Court File No. CV-19-00622054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FIRST SOURCE FINANCIAL MANAGEMENT INC.
and KINGSETT MORTGAGE CORPORATION

Applicants

and

IDEAL (BC) DEVELOPMENTS INC., IDEAL (BC2) DEVELOPMENTS INC., IDEAL DEVELOPMENTS INC., 2490564 ONTARIO INC., 2490568 ONTARIO INC. and SHAJIRAJ NADARAJALINGAM

Respondents

APPLICATION UNDER SUBSECTION 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

BOOK OF AUTHORITIES OF THE APPLICANTS

July 15, 2019

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TAB 1

2011 ONSC 3851
Ontario Superior Court of Justice

GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.

2011 CarswellOnt 5743, 2011 ONSC 3851, [2011] O.J. No. 2954, 204 A.C.W.S. (3d) 291, 81 C.B.R. (5th) 47

APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43

GE Commercial Distribution Finance Canada and GE Capital Canada Finance Inc. (Applicants)
and Sandy Cove Marine Company Limited and 2038278 Ontario Limited (Respondents)

Morawetz J.

Heard: June 10, 2011
Judgment: June 20, 2011
Docket: CV-11-9219-00CL

Counsel: Christopher J. Staples for Applicants
John Barzo for Respondents
I. Aversa for Bank of Montreal

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Pursuant to loan agreement, inventory financing advanced by lenders to debtors was repayable immediately upon sale of respective inventory or collateral for which advance was made — Remedies on default included right of appointment of receiver — In March 2010, lenders conducted review of debtor banking records and determined that it had deposited money into its bank account received by it on sale of lender financed inventory but which it had not remitted to lenders, also referred to as sales out of trust (SOT) — SOT deficiency consisted of transactions where boats had been sold and fully paid for by retail customers but customer had not taken delivery of boat; debtor reduced SOT deficiency after it was brought to its attention — In April 2011, new SOT deficiency was discovered which dated back as far as September 2010 — As result, lenders made demand under its loan facility and delivered s. 244 Bankruptcy and Insolvency Act (BIA) notices for failure by debtors to remit payments due on sale of inventory — Since date of demand, lenders advised debtors that it had lost faith in management and was unwilling to provide further financing; debtors paid out SOT amounts but there remained significant exposure to lenders — Lenders brought application seeking order appointing receiver of properties, assets and undertakings of debtors pursuant to s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Debtors argument that if third party purchaser entered into contract for purchase of boat and paid in full with delivery deferred until later time, obligation to pay lenders was deferred until delivery was rejected — If end purchaser has paid for boat in full, they would be of understanding that sale was complete — If full payment has been received by debtor from third party purchaser on account of boat, it would follow that there was immediate obligation to remit funds to lenders — Debtors were unable to point to any waiver provisions that would support argument that they were not in default.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — referred to

s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — referred to

Sale of Goods Act, R.S.O. 1990, c. S.1

Generally — referred to

***Morawetz J.*:**

1 On June 10, 2011, I released the following endorsement:

> Receivership order granted. Boat sales to continue in a manner consistent with recent practice. Parties to re-attend June 20, 2011 at 9:30 a.m. for directions regarding receivership generally. Receiver to provide recommendations at that time regarding ongoing operations. Reasons in respect of this decision will be provided on or prior to June 20, 2011.

2 GE Commercial Distribution Finance Canada ("GE Commercial") and GE Capital Canada Finance Inc. ("YMCF") (collectively, "GE") brought an application seeking an order appointing Grant Thornton Limited as receiver of the properties, assets and undertakings (the "Property") of Sandy Cove Marine Company Limited ("Sandy Cove") and 2038278 Ontario Limited ("203") (collectively, the "Debtors"), under s. 243(1) of the *Bankruptcy and Insolvency Act* (the "BIA") and s. 101 of the *Courts of Justice Act*.

3 GE and YMCF are secured floor plan lenders to the Debtors, which are related corporations operating in Innisfil and North Bay, Ontario. GE has made demand under its Loan Facility and delivered s. 244 BIA notices, for failure by Sandy Cove to remit to GE payments due on the sale of inventory. At the time of the application, GE was owed an aggregate of U.S. $4.7 million and CAN $1.2 million. The ten-day notice period referenced in s. 244 of the BIA has long passed.

4 GE is not willing to provide further floor plan financing to the Debtors and seeks to repossess both its floor plan collateral and GSA security through sales from the dealership sites.

5 Pursuant to the Loan Agreements, inventory financing advanced by GE to the Debtors is repayable in the amount of such advance immediately upon the sale of the respective inventory or collateral for which the advance was made.

6 Pursuant to a cross default addendum, Sandy Cove and 203 agreed with GE that any default under the Sandy Cove Loan Agreement or the 203 Loan Agreement would constitute a default under the other Loan Agreement.

7 Remedies on default include the right of appointment of a receiver of the collateral secured under the Loan Agreements and to apply to the court for the appointment of a receiver.

8 In March 2010, GE conducted a review of Sandy Cover banking records and determined that Sandy Cove had deposited into its bank account approximately $460,000 received by it on the sale of GE financed inventory but which it had not remitted to GE, a situation commonly referred to as sales out of trust ("SOT").

9 The SOT deficiency consisted of transactions where boats had been sold and fully paid for by retail customers but the customer had not taken delivery of the boat.

10 Under the Loan Agreements, the failure to remit amounts payable to GE when due and payable is an act of default.

11 GE brought the SOT deficiency to the Debtors' attention and Sandy Cove reduced the SOT deficiency.

12 GE conducted a further review of the banking records of Sandy Cove on April 13, 2011 and, as a result of the review, a new SOT deficiency was discovered, this time in the amount of approximately $354,000. The new SOT deficiency dates back as far as September 2010, which was shortly after the previous SOTs had been repaid.

13 As a result of this most recent default, GE made demand on the Debtors and issued the s. 244 BIA notices.

14 Since the date of demand, GE advised the Debtors that it has lost faith in management. GE is not willing to provide further floor plan financing to either of the Debtors.

15 Sandy Cove has paid out the SOT amounts to GE but there remains significant exposure to GE.

16 GE takes the position that a court-appointed receiver is necessary in order to allow for an orderly realization of the Debtors' inventory, property and assets.

17 The Debtors took the position that there never was a breach of the Loan Agreements and, if there was a breach, it was a technical breach only, which was rectified in good faith by the Debtors upon GE's demand. Further, prior to the initiation of the receivership proceedings, the Debtors were current with their obligations pursuant to the Loan Agreements and remain current. Further, there were no allegations that the secured property was improperly dealt with and that GE has at all times the right to inspect its collateral, and to examine the Debtors' books and records related to the collateral and that GE has regularly exercised these rights over time.

18 Counsel to the Debtors took the position that there was no breach of the Loan Agreements, based on an interpretation of the *Sale of Goods Act*. In general terms, the Debtors took the position that, if a third party purchaser entered into a contract with the Debtors for the purchase of a boat and paid for the boat in full with delivery to be deferred until a later time, the obligation to pay GE was deferred until delivery. In this way, the Debtors argued that they were entitled to keep the sale proceeds in their own account and were not required to immediately pay the purchase price to GE. Rather, the Debtors were able to use the funds for other operations.

19 I do not accept the Debtors' position. If an end purchaser has paid for a boat in full, he or she would certainly be of the understanding that the sale was complete. Likewise, if full payment has been received by Sandy Cove from a third party purchaser, on account of a boat, it would certainly follow that there was an immediate obligation to remit the funds to GE. By failing to make such payment, Sandy Cove defaulted on its obligation.

20 The Debtors were unable to point to any waiver provisions or curative provisions that would support the argument that the Loan Agreements were not in default.

21 The court has the power to appoint a receiver where it is "just or convenient" to do so. In making its determination, the court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties in relation thereto. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]). In that decision, Blair J. (as he then was) dealt with a 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 at para. 10 of the decision, which included the following:

> ...the fact that the moving party has a right under 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... 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.

22 In this case, GE is a secured creditor. It has a right to enforce its security. The conduct of the debtor with its repeated practice of SOTs, is such that it is quite understandable that GE has lost confidence in the Debtors. It is also understandable that GE would want the benefit of a court-appointed receiver, if for no other reason than to obtain timely directions and approvals in the realization process. Such direction may also be helpful insofar as there is a second

secured party, Bank of Montreal ("BMO"). BMO took no position on the receivership application, but it does have a continuing interest in this matter.

23 The conduct of the Debtors directly led to the default and the receivership application. In my view, the Debtors are in no position to argue against the choice of remedy selected by GE. In my view, having reviewed the record, I am satisfied that it is both just and convenient to appoint a receiver.

24 The application is granted and Grant Thornton Limited is appointed Receiver.

25 There are outstanding issues to consider. Accordingly, pending a re-attendance on June 20, 2011 for further directions, boat sales are to continue in a manner consistent with recent practice. The Receiver is to provide recommendations on June 20, 2011 regarding ongoing operations in the receivership.

Application granted.

TAB 2

1992 CarswellOnt 4933
Ontario Court of Justice (General Division)

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.

1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283, 3 W.D.C.P. (2d) 191

Farallon Investments Limited, Plaintiff and Bruce Pallett Fruit Farms Limited, Defendant

Davidson J.

Judgment: February 17, 1992
Docket: 91-CQ-9985

Counsel: None given

Headnote
Mortgages
Civil practice and procedure

***Davidson J.*, (Orally):**

1 This motion is for the appointment of a receiver and manager.

2 The parties in the charge entered into between them specifically contracted for the right of the plaintiff, the chargee, to appoint a receiver/manager when there was default under the charge. Default occurred as at September 1, 1991 when the mortgages fell due and no monies were paid. The plaintiff appointed a receiver/manager September 23, 1991, the said receiver/manager twice attending to take possession of the property in question but possession and entry was refused by the chargor, the defendant.

3 Default under the mortgages being twelve in number continues to date on $5,000,000 in principal, and interest is accumulating at the rate of $85,000 per month and which has continued since the 1st of September, 1991. The default is not denied nor is the quantum. Indeed it is admitted. The charge in question further provided for the consent of the chargor to a court order for appointment of a receiver if the chargee in its discretion chooses to obtain such order.

4 In my view in the motion before me the chargees are simply seeking enforcement of one of the agreed terms in the charge. Can it be said in these circumstances that the moving party is seeking an extraordinary equitable order? Specifically, I think not. Rather, it seeks I believe, to enforce one of the contractual terms in the charge. It is apparent as well on the material that the various charges were entered into and signed by representatives of the defendant in all cases with independent legal counsel acting on behalf of the defendant.

5 There is no suggestion on the material that there was any misunderstanding on the part of the defendant's representatives in signing this documentation. As such it appears to me that there should be some onus, at least modest, to show why, the appointment of the receiver ought not to be made. The chargor objects primarily on the basis that the appointment would be of no advantage to the chargee, that there is a potential prejudice to the chargor who is seeking to refinance the property and that if postponed at least until about the 1st of May it would be just and convenient as no monies would be coming in until approximately that time, the subject property being a golf course and orchard in which any cash flow would not be generated during the present months. In addition, the chargor submits that the property being worth approximately $10,000,000 as at the last appraisal in July of 1991, the chargee's security is not in jeopardy let alone in serious jeopardy.

6 I have reference to the decision in the *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 which was referred in one of the decisions put to me by the defendant's counsel in submissions, namely *Ryder Truck Rental Canada Ltd. et al. v. Thorne Ernest et al.* (1987), 16 C.P.C. (2d) 130. In my view the *Bank of Montreal* decision is of some assistance. In that case Justice Anderson considered the meaning of just and convenient in s.19 of the *Judicature Act* (presently s.114 of the *Courts of Justice Act*) and he expressed the view that one should have in the mind the existence of a debenture conferring by contract certain rights on a debenture holder, in that case the right to appoint a receiver. Although security was not commented on at length in that case it does not appear to have been in serious jeopardy yet the receiver was appointed.

7 In the case before me there is no evidence of mismanagement by the chargor in the conduct of the business, nor any suggested intent to impair the security and indeed the property appears to be not a wasting asset. Although attempts at refinancing have been made, particulars in the material are sparse in the extreme and there is no date whatsoever where one can infer that one can reasonably anticipate that there might or will be a refinancing. On the other hand, the chargee seeks only what he was entitled to by contract. I am not persuaded on the material that there is prejudice to the chargor if the appointment is made or at least not prejudice in the sense of an impairment of the rights that he might have and wishes to exercise to refinance.

8 It seems to me that the fact of nonpayment of the mortgage of over $5,000,000 when due in September, 1991, the interest that is accumulating, outstanding debts in respect to the property amounting to well over $300,000 to some of the trades and overdue loans and bearing in mind the absence of any funds apparently available to the defendant to conduct the business, that all of this would be self evident to any proposed lender in any refinancing negotiations and I do not feel that the appointment of a receiver/manager would be prejudicial in that context. Additionally it seems to me that at least the chargee would benefit by an orderly management of the business pending any refinancing that might be negotiated and at the same time safeguarding the security and its ongoing liability and the conduct of the business of the business carried on on the property.

9 In the result the order will go appointing Mintz and Partners Inc. receiver and manager of the subject property. Having said that its seems to me that there should be some containment upon the rights to be exercised by the receiver/manager and I invite counsel to make whatever submissions you think are appropriate or alternatively if you agree on what the terms ought to be that would of course be of great assistance as well. I leave that aspect open at the present time and as well submissions in regard to costs.

10 Submissions were made.

11 Endorsement on the Record:

> For oral reasons dictated this day order appointing Mintz and Partners as Receiver Manager of defendant in respect to the subject lands with right of defendant officers to full and unfettered access to the Books and Records of defendant at all reasonable times.
>
> Terms of appointment to be agreed upon by the parties, in the alternative to be subject of submissions at a date to be arranged.
>
> Costs of the motion to plaintiff on solicitor and client basis fixed at $2,000 inclusive of disbursements + G.S.T. but not including cost of transcript of cross-examination of defendant representative which shall also be paid by defendant.

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

Headnote
Bankruptcy and insolvency
Civil practice and procedure
Debtors and creditors
Table of Authorities
Cases considered by *Morawetz J.*:
Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to
Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — referred to
Canadian Tire Corp. v. Healy (2011), 2011 ONSC 4616, 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]) — referred to
Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — referred to

***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

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 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

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors --- Receivers — Jurisdiction of court to appoint

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — considered

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

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

s. 243(1) — pursuant to

s. 244(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — pursuant to

***Morawetz J.*:**

1 Business Development Bank of Canada ("BDC") brings this application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

2 Counsel to the Respondent submits that a receiver can be appointed by an interlocutory order where it appears to the court to be just or convenient to do so. Counsel referenced *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (Ont. H.C.) for this proposition. Counsel questioned as to whether it was proper to proceed by way of application as this would result in the granting of a final order, which, he submits, is inconsistent with the view expressed by Callaghan J. (as he then was) in *National Trustco*.

3 Counsel to BDC responded by referencing *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267 (Ont. C.A. [In Chambers]), a decision of MacPherson J.A. (In Chambers). In this case, the Ministry commenced its application, including the relief to appoint a receiver and manager pursuant to s. 101 of the *CJA*. The order appointing the receiver was granted and the moving party on appeal, Shehrazad, sought a stay pending appeal. The request for the stay was opposed by the Ministry on two bases: (1) the Court of Appeal had no jurisdiction to hear the motion because the order being appealed was an interlocutory order and, therefore, the appeal would have to be taken to Divisional Court; and (2) on the merits, the moving party could not meet the test for obtaining a stay.

4 With respect to the jurisdictional point, MacPherson J.A. disagreed with the position put forth by the Ministry noting that the Ministry did not bring a motion to appoint a receiver; rather, it made an application.

5 Justice MacPherson stated the following:

> 16. It follows that the decision of this court in *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.), governs the question of which court has jurisdiction to hear the appeal in these proceedings. In *Illidge*, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.
>
> 17. The court rejected this argument. Armstrong J.A. stated at paragraph 4:
>
> > At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675, ... and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.
>
> In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for stay should be considered on the merits.

6 The above passage is, in my view, a complete answer to the position put forth by counsel to the Respondent. The Court of Appeal did not take issue with the fact that the proceeding to appoint the receiver was brought by way of application which resulted in a final order.

7 In any event, the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver.

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

> (a) the credit agreement is in default;
>
> (b) the indebtedness is not in dispute;
>
> (c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and
>
> (d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

23 The application is granted and the Fuller Landau Group Inc. is appointed Receiver.

Application granted.

TAB 5

2011 ONSC 3459
Ontario Superior Court of Justice

GE Canada Equipment Financing G.P. v. Barber Group Rentals Inc.

2011 CarswellOnt 5878, 2011 ONSC 3459, 204 A.C.W.S. (3d) 712, 81 C.B.R. (5th) 62, 81 C.B.R. (5th) 66

APPLICATION UNDER SUBSECTION 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

GE Canada Equipment Financing G.P. and General Electric Canada Real Estate Finance Inc. (Applicants) and Barber Group Rentals Inc. and Evergreen Developments (North) Ltd. (Respondents)

Morawetz J.

Heard: March 28, 2011
Oral reasons: March 28, 2011
Docket: CV-11-9129-00CL

Counsel: Linc Rogers, Chris Burr for Applicants
Irwin Duncan for Respondents
George Benchetrit for Grant Thornton

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Debtor was in default of debts — Hearing was held regarding remedy — Receiver appointed — Appointment of receiver would allow for independent control of sale process, allow for addressing competing offers and time frames, avoid precipitous actions by creditors, and provide for potential granting of vesting order — Appointment of receiver was just and convenient as contemplated under both s. 243 of Bankruptcy and Insolvency Act and s. 101 of Courts of Justice Act — Creditor GE had right to apply to court for appointment of receiver, which was to be taken into account but was not dispositive — Cost concerns not relevant considering amount of debt — Appointment of receiver was not sought for improper purposes, namely to protect creditor GE in event of shortfall from sale of assets — Possible conflict of interest in appointing particular receiver could be reviewed at later date.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Nova Scotia v. D.G. Jewelry Inc. (2002), 2002 CarswellOnt 3443, 38 C.B.R. (4th) 7 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — referred to

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

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

***Morawetz J.*:**

1 The Debtors are in default of their obligations to GE. Attempts to resolve the defaults consensually have been unsuccessful. The Debtors admit default and the Debtors concede that GE is entitled to a remedy as a result of such defaults.

2 The possible remedies for GE are:

(a) Power of Sale

(b) Judicial Sale

(c) Private Receivership

(d) Court Appointed Receivership

3 The Debtors are no longer in a position to control the process. The Debtors can only be in a position to effect a sale if the proceeds would be sufficient to pay out GE in full and the opportunity to present such a proposal would not necessarily be foreclosed as a result of the appointment of a court-appointed receiver.

4 The Applicants have outlined a number of reasons why a receiver should be appointed by the court:

(a) Judicial process will ensure that an independent court officer will control the sale process;

(b) Court-appointed receiver can address issues arising from competing offers;

(c) It will avoid precipitous actions by creditors;

(d) Provides for the potential granting of a vesting order;

(e) Cost concerns are not material in the context of an approximately $12 million indebtedness;

(f) Court-appointed receiver can address competing timeframes;

(g) Court-appointed receiver can address issues relating to interest, taxes and borrowings;

(h) In exercising its business judgment, a court-appointed receiver can balance competing interests.

5 In addition, on the facts of this case, GE has the contractual right to apply to court for the appointment of a receiver. This factor, on its own, is not dispositive of the matter, but it is a factor to be taken into account.

6 The authorities cited by the Applicant in its factum in my view support the arguments put forth by the Applicant, in particular:

United Savings Credit Union v. F&R Brokers Inc. (2003), 15 B.C.L.R. (4th) 347

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97

Bank of Nova Scotia v. D.G. Jewelry Inc., (2002) 38 C.B.R. (4th) 7

7 Further, I see no basis for the argument put forth by the Debtors that the court-appointment is being sought for improper purposes, namely to protect GE from liability in the event there is a shortfall from the sale of the Respondents' assets. It seems to me that issues of this nature can be addressed at the time that sale approval is sought.

8 With respect to the argument of conflict arising from the potential appointment of GTL as Receiver where GTL is Receiver of the operating entities, it seems to me that this issue can be reviewed in the weeks ahead. To a large extent, it is an issue that concerns the secured creditors of the operating entities and the secured creditors of these Debtors in this application. If it remains an issue, it can be identified by counsel to the Receiver of either the operating companies or these Debtors and appropriate directions obtained.

9 For the reasons set forth above and as summarized in the Applicant's factum, I have concluded that the tests for the appointment of a receiver — namely the just or convenient test under both s. 243 of the BIA and s. 101 of the CJA has been met — under both heads.

10 The Application is granted.

11 Grant Thornton Limited is appointed as receiver and manager of the Debtors.

12 An order shall issue to give effect to the foregoing.

Order accordingly.

KINGSETT MORTGAGE CORPORATION et al.
Applicants

-and-

IDEAL (BC) DEVELOPMENTS INC. et al.
Respondents

Court File No. CV-19-00622054-00CL

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