms of the SPA - being the detailed agreement *actually* reached following the mandated negotiations - supersedes the general description of the "share purchase transaction" in s. 8.1 of the APA that the parties agreed to negotiate. The "best efforts" obligation - such as it was - was confined thereafter to s. 5.6 of the SPA discussed further below.

34 I need not speculate about what would have happened had the parties failed to agree on the terms of the contemplated transaction or whether an "agreement to agree" in such terms is enforceable. The parties did negotiate and they did reach an agreement on the terms of the transaction on December 23, 2020.

35 There is no serious issue taken with the good faith of the Receiver as regards the discharge of its obligation to negotiate the terms of the SPA nor is there anything in the evidence that reasonably calls this into question. While the heading of Article 8 is not determinative, it is at least noteworthy that it appears to contemplate the negotiation phase of the share purchase transaction taking place in whole or in part *after* closing of the APA. There is simply no basis to allege a breach of s. 8.1 of the APA by reason of the time taken to negotiate and finalize the terms of the SPA nor has the moving party made such an allegation.

36 The SPA was entered into on December 23, 2020 which fell on a Wednesday. The Cannabis License expired on Monday, December 28, 2020 - virtually the next business day following the intervening weekend and Christmas holidays. There is no evidence that *anything* could have been done by the Receiver to renew the Cannabis License or otherwise forestall its expiry in accordance with its terms. Not only was the Receiver unaware of the pending expiry date in fact, but the Receiver's appointment by the Court specifically precluded the Receiver from asserting any authority over the Cannabis License in explicit and unambiguous terms. The Receiver had no access to Health Canada's Cannabis Tracking and License System through which renewal applications had to be processed. Indeed, earlier in the receivership proceeding the Receiver had sought to cause a termination of the Cannabis License by stopping the RPIC from withdrawing a prior request to revoke it. That request was opposed by the Department of Justice on the grounds of the Receiver's lack of authority to deal with the license. Renewal of the Cannabis License lay beyond the Receiver's powers even if the looming expiry had been identified as an issue earlier. There is at all events no suggestion that a renewal application could have been completed and processed within a single business day even if the RPIC had decided on his own to do so.

37 It is clear that s. 8.1 of the APA merged into the SPA that the parties actually negotiated and signed. The general description of the "share purchase transaction" in s. 8.1 was superceded by the actual detailed SPA and the extent of the "best efforts" required to close the SPA was also specifically addressed in s. 5.6 thereof. Even if s. 8.1 of the APA had further independent application following the execution of the SPA on December 23, 2020, there can be no reasonable basis to conclude that the Receiver failed to use its best efforts to complete the transaction during the one business day that elapsed between entering into the SPA and the expiry of the Cannabis License.

38 The moving party Purchaser takes the position that the "best efforts to complete" obligation in s. 8.1 of the APA must be applied to the "share purchase transaction" as a whole both before and after the completion of negotiation its terms in the form of the SPA itself. As a result, the Purchaser says that s. 8.1 imposed an immediate and continuous obligation upon the Receiver to expend its "best efforts" to *complete* a transaction while still in the process of negotiating its terms. This interpretation puts the completion cart before the negotiation horse and runs quite contrary to the clear wording of s. 8.1 of the Agreement.

39 While the foregoing analysis disposes of the Purchaser's arguments as regards s. 8.1 of the APA, I shall nevertheless consider the arguments advanced by the Purchaser regarding the alleged failures of the Receiver in the period prior to the execution of the SPA on December 23, 2020. As shall be seen, it makes little difference whether the "best efforts" standard is also applied to the actions or failures of the Receiver during the negotiation phase of the SPA.

40 The affidavit of the moving party Purchaser contains an extensive account of the back and forth that occurred between the Receiver and the Purchaser regarding the matter of replacing the RPIC between December 4, 2020 and December 22, 2020. I do not find it necessary to delve into the details of those exchanges beyond the following summary observations:

a. The Purchaser expressed considerable frustration with the price demanded by the RPIC for its cooperation during his private negotiations with the Purchaser — a price that the Purchaser was unwilling to pay;

b. The Receiver played no part in those negotiations and was only made privy to selected aspects of them by the Purchaser;

c. The Purchaser communicated its fear that the RPIC might unilaterally take steps to cancel the Cannabis License prior to closing: "[the RPIC] has the power to request a revocation of the license and he has threatened to do so but thankfully has not acted on that threat as yet";

d. The Purchaser communicated to the Receiver the advice received from its own cannabis licensing expert that replacing the RPIC with a nominee of the Purchaser would be the best path forward to deal with this prospect;

e. The Purchaser repeatedly asserted that the Receiver was in the "best position" to direct Health Canada to effect a change in the RPIC under the Cannabis License.

f. The Receiver for its part consistently pointed out its own lack of authority over the Cannabis license but also consistently recommended finalizing the SPA so that the Receiver and Purchaser would be in a better position to seek whatever administrative assistance Health Canada might be prepared to extend to facilitate a change of control transaction.

41 Nothing in the correspondence record produced indicates in any way that either party had turned their mind to the question of the possible expiry of the Cannabis License or the need for their renewal. The risk sought to be averted by the requested appointment of a replacement RPIC was to prevent the RPIC making good on an alleged threat to request a revocation of the license and to ensure the necessary cooperation from the RPIC during the change of control phase.

42 Given the failure of the Purchaser to have noticed the looming license expiry date in the course of its own due diligence, there is simply no reason to believe that the appointment of a replacement RPIC of the Purchaser's choosing would have had *any* impact at all upon the course of events. It cannot be assumed that a new RPIC designated by the Purchaser would have been any more diligent than the Purchaser itself had been in that regard. Indeed, the existing RPIC's correspondence makes clear that he would have tried to take steps to try to preserve the license had he known it was at risk because he still hoped to monetize his future cooperation.

43 The idea that the Receiver had a positive obligation to designate a representative of a mere prospective Purchaser while still in the process of negotiating the relevant purchase agreement (and prior to court approval which could not be presumed) and to clothe such designate with the authority to act as the lawful representative of one of the respondents for purposes of dealing with a license over which the Receiver itself had no explicit control is absurd. The Receiver *did* take steps to alert Health Canada of developments and the emerging status of the proposed Purchaser. More than that it could not reasonably do. Anything further would have required stepping beyond the metes and bounds of the court order appointing the Receiver. A responsible court-appointed Receiver does not take aggressive "try it on for size" interpretations of its constating order without seeking directions from the Court. The actions requested of the Receiver went considerably beyond even that quite inappropriate standard.

44 The Purchaser is attempting to create indirectly a positive obligation upon the Receiver to keep the licenses in good standing which a fair reading of both agreements clearly excludes. The Receiver never had authority over the Cannabis License and therefore could not have renewed it.

45 The Receiver did not undertake to keep the Cannabis License in good standing until closing nor did it even represent that it was in good standing at the time of signature.

46 The Purchaser affirmed its reliance upon its own due diligence and had no reason to be believe that the Receiver was better placed to know the status of the Cannabis License or that the Receiver would take any concrete steps in relation to it. The Purchaser had a duty to inform itself of the expiry date of the Cannabis License if expiry was a matter of importance to it.

47 Conversely, the Purchaser had no reason to believe that the Receiver had any authority over the Cannabis License by reason of the clear terms of its appointment order nor did it have any reason to believe that the Receiver had inquired into matters (such as expiry date of a license it did not control) that the Purchaser itself had not bothered to examine. Due diligence was explicitly the responsibility of the Purchaser.

48 There is simply no basis to assert that any best efforts of the Receiver to complete a transaction prior to reaching an agreement as to its terms would have resulted in the survival of the Cannabis License even if either party knew in fact that it was on the verge of expiry. The Receiver had no authority in fact to renew the Cannabis License on its own or to direct the RPIC to do so nor did it have the authority to appoint a replacement RPIC as sought by the Purchaser in any event. It would be pure speculation to assume that any renewal application would have been accepted or that any such renewal would have been accepted as the basis for the transfer of the license of an inactive and in default producer by way of a change of control transaction. There is at least some evidence which the Purchaser has not seriously contradicted that Health Canada would have required a fresh application by the Purchaser at all events.

(b) Has the Receiver breached s. 5.6 of the SPA?

49 Leaving aside the rather significant objection that the Purchaser can assert no rights under s. 5.6 of the SPA by reason of its termination following default by the Purchaser [1] , the argument that the Receiver has breached s. 5.6 of the SPA is necessarily circular.

50 The obligation imposed by section 5.6 of the SPA came into being with its execution on December 23, 2020. On December 23, 2020, the Cannabis License had one business day to run and there is no indication that any amount of heroics on the part of the Receiver might have saved it from its inevitable expiry. What fault the Purchaser lays at the feet of the Receiver (failure to take up its suggestion of appointing a new RPIC) had already occurred before the obligations imposed by s. 5.6 were born.

51 Further, s. 5.6 of the SPA imposes only a narrowly-focused obligation upon the Receiver. Such obligations as the Receiver undertook were directed to the goal of assisting the purchaser to obtain "approval from Health Canada in respect of the *change of control of the Company*, such that the Health Canada Licence will be valid and in good standing" (emphasis added). The loss of the Cannabis License was in no way tied to the change of control of the Company. That change of control never occurred because the SPA was ultimately terminated. There was no warranty in the SPA as regards the good standing or time to expiry

of the Cannabis License. There was no closing condition relating to the status of the Cannabis License and the transaction was explicitly an "as is, where is" transaction.

52 While the Purchaser claims that there was an obligation to ensure that the licenses remain valid and in good standing, no such obligation was undertaken in either of the two contracts the parties signed and both contracts contain an explicit "entire agreement" clause. I can give no effect to such unilateral wishful thinking.

53 The Purchaser repeatedly attempted to persuade the Receiver to undertake the obligation to replace the RPIC with a person designated by the Purchaser prior to execution of the SPA. The Receiver pointedly refused to do so and explained its refusal — the Purchaser did not negotiate a change to the SPA to reflect such an explicit obligation and signed an agreement, complete with an "entire agreement clause" containing no such stipulation.

54 I find that the Receiver has not breached its obligations under s. 5.6 of the SPA. The Purchaser cannot use the language of s. 5.6 of the SPA to supply its own want of due diligence in relation to the Cannabis License particularly when it knew at all material times that the Receiver's appointment order precluded it from asserting authority over it.

(c) Has the Purchaser demonstrated an entitlement to damages or an abatement?

55 Given my conclusions regarding the first two questions, I do not find it necessary to assess damages or a possible abatement in the purchase price. There was an issue at the outset of the hearing regarding a late affidavit filed by the Purchaser in support of the damages claim. That affidavit was delivered following the completion of cross-examinations and leave was neither sought nor granted prior to the hearing to deliver same. I declined to grant leave to file the affidavit at the hearing but agreed to consider what subsequent orders might be needed regarding the assessment of damages should such become necessary. In light of my findings on liability, no further orders were sought or granted.

Disposition

56 As indicated, I dismissed the Purchaser's motion from the bench following the hearing. As regards costs, I found that the Receiver had made a qualifying Offer to Settle prior to the hearing and ordered the moving party to pay the Receiver's costs on a partial indemnity basis to the date of the Offer and a full indemnity basis thereafter. The parties were directed to return to me to settle the amount of costs if they were unable reach an agreement on the amount. No party has come back to me on that issue to date. I assume that the parties have reached agreement on the amount and that no further order is required.

57 If I am wrong in that assumption, I am directing the Receiver to provide its Outline of Costs and written submissions as to the amount claimed (scale having already been settled) within fourteen days from today's date. The Purchaser shall have seven days to respond and shall provide its own Outline of Costs to me at that time.

58 Written submissions from both parties shall be restricted to five pages excluding Costs Outlines and shall be delivered electronically through my assistant. Case citations alone are sufficient.

Motion dismissed.

Footnotes

1 The Purchaser does not purport to have exercised any right to terminate the SPA but rather repeatedly agreed to extensions of the time to close it after January 7, 2021 after it had learned of the loss of the Cannabis License.

TAB 16

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10

months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and

doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate

to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that

if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

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

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is

sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada,

jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand,

he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal

of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

TAB 17

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

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

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. [1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, [2] *BIA* proposals, [3] and *CCAA* proceedings. [4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. [5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid. [6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court. [7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent,

ex parte basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation. [8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not

regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

TAB 18

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: **CV-23-00698576-00CL (CV-23-00698637-00CL, CV-23-00698632-00CL, CV-23-00698395-00CL & CV-23-00699067-00CL)** **DATE: JUNE 5, 2023**

NO. ON LIST: 2

TITLE OF PROCEEDING: **KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION v. STATEVIEW HOMES (MINU TOWNS) INC. et al**

BEFORE JUSTICE: **PENNY**

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DAN ROSENBLUTH (observing)	Counsel for the KSV Restructuring Inc., receiver on CV-23-00698637-00CL, CV-23-00698632-00CL, CV-23-00698395-00CL & CV-23-00699067-00CL	daniel.rosenbluth@paliareroland.com

ENDORSEMENT OF JUSTICE PENNY:

KSV Restructuring Inc. as Receiver brings a motion for an order: a) approving the sale process set out in Section 5.0 of the First Report of the Receiver and authorizing the Receiver to conduct the Sale Process, including entering into specified realtor listing agreements; and, b) approving the First Report and the activities of the Receiver as described.

Five receivership orders have been made regarding a number of Stateview real estate projects: Nao Phase I, Nao Phase II, Minu, High Crown, On the Mark, BEA, Highview, Taurasi Holdings and Elm.

Due to the size and complexity of the Stateview projects, the Receiver engaged in a realtor selection process by which multiple national real estate brokerages were invited to submit proposals to market real properties for sale. The Receiver then considered the realtors' familiarity with the applicable market, their proposed marketing processes, their commission structures, the experience of their teams and feedback from key stakeholders. The Receiver selected: (i) Cushman & Wakefield ULC to sell the NAO Phase II and Elm Projects; (ii) Colliers International to sell the BEA and Highview Projects; (iii) Jones Lang LaSalle Real Estate Services, Inc. to sell the industrial properties owned by Taurasi Holdings and the High Crown Project; and (iv) CBRE Limited to sell the Minu and Nao Phase I Projects.

The Receiver, in conjunction with the mortgagees and the realtors, has developed the Sale Process in a manner that will realize and maximize the value of the projects in a timely fashion for the benefit of all stakeholders. The details of the proposed Sale Process are set out in Section 5.0 of the First Report.

In CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750 at para 6, the court held that the criteria identified in Soundair also informs the determination of

whether to approve a court appointed receiver's proposed sale process. Specifically, the court is to assess:

(a) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver;

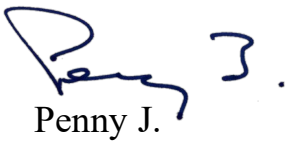
(b) the fairness, transparency and integrity of the proposed process; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

There is no opposition to the form of order being sought. In the current circumstances it is in the interests of all stakeholders to maximize the value of recovery on these assets.

I am satisfied, on the basis of the Receiver's First Report and the submissions of counsel, that the proposed Sale Process is consistent with the criteria established in CCM, in that it will optimize the chance of securing the best possible price for each of the projects and will promote a disposition of the applicable receivership companies' assets that satisfies the Soundair criteria. Accordingly, the Sale Process is approved. I am also satisfied with the Receiver's First Report and the actions undertaken, as reported therein.

Orders to issue in the form signed by me this day.



Penny J.

FIERA FP REAL ESTATE FINANCING FUND, L.P.	- and -	**CHANCERY (OSHAWA) THE BARTLETT LIMITED PARTNERSHIP et al.**
Applicant		Respondents

Court File No. CV-23-00700694-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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