Commercial List File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

DBDC SPADINA LTD.

AND THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON,

THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO,
TO BE BOUND BY THE RESULT

BOOK OF AUTHORITIES
OF COMPUTERSHARE TRUST COMPANY OF CANADA, AS CUSTODIAN, NOMINEE AND AGENT FOR AND ON BEHALF OF INVESTORS IN A CANADIAN COMMERCIAL MORTGAGE SECURITIZATION KNOWN AS INSTITUTIONAL MORTGAGE SECURITIES CANADA, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2012-2

(Motion returnable December 18, 2013)

Date: December 18, 2013

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TAB 1

1970 CarswellOnt 776, [1971] 1 O.R. 467, 15 D.L.R. (3d) 649

1970 CarswellOnt 776, [1971] 1 O.R. 467, 15 D.L.R. (3d) 649

Arnold v. Bronstein

Arnold v. Bronstein et al.

Ontario Supreme Court [High Court of Justice]

Lacourciere, J.

Judgment: November 24, 1970
Docket: None given.

Counsel: A. Wellenreiter, for plaintiff

M.A. Catzman, for defendants

Subject: Property; Civil Practice and Procedure

***Lacourciere, J.*:**

1 The plaintiff, a mortgagor in possession of property known as the Norfolk Hotel, in the Town of Simcoe, brings this application for an interim injunction to restrain the defendant Bronstein, a first mortgagee, from selling under a power of sale contained in his mortgage.

2 In very brief summary, the principal amount owing under the mortgage became due on July 10, 1969; more than six months before the said date, the first mortgagee advised the plaintiff, by letter, that the mortgage would not be renewed, although a short term renewal might be considered if the principal was reduced by $50,000 and the taxes paid in full. The principal was not so reduced, although monthly payments were accepted by the mortgagee providing very slight reduction on a large mortgage. Following the notice, the mortgagor made three abortive attempts to refinance. He was unable to arrange funds on a solid commitment basis. The efforts are fully set out in the applicant's extensive affidavit. He blames the general economic conditions for his inability to refinance. He refers to the deteriorating state of his health and argues that a postponement of the sale by injunction will not prejudice the mortgagee, whose security is said to be ample.

3 It is clear that different considerations apply where the sale is made by a mortgagee under a power of sale in contrast to a sale after final order of foreclosure. As pointed out by Riddell, J., in *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46 at pp. 56-7:

> The difference is manifest — on a sale after final order for foreclosure the mortgagee has a chance of making a gain — he has not to account to the mortgagor; and, if he does not make enough to pay the amount of the debt, he cannot sue for the balance. Where the property is sold under power of sale, the mortgagee cannot make a gain; he must account for the surplus over his debt, but he can sue if there be a deficiency: *Burnham v. Galt* (1869), 16 Gr. 417, at p. 419; *Pegg v. Hobson* (1887), 14 O.R. 272; *Rudge v. Richens*, L.R. 8 C.P. 358.
>
> Again, there is a marked difference in the power of the Court to interfere where it is a question of rights arising under its own decree, and where it is a question of rights arising from a contract. Where a person, to support his claim to land, must rely upon a judgment of the Court, the Court may well have the power to vary such judgment and the rights arising under it — but whence comes the power of the Courts to interfere with rights arising under contract and independently of any Court proceeding?

4 It appears that Courts have refused to interfere with the proper exercise of a power of sale in all but the most extreme and exceptional cases. In fact, the learned author of *Kerr on Injunctions*, 5th ed., p. 538, in a chapter dealing with injunctions between mortgagor and mortgagee, goes so far as to assert that:

> The Court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keep within the terms of the power and no case of fraud be made out.

The proposition is well supported by cases referred to in footnote (e). The general rule developed from numerous cases is that a mortgagee, acting in good faith and without fraud, will not be restrained from a proper exercise of his power of sale, except upon tender by the mortgagor of the principal moneys due, interest and costs. This is of course subject to the statutory relief provided by s. 20 [rep. & sub. 1970, c. 54, s. 1] of the *Mortgages Act*, R.S.O. 1960, c. 245, which is not here invoked. The institution of a redemption action *per se* does not affect the mortgagee's power of sale: *Kerr on Injunctions, supra*, p. 540; Halsbury's Laws of England, 3rd ed., vol. 27, para. 566, p. 301.

5 The rule is stated thus in *Macleod v. Jones* (1883), 24 Ch.D. 289 at pp. 299-300, *per* Cotton, L.J.:

> This is an application to restrain a mortgagee from exercising his power of sale. Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge or the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And that is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe.

See *Yandt v. Sparling* (1927), 32 O.W.N. 318.

6 I am far from satisfied, on the material before me, that the applicant has shown extreme or exceptional circumstances which would justify a departure from the prevailing practice; nor has it been established that the plaintiff would probably be entitled to redeem, following the granting of an interlocutory injunction.

7 On the contrary, the plaintiff was given every consideration, and every reasonable opportunity, to make arrangements. In the light of the plaintiff's poor record of payment, allowing taxes on the property to accumulate

in an amount in excess of $22,000 for the years 1969 and 1970, previous abortive attempts to refinance, the mortgagee was not unreasonable in advising the plaintiff that his instructions to proceed with the sale of the property were peremptory.

8 The date fixed for sale is November 27th next, 11 days following the return of this motion. In preparation for the sale, the mortgagee obtained appraisals, inserted advertisements in three publications, posted the formal advertisements in prominent places in the County of Norfolk, sent copies thereof to 34 different law firms in surrounding municipalities, and as a result of these efforts received some 30 inquiries from interested parties who plan to attend the sale and to enter bids. Postponement of the sale at this time on the plaintiff's vague and indefinite hope of finding new financial backing would, in my opinion, constitute an unwarranted interference with the mortgagee's contractual rights.

9 Speaking of a judicial sale, Blake, V.C., had this to say in *Hoskins v. Johnston* (1875), 6 P.R. (Ont.) 257 at p. 259:

> Only in an extreme case should a sale be postponed. Where an application is made, some time before the day appointed for the auction, so that a postponement can be had before bidders have arranged to attend and to become purchasers, then it may not, at times, be unreasonable to allow an adjournment, as no injury need thereby be done; but where the application is made but a few days before the time appointed for the sale, then it is out of the question to grant a postponement unless there be some fraud or evil practice, or some omission which will plainly cause damage to parties interested. Here by a postponement the proposed sale would be damped, and general discredit will be cast upon all the sales of the Court. The sale in question is to take place tomorrow; already those who intend to purchase have made their arrangements for so doing. No postponement can now take place, except in the auction room. The annoyance caused by dispersing in this manner the intending purchasers will put persons out of the whim or intention of purchasing, and deter them from attending any future sale of the kind.

These words are equally applicable to a private sale where a postponement could deter potential purchasers.

10 Upon payment into Court of the principal amount, accumulated interest and costs, the proposed sale will be restrained. Otherwise, this application will be dismissed with costs to be paid by the applicant to the respondent David Bronstein in any event of the cause.

11 *Order accordingly.*

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TAB 2

Indexed as:

Maier v. Keevil

Between
Joachim Maier, in trust Canstett Limited and The Laurentian Bank of Canada, plaintiffs, and
Leslea Gail Keevil, Lorna Jean Hiscock, Bradford Keevil and 1070314 Ontario Ltd., defendants

[1996] O.J. No. 433

Court File No. 95-CU-93790-CM

Ontario Court of Justice (General Division)

Ground J.

Heard: January 17 and February 2, 1996.
Judgment: February 6, 1996.

(4 pp.)

Injunctions -- Interlocutory or interim injunctions -- Requirement of strong prima facie case -- Serious question to be tried.

Application by the defendants for an interlocutory injunction restraining the plaintiffs from listing or selling any of the real properties which were the subject of this litigation and which were owned by the defendants other than Keevil.

HELD: Application dismissed. There was no evidence to establish a prima facie case or even a serious issue with respect to bad faith or fraud on the part of the mortgagee. Therefore, the mortgagee was not to be restrained from exercising a power of sale.

Counsel:

Ian Morris, for the plaintiffs.
David J. Taylor, for the defendants, L.G. Keevil, L.J. Hiscock and 1070314 Ontario Ltd.

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1 GROUND J.:-- This is a motion brought by the defendants, other than Bradford Keevil, for an interlocutory injunction until trial of this action restraining the plaintiffs from listing or selling any of the real properties which are the subject matter of this litigation and which are owned by the defendants, other than Bradford Keevil.

2 Having considered the affidavits and other materials filed in this motion and the submissions of

counsel, I am of the view that the injunction should not be granted.

3 I accept the submission of counsel for the plaintiffs that law in Ontario is as set out in Arnold v. Bronstein (1971), 1 O.R. 467 that, absent evidence of bad faith or fraud on the part of the mortgagee, a mortgagee is not to be restrained from exercising a power of sale. Although bad faith is pleaded, there is no evidence before the Court as to bad faith or fraud on the part of the mortgagee and nothing to establish a strong prima facie case or even a serious issue to be tried on the matter of bad faith or fraud.

4 There is a dispute between the parties as to the authorization for the $71,250 commitment fee, or lender's fee, withheld from the proceeds of the mortgages. On the basis of the evidence before me, I am satisfied that the defendant Leslea Gail Keevil was fully aware that a commitment fee of 12.5% was payable with respect to the mortgages negotiated and it would appear that the change in the amount of the commitment fee simply reflects the reduction in the principal amount of the mortgages ultimately given. I have some concern that there appears to be no commitment letter signed by either the defendant Lorna Jean Hiscock or the defendant 1070314 Ontario Ltd. providing for a commitment fee; however, mortgages on their properties have been signed by both such defendants and the mortgages in respect of which power of sale proceedings have been commenced are, as I understand the transaction, for a total amount of $265,000. It is clear that, whatever the eventual outcome at trial of the dispute as to the commitment fee may be, the amount of $265,000 was clearly advanced by the mortgagees and secured by mortgages executed by the defendants now before this court.

5 Motion dismissed.

6 Counsel may make written submissions to me, prior to March 31, 1996, as to the disposition of costs of this motion.

GROUND J.

qp/d/ala/DRS/DRS

TAB 3

1993 CarswellOnt 1060, 14 O.R. (3d) 619

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1993 CarswellOnt 1060, 14 O.R. (3d) 619

Toronto Dominion Bank v. E. Goldberger Holdings Ltd.

Toronto-Dominion Bank, Plaintiff v. E. Goldberger Holdings Limited and 774747 Ontario Limited, Defendants

Ontario General Division

Ground J.

Judgment: August 4, 1993
Docket: Doc. B273/92

Counsel: *John Campion*, for the Plaintiff.

Leo Klug, for the Defendants.

Subject: Corporate and Commercial

Mortgages --- Sale — Contractual power of sale — Grounds for setting aside sale

Cause of action estoppel — Issue estoppel — Nemo debet bis vexari.

Plaintiff bank, the first mortgagee of certain lands and premises over which a receiver had been appointed, motioned for an order permitting it to proceed to sell the property pursuant to its rights under the various security instruments granted to it by defendants. The order appointing the receiver did not authorize the receiver to sell the mortgaged property. Defendants, in opposition, relied on the doctrines of cause of action estoppel, issue estoppel and nemo debet bis vexari. Held, the motion was allowed. The various doctrines relied upon by defendant were inapplicable, as there had not been a final judgment and the earlier motion failed to deal with the bank exercising its contractual power of sale. The current law of Ontario allowed plaintiff to exercise its power of sale, given the absence of bad faith or fraud on its part.

***Ground J.*:**

1 This is a motion, brought by the Toronto-Dominion Bank (the "Bank"), the mortgagee of certain lands and premises in Scarborough, Ontario (the "Milner Avenue Property") of which Price Waterhouse Limited (the "Receiver") has been appointed Receiver pursuant to an order of Madam Justice Haley dated June 19, 1992. This motion is brought by the Bank for an order permitting it to proceed to sell the Milner Avenue Property pursuant

to its rights under the various security instruments granted to the Bank by the defendants.

Facts

2 The Bank holds the first mortgage on the Milner Avenue Property, the legal title to which is registered in the name of the defendant 774747 Ontario Limited ("774747") and the beneficial owner of which is the defendant, E. Goldberger Holdings Limited ("Holdings").

3 Pursuant to a commitment letter dated February 28, 1989 (the "Commitment Letter"), the Bank agreed to advance funds (the "Loan") to Holdings, the initial advance to be in the principal sum of $24,000.000. Under the terms of the Commitment Letter, the Loan, on the occurrence of certain conditions, could be increased to $33,300,000. The purpose of the Loan was to fund the construction by Holdings of an office tower (the "Milner Building") on the Milner Avenue Property.

4 As of June 4, 1992, the Bank's records indicated that Holdings was indebted to the Bank in the aggregate amount of $32,374,196.97, inclusive of accrued but unpaid interest calculated to June 4, 1992 in the amount of $3,195,751.33.

5 The Loan is evidenced by a promissory note in the principal amount of $33,375,000 dated February 1, 1990 (the "Note") which was delivered by Holdings to the Bank. The Note is expressed to be payable upon demand.

6 Pursuant to the Commitment Letter, 774747 and Holdings granted to the Bank a first mortgage dated April 7, 1989 in the principal amount of $33,300,000 (the "Mortgage"); a General Security Agreement dated June 7, 1989 against all of the collateral of Holdings (the "GSA"); and a General Assignment of Book Debts dated June 7, 1989 granting an assignment to the Bank of all book debts of Holdings (the "Assignment").

7 In October 1991, Holdings executed a lease (the "Tele-Direct Lease") with Tele-Direct (Publications) Inc. ("Tele-Direct") for approximately 166,901 square feet in the Milner Building. Under the terms of the Tele-Direct Lease, Tele-Direct was allowed a three month period in which it was not required to pay basic rent and in addition Holdings agreed to pay Tele-Direct $30.00 per square foot, totalling approximately $5,000,000 in respect of tenant improvements. As a further inducement to Tele-Direct to enter into the Tele-Direct Lease, Holdings agreed to assume the obligations of Tele-Direct pursuant to its former lease with Canada Life Assurance Company at 55 Towne Centre (the "Towne Centre Lease"). A set-off provision in the Tele-Direct Lease gives Tele-Direct the right to set off against rental payments owed pursuant to the Tele-Direct Lease any amount which Tele-Direct might be obligated to pay to Canada Life if the rental obligations in connection with the Towne Centre Lease are not paid by Holdings.

8 Holdings has not paid any accrued interest on the Loan since January, 1991. During 1991 and the first few months of 1992 a number of meetings were held in an effort to achieve a work out arrangement with respect to the repayment of the Loan. Such discussions were not fruitful and on May 13, 1992 the Bank made demands for payment upon Holdings and upon 774747, Magnolia Builders (1988) Limited, a related company, and Ernest Goldberger for repayment of their respective indebtedness to the Bank on or before June 12, 1992. Payment was not made and the Bank moved for the appointment of a receiver and manager of all the property, assets and undertakings of Holdings and 774747. The order of Madam Justice Haley made June 19, 1992 appointed the Receiver as interim receiver and manager of the Milner Avenue Property but did not grant to the Receiver the power to sell the Milner Avenue Property.

9 The Mortgage and the GSA both grant to the Bank the usual powers of sale upon default. Both the Mortgage and the GSA provide that, upon default, the Bank may appoint a receiver and manager of the undertaking, property and assets of Holdings and GSA gives such receiver and manager the specific power to sell the collater- al.

10 A motion was brought before me on February 19, 1993 for an order amending the order of Madam Justice Haley to permit the sale of the Milner Avenue Property by the Receiver. Such order was not granted for the reasons set out in my Reasons dated April 7, 1993.

Issues

11 Three principal issues arise on this motion:

12 1. Whether the motion should be stayed, on the basis of the doctrines of cause of action estoppel, issue estoppel or nemo debet bis vexara in view of my earlier order denying the Receiver the power to sell the Milner Avenue Property.

13 2. Whether the Bank can, in effect, be enjoined from enforcing its power of sale contained in the security documents including the Mortgage.

14 3. Whether the defendants may rely on the doctrine of equitable set-off to prevent the Bank from exercising its power of sale.

Submissions

15 With respect to whether the motion ought to be stayed, counsel for the plaintiff, on the procedural question, submits that I am not functus because the Order on the hearing of February 19, 1993 has not yet been entered and accordingly today's hearing may be regarded as a continuation of the original motion. In any event, he submits that none of the doctrines of cause of action estoppel, issue estoppel or nemo debet is applicable. He submits that, whereas cause of action estoppel may be applicable to motions, it does not apply to an interlocutory order where all issues are not decided. With respect to issue estoppel, he submits that the only issue dealt with on the earlier hearing was whether the Receiver should be granted the power to sell the property and that the issue of leave to the Bank to proceed with its power of sale has not been dealt with and, to decide that issue, the tests to be applied and the relevant factors are substantially different. It appears to be his position that there is no distinction between the doctrine of cause of action estoppel and the nemo debet doctrine and that such doctrines are not applicable in a situation where an interlocutory motion is brought in a continuing action and only one issue has been dealt with on an earlier motion.

16 Counsel for the defendants submits that the nemo debet doctrine is different from cause of action estoppel and that the nemo debet doctrine clearly applies where a conscious election has been made by a party to proceed in one way. Such party, if not successful, cannot then turn around and commence a further proceeding to accomplish the same purpose; the party cannot split the cause of action. In the case before the court, counsel for the defendants submits that the Bank made a clear election to proceed by way of receivership rather than by way of power of sale and, having brought an unsuccessful application to the court to grant the Receiver the power to sell the property, ought not to be entitled to commence another proceeding to permit the sale of the property by the Bank under its power of sale. He submits that the whole purpose of the receivership was to preserve the Milner Avenue Property and that the property is not deteriorating but in fact the cash flow position is improving and

will improve further by the end of this year. Accordingly, the court should preserve the status quo and leave the Receiver in place to manage the Property.

17 With respect to whether the Bank should be enjoined from proceeding with its power of sale, counsel for the Bank submits that the general rule is the rule set out in *Arnold v. Bronstein et al.* (1971), 1 O.R. 467 that a mortgagee will not be restrained from exercising a right of power of sale unless the mortgagee is acting in bad faith or there is evidence of fraud, neither of which applies in our case. Counsel for the Bank submits that the defendants, in seeking to enjoin the Bank from enforcing its security, are essentially seeking an injunction and that, in order to obtain such an injunction, the defendants would have to establish a strong *prima facie* case, would have to establish that the balance of convenience favours the granting of an injunction and would have to establish that the Milner Avenue Property is an unique property and that a remedy in damages would not be adequate. Counsel for the Bank submits that, in the case at the bar, the defendants have not established any case let alone a strong *prima facie* case of bad faith or fraud, the balance of convenience favours the Bank in that the Bank's security is eroding and, the property being an income producing property, it cannot be characterized as unique and damages would be an adequate remedy. In addition, counsel submits that the defendants cannot establish that they are financially able to provide an enforceable undertaking for damages should the injunction be granted. It is the position of counsel for the Bank that the pleadings in the litigation between these parties may establish a claim for damages on the part of the defendants but do not disclose facts which would entitle the defendants to have the Bank's security set aside.

18 It is the position of counsel for the defendants that the pleadings in the litigation between the parties do contain allegations of bad faith and that accordingly the motion for leave to proceed with power of sale should be adjourned until the trial of the actions. Counsel further submits that the value of the Bank's security is not deteriorating but, on the contrary, the cash flow position is improving. Counsel for the defendants relies on submissions made on the earlier motion that the Milner Avenue Property is somewhat unique and that the value of the Property is sufficient to protect any claim which the Bank may have upon determination of all the issues between the parties raised in the litigation.

19 With respect to the application of equitable set-off, it is the position of counsel for the Bank that, in power of sale cases, the courts have clearly established that the equitable right of set-off of an unproven claim cannot exist between a mortgagor and mortgagee unless the right to set-off is specifically provided for in the mortgage which it is not in our case. Further, the amounts due under the mortgage and other security documents are evidenced by a promissory note and a claim for equitable set-off cannot apply to claims based on promissory notes or other bills of exchange. Counsel for the plaintiff further submits that the defendants have failed to establish any equitable ground for relief, their claims in the litigation are at best doubtful given that they are alleging an oral variation of a mortgage contrary to the Statute of Frauds and that their claims are based on a series of unsubstantiated allegations which the Bank has strenuously denied.

20 Counsel for the defendants submits that the doctrine of equitable set-off has been applied against security held by a bank where in the opinion of the court the application of such doctrine was necessary to avoid unconscienability or injustice and the court has in such circumstances departed from the rule in *Arnold v. Bronstein*, supra. Counsel for the defendants further maintains that the lack of a provision in the security documents providing for set-off is not fatal in that the claims brought by the defendants in the litigation directly bring into question the validity of the security and that accordingly, unless the defendants have contracted out of an equitable right, that equitable right still prevails and the doctrine of set-off must be taken into account.

Reasons

21 With respect to the question of whether any of the doctrines of issue estoppel, cause of action estoppel or nemo debet bis vexara ought to be applied so as to deny the orders sought by the Bank in the within motion, I concur with the submissions of counsel for the Bank that the doctrine of issue estoppel is not applicable. The only matter dealt with on the earlier motion was whether the Receiver ought to be granted the additional power to sell the Milner Avenue Property. The question of the Bank exercising the powers of sale granted to it by the various security documents was not an issue addressed on the earlier motion.

22 With respect to the distinction between cause of action estoppel and the nemo debet doctrine, counsel for the defendants relies upon the distinction drawn by Middleton J.A. in *McIntosh v. Parent* (1924), 55 O.L.R. 552 at p. 555:

> Two totally distinct ideas are often confounded in speaking of *res judicata*. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
>
> Some think that this judgment must be specially pleaded (*Cooper v. Molsons Bank* (1896), 26 Can. S.C.R. 611), and will then be an estoppel, but there is high authority that, even when not pleaded, the judgment may be given in evidence, and will, as evidence, prove the facts quite apart from the doctrine of estoppel: *Southern Pacific Railroad Co. v. United States* (1897), 168 U.S. 1.
>
> The other doctrine is often discussed under the maxim *nemo debet bis vexari*, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the courts for the same cause for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever.

23 It is the position of counsel for the defendants that, if the doctrine of cause of action estoppel is not applicable in that the question of the Bank's right to exercise its power of sale was not directly put in issue and determined by the court on the earlier motion, the doctrine of nemo debet is clearly applicable. The earlier motion brought at the instance of the Bank to grant the Receiver the additional power of sale was denied and the Bank, on the present motion, is simply trying to achieve the same result through a different route. In *Fishermans Wharf Ltd. v. Prudential Assurance Company Limited and Montreal Trust Company, Trustee* (S.C.O. - January 15, 1990), Davidson J. upheld the decision of Master Donkin where he stated at pp. 9-10:

> The maxim nemo debet bis vexari must also be considered. It applies to motions as well as to actions, and it prevents a motion being brought for relief already requested even if that relief is based on different grounds. *Industrial Acceptance Corporation Ltd. v. Golisky* (1967), 1 O.R. 278. The maxim applies where the merits of the relief requested was decided but not where there was no decision on the merits because of some technical default which prevented a decision on the merits. *Payne v. Newberry (No. 2)* (1890), 13 P.R. 392. In my view, Master Peppiatt's decision is a decision on the merits.
>
> The maxim applies not only to the situation where the moving party urges new grounds for relief which was

denied to him before, but it appears also to apply to the splitting of a cause of action.

. . . . .

It seems to me that since all the facts upon which this present motion is based were known at the time of the motion before Master Peppiatt, then all the relief which could flow from those facts by way of amendment should have been requested when the matter came before him even if that meant making requests in the alternative. This proposition appears to be supported by authority, and in addition it makes reasonable sense. If the reverse were true it might be possible for an imaginative pleader in this case to come back with a third or perhaps even a fourth plea based on the same facts and surely that would be an abuse.

24 In my view, the nemo debet doctrine as expressed in *McIntosh v. Parent*, supra, and in *Fisherman's Wharf Ltd. v. Prudential Assurance Co. and Montreal Trust Company*, supra, is not applicable to the case before the bar. The doctrine is based upon merger by judgment and is applied where there has been a final judgment or final order. In *McIntosh v. Parent*, supra, there had been a judgment issued in earlier action and in *Fisherman's Wharf*, supra, it was determined by both Master Donkin and Davidson J. that the earlier order of Master Peppiatt was a final order with respect to the question of adding certain parties as defendants. I am accordingly of the view that none of the doctrines of issue estoppel, cause of action estoppel or nemo debet is applicable to the motion now before this court.

25 On the question of whether the Bank can be prevented or in fact enjoined from exercising its power of sale, I accept the submissions of counsel for the Bank that the principle stated in *Arnold v. Bronstein*, supra, is the current law in Ontario and that a mortgagee ought not to be restrained from exercising a power of sale absent bad faith or evidence of fraud on the part of the mortgagee. There is no evidence before this court indicating any bad faith or fraud on the part of the mortgagee. The litigation commenced by the Goldberger companies and individuals contains allegations which, if substantiated, may give rise to a claim for damages against the Bank but do not in my view provide any strong evidence of bad faith or fraud on the part of the mortgagee or sufficient grounds for enjoining the Bank from exercising its power of sale. I am also not satisfied that any of the grounds for issuing an injunction in favour of the defendants to enjoin the Bank from exercising its power of sale exists in this case. As stated above, I do not think the defendants have established a prima facie case of bad faith or fraud, the balance of convenience appears to me to favour the Bank in that the value, based on the forecast provided by the Receiver, of its security is eroding and damages would appear to me to be an adequate remedy for any loss the defendants may suffer by virtue of the Bank exercising its power of sale.

26 Counsel for the defendants has also submitted that the doctrine of equitable set-off ought to be applied in this situation to prevent the Bank from exercising its power of sale. I have considered the further submissions, submitted by counsel at my request, with respect to the application of the doctrine of equitable set-off. Although I am satisfied that there may be situations where the doctrine can apply as between mortgagor and mortgagee and that there may be situations where the doctrine might be applied even though no reference to set-off is contained in the mortgage instrument, in my view, this is not such a case. It appears to me that the authorities cited by counsel for the defendants are situations where the granting of the security itself has been directly brought into question or where the issue to be resolved is the quantification of the damages claimed by the mortgagor. In the case at the bar, the original granting of the security in 1989 is not in issue and, although the pleadings in the litigation commenced by the defendants against the Bank raise a number of issues with respect to claims which the defendants among others may have against the Bank, all of the allegations in the statement of claim are strenuously denied by the Bank and we are not dealing with the question of the quantification of a claim by the

mortgagor or the right of the mortgagor to set-off a specific and determined amount. I accordingly find that the case before the bar is not one where the doctrine of equitable set-off ought to be applied as between the defendants and the Bank.

27 An order will issue granting the Bank leave, pursuant to paragraph 8 of the order of Haley J. dated June 19, 1992, to proceed to exercise the power of sale of the Milner Avenue Property granted to the Bank pursuant to the security documents.

28 Counsel are invited to speak to me regarding costs of this motion and of the earlier motion heard February 19, 1993.

END OF DOCUMENT

TAB 4

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2008 CarswellOnt 9225

Quest Capital Corp. v. Lakefront Estates Corp.

Quest Capital Corp., (Applicant / Plaintiff) Lakefront Estates Corporation, Michael Moldenhauer, Moldenhauer Developments Inc., 2036497 Ontario Inc., 2065515 Ontario Inc., and Northmount Village Inc., (Respondents / Defendants)

Ontario Superior Court of Justice

Sandra Chapnik J.

Judgment: October 31, 2008
Docket: 08-CV-349611PD1

Proceedings: affirmed *Quest Capital Corp. v. Lakefront Estates Corp.* (2009), 2009 CarswellOnt 2918, 2009 ONCA 441 (Ont. C.A.)

Counsel: Jonathan Davis-Sydor, for Applicant / Plaintiff

David Taub, for Respondents / Defendants

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

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff moved for summary judgment against defendants for amounts due and owing pursuant to loan made to LE Corp. and indemnified by other defendants who were jointly and severally responsible for the debt — Motion granted — No cogent evidence that raised genuine issue for trial, and there would be nothing unfair or unconscionable in granting plaintiff judgment in this action.

Cases considered by *Sandra Chapnik J.*:

Arnold v. Bronstein (1970), 15 D.L.R. (3d) 649, [1971] 1 O.R. 467, 1970 CarswellOnt 776 (Ont. H.C.) — followed

MOTION by plaintiff for summary judgment against defendants for amounts due and owing pursuant to loan made to LE Corp. and indemnified by other defendants who were jointly and severally responsible for the debt.

***Sandra Chapnik J.*:**

1 The plaintiff moves for summary judgment against the defendants for the amounts due and owing pursu-

ant to a loan made to Lakefront Estates Corporation ("Lakefront") and indemnified by the other defendants who are jointly and severally responsible for the debt. It is common ground that, as at October 28, 2008, the amount outstanding on the loan is $9,763,032.72, including principal and interest to that date and legal fees, costs and expenses to September 30, 2008.

2 The defendants move for an order amending the Statement of Defence to claim damages, set-off and a counterclaim focused on the circumstances that are rooted in an alleged improvident sale of the subject property. The defendant had also claimed injunctive relief with respect to the alleged improvident sale. However, the proposed sale was aborted due to the failure of the purchaser to raise sufficient funds for the deposit. Accordingly, the contract for sale is at an end, and there is no current contract for the sale of the property.

3 The principle in *Arnold v. Bronstein*, [**1970**] **O.J. No. 1677** (Ont. H.C.) represents the current law in Ontario that a mortgagee ought not to be restrained from exercising a power of sale absent bad faith or evidence of fraud on the part of the mortgagee.

4 The defendants' proposed pleading contains allegations that, if substantiated, may give rise to a claim for damages against the plaintiff but they do not, in my view, contain evidence of bad faith such that they provide sufficient grounds for enjoining the plaintiff from exercising its rights under the Notice of Sale. Nor do the Forbearance Agreements have the effect of invalidating the Notice of Sale. The parties dealt directly with this in their written agreements in which they specifically validated the Notice of Sale and waived the right to a further Notice.

5 In all the circumstances, I find there is no genuine issue for trial. Lakefront borrowed substantial funds from the plaintiff pursuant to the terms of a written agreement. The other defendants, as covenantors are joint and severally liable for Lakefront's obligations; and the indemnitors entered into written agreements to indemnify and save the plaintiff harmless against any and all losses, costs, expenses and damages in any way relating to or arising out of the said loan.

6 There is no cogent evidence that raises a genuine issue for trial, and there would, in my view, be nothing unfair or unconscionable in granting the plaintiff judgment in this action.

7 This is not a case where the doctrine of equitable set-off ought to be applied. Accordingly, the plaintiff's motion for summary judgment is allowed against each of the defendants, jointly and severally, for the sum of $9,763,032.72.

8 In the alternative, the defendants submit that any judgment in favour of the plaintiff ought to be stayed to provide them an opportunity to sell the property and proceed with their refinancing. There are no extreme or exceptional circumstances in this case sufficient to interfere with the proper exercise of the power of sale and I am not prepared to make that order.

9 Judgment shall issue in favour of the plaintiff for the sum of $9,763,032.72 against the defendants jointly and severally. Costs to the plaintiff in the all-inclusive sum of $20,000.00.

Motion granted.

END OF DOCUMENT

TAB 5

Court File No. CV-11-9409 CL
Court File No. CV-11-9452 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

- and -

THE RESPONDENTS LISTED IN SCHEDULE "A" HERETO

Respondents

UNOFFICIAL TRANSCRIPTION OF THE ENDORSEMENT OF THE HONOURABLE MR. JUSTICE CAMPBELL DATED DECEMBER 12, 2011

---

12 Dec/11

Two motions were before the Court this day. The first uncontested sought extension of the stay provided for in the Initial Order and approval of the activities of the Monitor. The first relief was unopposed and the form of order to issue as signed.

The second motion by Firm Capital seeks a lifting of the stay to permit judicial sale in Alberta of the property over which it holds first security. Alternatively, Firm Capital seeks a judicially approved sale the supervision to be by this Court.

Mr. Marshall, for Firm Capital, urges that this Court does not have jurisdiction to burden the

property over which his client has first security with the costs of a receiver driven process which at best seeks to expend funds with the hope that a development process may evolve that would attract approval of the Town in which the property lies. Part of the difficulty is that there are two appraisals of quite different value from the 1st and 2nd mortgagees. The Receiver urges that, if further funds could result in an approval of a development plan by the Town, it would likely achieve a greater value than a sale now. Firm Capital does not wish to see its security eroded by further expenditure which at best is only a hope of possible development sometime in the future.

Various other interests support the Receiver's position on the basis that with more time there may be a possibility of greater return for their clients then a judicial sale now. The Receiver submits that bearing in mind the *Soundair* principles of fairness to all interests, a Receiver directed process of waiting until the New Year and having the Receiver conduct the sale gives better assurance of fairness even if the development proposition is not accepted.

I recognized when the Initial Order was made that this would not be a standard CCAA process. I envisioned exactly what has transpired.

The likelihood of a Plan is at best remote and an orderly liquidation much more likely and indeed the Receiver does recommend that several properties be offered for sale immediately.

Since there is no overall Plan for the entire CCAA Group of Companies and the proposal for further expense on Firm Capital is only in context of a possibility or hope of greater recovery from a later rather than earlier sale, I am not satisfied that the balancing of interests favours waiting. There is a distinction between the rights of mortgage creditors and those who may have general property claims to assets other than land within a CCAA order.

I conclude that by permitting the sale process to proceed subject to approval of any sale that may takc place with the ability of those creditors which also have some claim to the land being convinced of what is being proposed will give full opportunity to all Creditors to have input before final sale.

I expect co-operation between the Receiver, the Monitor and other parties with Firm Capital to bring forward what may be in the best interests of all Creditors.

I recognize that there may be similar requests from other mortgagees. This was recognized at the time of the Initial Order and should give impetus to all concerned to bring forward a plan that may be acceptable to all creditors by the time of the expiry of the extension granted to February 17, 2012.

Campbell J.

16038602.1

Court File Number: CV-11-9409 CL
CV-11-9452 CL.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

ROMSPEN INVESTMENTS
Plaintiff(s)

AND

EDGEWORTH PROPERTIES.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
See attached		

☐ 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):

Two motions were before the Court this day. The first uncontested brought extension of the stay provided for in the Initial Order & approval of the activities of the monitor. The first relief was unopposed & the form of order to issue as signed

The second motion by Firm Capital seeks a lifting of the stay to permit judicial sale in Alberta of the property over which

Dec. 12/11
Date

C.L. Campbell J.
Judge's Signature

☑ Additional Pages 4

Court File Number: CV-11-9409CL
CV-11 9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
it holds first security. Alternatively Firm Capital seeks a judicially approved sale process to be run by this Court.
Mrs. Marshall for Firm Capital urges that this Court does not have jurisdiction to broaden the property over which his client has first security with the case of a Receiver classic process which at best seeks to expend funds with the hope that a development process may evolve that would attract approval of the Court in which the property lies.
Part of the difficulty is that there are 2 appraisals of quite differing value from the 1st & 2nd mortgagees. The Receiver urges that if further funds could result in an approval of a development plan by the Court it would likely achieve a greater value than a sale now. Firm Capital does not wish to see its security eroded by further

Judges Initials RLCo.

Court File Number: CV-11-9405CL
CV-11-9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
expenditure which at best is only a hope of possible development some time in the ~~future~~ future.
Various other interests support the Receiver's position on the basis that with more time there may be the possibility of greater return for their clients than a judicial sale would.
The Receiver submits that bearing in mind the Soundair principles of fairness to all interests a Receiver directed process of waiting until the New year & having the Receiver conduct the sale serves better assurance of fairness even if the development proposition is not accepted.
I recognized when the Initial Order was made that this should not be a standard CCAA process & envisaged exactly what has happened.
The likelihood of a Plan is at best remote & an orderly liquidation

Judges Initials CLC.

Court File Number: CV-11-9405CL
CV-11-9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
much more likely & indeed the Receiver does recommend that several properties be offered for sale immediately. Since there is no overall Plan for the entire CCAA group of companies & the proposal for further expenses on the Fiera Capital is only in context of a possibility or hope of greater recovery from a later return than current sale I am not satisfied that the balancing of interests favours allowing There is a distinction between the rights of mortgage creditors & those who may have general property claims to assets other than land within a CCAA Order. I conclude that by permitting the sale process to proceed subject to approval of any sale that may take place with the ability of these creditors when

Judges Initials CCG

Court File Number: CV-11-9409 CL
CV-11-9452 CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
also heard Anne Claire to the fund being
cautious of what is being proposed
will give full opportunity to all
Creditors to have input before a
final date.
I expect co-operation between the
Receiver, the Monitor & other parties
with Terms Capped to being provided
what may be in the best interests
of all creditors.
I recognize that there may be similar
requests from other mortgagees. This
was recognized at the time of the
Initial Order & should give impetus
to all concerned to ~~the~~ bring forward
a plan that may be acceptable to
all creditors by the time of the
expiry of the stay granted to Feb. 17/12

Judges Initials CCC.

TAB 6

Case Name:

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community

RE: Peoples Trust Company, Applicant, and Rose of Sharon (Ontario) Retirement Community, Respondent

[2012] O.J. No. 6219

2012 ONSC 7319

224 A.C.W.S. (3d) 323

97 C.B.R. (5th) 303

2012 CarswellOnt 16827

Court File No. CV-11-9399-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: December 21, 2012.
Judgment: December 27, 2012.

(26 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by Trisura to lift a stay in a receivership in order to set down for trial a construction lien action allowed -- Deloitte & Touche was the receiver of the assets and undertakings of Rose of Sharon Retirement Community -- Construction lien proceedings had been initiated and Trisura was required to set the construction lien action down for trial by December 31, 2012 -- If the motion was not granted, Trisura would be materially prejudiced as its claim would expire -- However, a condition was imposed, requiring the setting aside of a default judgment granted against Rose of Sharon -- Bankruptcy and Insolvency Act, s. 69.4(1).

Construction law -- Liens -- Miscellaneous issues -- Motion by Trisura to lift a stay in a receivership in order to set down for trial a construction lien action allowed -- Deloitte & Touche was the receiver of the assets and undertakings of Rose of Sharon Retirement Community -- Construction lien proceedings had been initiated and Trisura was required to set the construction lien action down for trial by December 31, 2012 -- If the motion was not granted, Trisura would be materially prejudiced as its claim would expire -- However, a condition was imposed, requiring the setting aside of a default judgment granted against Rose of Sharon -- Bankruptcy and Insolvency Act, s. 69.4(1).

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4(1)

Construction Lien Act, R.S.O. 1990, c. C.30, s. 37, s. 54(3), s. 67(3)

Rules of Civil Procedure, Rule 19.03(1)

Counsel:

C. Prophet and C. Stanek, for the Receiver, Deloitte & Touche Inc.

R. Jaipargas, for Trisura Guarantee Insurance Company.

REASONS FOR DECISION (corrected)

D.M. BROWN J.:--

I. Motion to lift stay in a receivership in order to set down for trial a construction lien action

1 On September 27, 2011, C. Campbell J. appointed Deloitte & Touche Inc. receiver and manager of all the assets, undertakings and properties of Rose of Sharon (Ontario) Retirement Community. Paragraph 8 of the Appointment Order contained the standard clause staying proceedings against the debtor.

2 Rose of Sharon owned a long-term care condominium located on Maplewood Avenue, Toronto. Prior to the appointment of the Receiver construction lien litigation had broken out over the condominium project and the general contractor, Mikal-Calladan Construction Inc., had initiated lien proceedings. On January 30, 2012, Trisura Guarantee Insurance Company obtained an assignment of Mikal-Calladan's lien. On November 26, 2012, Trisura obtained an order to continue the construction lien action. As required by the terms of section 37 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, Trisura must set the construction lien action down for trial by December 31, 2012, failing which its lien will expire.

3 Trisura therefore moved for an order lifting the stay of proceedings to allow it to pursue the construction lien action so that it can set the action down for trial.

4 The Receiver did not oppose the lifting of the stay, but it sought certain terms for the order. Trisura has agreed to all the terms, but one - whether as a condition of lifting the stay this Court should set aside a default judgment granted against Rose of Sharon some two days after the Appointment Order was made and the earlier noting in default of Rose of Sharon.

II. Governing legal principles governing the lifting of stays

5 On a motion to lift a stay of proceedings in a receivership the moving party bears the onus of convincing the court that the relief should be granted, and in considering such a request the court should look at the totality of the circumstances and the relative prejudice to both sides.[1] The parties agreed that the court may find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*. Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, "subject to any qualifications that the court considers

proper", where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is equitable on other grounds to make such a declaration. In *Re Ma*[2] the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

> Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

III. The basic chronology

6 Mikal-Calladan preserved a Claim for Lien on November 19, 2010 against title to the Project. It perfected its lien by commencing the construction lien action -- CV-10-417426 -- on December 31, 2010. On July 21, 2011, Peoples Trust served a statement of defence in the Lien Action. Rose of Sharon was noted in default in the Lien Action; exactly when, the materials did not disclose.

7 On August 31, 2011, with the consent of Peoples Trust, the parties agreed to refer the Lien Action to a construction lien master in Toronto for a trial. MacDonald J. made a standard Reference Order on that day which provided that "the Master determine all questions arising in this action on the reference".

8 Then, less than a month later, at the suit of Peoples Trust, the Appointment Order was made.

9 On September 12, 2011, before the Appointment Order was made, Mikal-Calladan had requisitioned default judgment against Rose of Sharon. On September 29, two days after the Appointment Order was made, the Registrar signed default judgment against Rose of Sharon for $4,195,768.64, plus costs of $1,350.00 (the "Default Judgment").

10 As mentioned, earlier this year Trisura took an assignment of Mikal-Calladan's Lien Claim and obtained an order to continue the Lien Action about a month ago.

11 With the December 31 deadline looming to set down the Lien Action or face the expiry of its lien, on November 7, 2012 Trisura's counsel wrote to the Receiver's requesting that the Receiver consent to a lifting of the stay so it could set the Lien Action down for trial. Trisura's counsel indicated that "the main

issue in the lien action relates to the priority of the lien over the People's Trust mortgage".

12 Receiver's counsel responded on November 22, 2012 advising that the Receiver was prepared to consent to lifting the stay on the following terms:

> Condition 1: Trisura obtained an order to continue in the Lien Action;
>
> Condition 2: Trisura agreed to set aside the noting in default of Rose of Sharon and the Default Judgment so that the Receiver could defend the Lien Action;
>
> Condition 3: Issues of liability, timeliness and quantum in the Lien Action would be determined in a Reference before a Master; and,
>
> Condition 4: The issue of the priorities of the construction lien vis-à-vis any other encumbrance would be determined by a judge of the Commercial List.

13 Mr. Edouard Chassé, a claims adjuster retained by Trisura, in his affidavit stated that Trisura had obtained an order to continue and it agreed to Conditions 3 and 4. Trisura opposed Condition 2 "as the Receiver has had notice of the default for 14 months and has taken no steps" to set aside the noting in default and default judgment.

IV. Analysis

14 There is no doubt that if the stay is not lifted, Trisura would be prejudiced materially by losing its ability to advance its lien claim. Section 37(1) of the *Construction Lien Act* provides that a perfected lien, such as that assigned to Trisura, expires immediately after the second anniversary of the commencement of the lien action unless either (i) an order is made for the trial of an action in which the lien may be enforced or (ii) an action in which the lien may be enforced is set down for trial. December 31, 2012 is the second anniversary of the commencement of the Lien Action, so unless the stay is lifted, Trisura's lien claim will expire. As mentioned, the Receiver has consented to the lifting of the stay, so the remaining dispute centres only around Condition 2 -- the Receiver's requirement that the noting of default and Default Judgment against Rose be set aside.

15 Trisura advanced two arguments why no setting aside should occur. First, Trisura argued that because the August 31, 2011 Reference Order of MacDonald J. stipulated that "the Master determine all questions arising in this action on the reference and all questions arising under the *Construction Lien Act*", it was not open to the court supervising the receivership proceedings to set aside a noting of default which had occurred in the Lien Action.

16 I disagree, for two reasons. First, the Default Judgment was made two days after the Appointment Order. No doubt that occurred because the papers requisitioning the Default Judgment were moving through the court's administrative office and the Registrar was unaware of the Appointment Order. Nonetheless, given the stay of proceedings ordered in the Appointment Order, the Default Judgment contravened the Appointment Order and therefore was of no force or effect.

17 Second, Trisura's submission ignored what occurred less than one month after MacDonald J. made his Reference Order -- this receivership came about. As a result of the Appointment Order, the court supervising the receivership considers all issues relating to or touching upon the receivership and therefore is the proper court to determine whether, as a condition of lifting a stay of proceedings, certain relief should be granted to the receiver as part of the process of balancing the respective interests at stake on the lift-stay motion.

18 Which brings me to the second argument made by Trisura: it contended that the appropriate test for considering whether to set aside a noting in default in a construction lien action is that set out in the *Construction Lien Act* and the related jurisprudence and, in the circumstances of this case, the Receiver could not meet that test. Section 54(3) of the *CLA* provides that where a defendant has been noted in default, it shall not be permitted to contest the claim "except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence". Section 67(3) of the *CLA* states that "except where inconsistent with this Act ... the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act."

19 In *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, Master Polika held that Rule 19.03(1) of the *Rules of Civil Procedure* dealing with the setting aside of notings in default was inconsistent with *CLA* s. 54(3) because it was less stringent than the test under the *CLA* by reason of granting the court a discretion to set aside a noting of default on such terms as were just. Master Polika stated that the sole test a party moving to set aside the noting of default in a construction lien action needed to meet was that set out in *CLA* s. 54(3) - i.e. to satisfy the court that there existed evidence to support a defence.[3] In *A1 Equipment Rental Ltd. v. Borkowski* Lederer J. stated that a party moving to set aside a noting in default under the *CLA* must not only demonstrate that evidence existed to support a defence, it also had to move promptly to set aside the noting in default.[4]

20 Whether, when a lien claimant seeks leave of the court supervising a receivership to lift the stay of proceedings and the receiver seeks a condition that a noting of default be set aside, the court must apply the test under *CLA* s. 54(3) or may proceed on a less stringent basis as part of its discretion in lifting the stay, is a question I need not determine for the simple reason that on the facts of this case the Receiver meets the test under the *CLA*.

21 Trisura submitted that the Receiver cannot now attempt to impose a condition setting aside the noting of default when over a year has passed since that event. The evidence does not support that contention. First, just over a week after the making of the Appointment Order, counsel for Mikal-Calladan wrote to Receiver's counsel advising of the Default Judgment and stating:

> Under the circumstances, we will not take any steps to enforce our client's judgment in the absence of obtaining the necessary leave from the Court.

In light of that position taken by the lien claimant, it is not surprising that the Receiver took no immediate steps to set aside the Default Judgment or the noting in default.

22 In its First Report dated December 12, 2011 the Receiver reported:

> While there may be setoffs against Mikail's claim that may be asserted by the Receiver, pending disposition of the Property, the Receiver does not intend to take any action in connection with any of the above-noted lien claims at this time.

Again, this constitutes evidence of a reasonable explanation by the Receiver about why it did not take steps at the time in the Lien Action.

23 On February 29, 2012, Trisura advised the Receiver of the assignment of the Lien Claim, but then took no further steps to move the Lien Action along until October 24, 2012 when it informed the Receiver that it wished to obtain a trial date. Further emails between counsel ultimately resulted in the Receiver's November 22, 2012 letter setting out the terms for lifting the stay of proceedings. In those circumstances, I see no argument that the Receiver failed to take steps promptly to set aside the noting in default once it became aware of Trisura's intention to proceed with the Lien Action. I also would note,

by way of chronology, that on September 14, 2012, a month before Trisura approached the Receiver about further steps in the Lien Action, the Receiver had commenced a claim against Trisura under the performance bond for the Project.

24 As to whether the Receiver has filed evidence to support a defence, it has. Although the Receiver has not filed a draft Statement of Defence, the Receiver provided Trisura with ample details of its defence through its July 10, 2012 letter to Trisura's counsel, in particular the sections entitled "Set-Offs" and "Deficiencies", as well as in portions of its Statement of Claim in the performance bond action, specifically paragraphs 42 and 62 of the claim.

25 In balancing the interests of Trisura and the Receiver on this motion to lift the stay of proceedings, I conclude that it is fair and appropriate to require, as a term of lifting the stay, that both the noting of default of Rose of Sharon and the Default Judgment be set aside, and that the Receiver be permitted to file a Statement of Defence in the Lien Action within 20 days.

V. Summary and costs

26 By way of summary, I grant the motion of Trisura to lift the stay of proceedings contained in the Appointment Order to allow it to pursue the Lien Action, including allowing Trisura to set the Lien Action down for trial. Out of an abundance of caution, given the proximity of the December 31 deadline, I also order the trial of the Lien Action. As conditions for lifting the stay I order as follows:

(i) the noting in default of Rose of Sharon and the Default Judgment against it are set aside so that the Receiver can defend the Lien Action;
(ii) the Receiver may file a Statement of Defence in the Lien Action within 20 days;
(iii) the issues of liability, timeliness and quantum in the Lien Action shall be determined in a Reference before a Master; and,
(iv) the issue of the priorities of the construction lien vis-à-vis any other encumbrance shall be determined by a judge of the Commercial List in these receivership proceedings.

As to costs, the conditions sought by the Receiver in its November 22, 2012 letter were reasonable. There really was no need for a contested motion. Accordingly, I grant the Receiver its costs of this motion fixed at $4,000.00 payable by Trisura within 20 days of the date of this Order. I am available at a 9:30 appointment tomorrow, Friday, December 28, 2012, to issue this order, if required.

D.M. BROWN J.

cp/e/qljel/qlrdp/qljac

1 *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199, paras. 13 and 14.

2 (2001), 24 C.B.R. (4th) 68 (Ont. C.A.), paras. 2 and 3.

3 (2009), 79 C.L.R. (3d) 144 (S.C.J.), para. 24.

4 (2008), 70 C.L.R. (3d) 274 (S.C.J.), para. 51.

TAB 7

Case Name:

Haunert-Faga v. Faga

IN THE MATTER OF the Receivership Order of the Honourable Justice Campbell dated December 8, 2010
RE: Christine Marie Haunert-Faga, Applicant, and Stephen Leonardo Glen Faga, Respondent

[2013] O.J. No. 3595

2013 ONSC 5161

230 A.C.W.S. (3d) 638

4 C.B.R. (6th) 118

2013 CarswellOnt 11104

Court File No. CV-10-9014-CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: August 7, 2013.
Judgment: August 8, 2013.

(32 paras.)

Civil procedure -- Actions -- Causes of action -- Assignment of -- Application by Haunert-Faga for order lifting stay under receivership order in order to bring application for bankruptcy against respondent Faga allowed -- Receiver had been appointed after applicant unable to realize on divorce judgment -- Receiver discovered respondent and his family concealed and/ or dissipated respondent's income and assets -- Receiver decided not to continue with recovery action against respondent and other defendants after receiver was denied motion for declaration it would not be personally liable for costs -- To have denied applicant opportunity to continue recovery action would have resulted in prejudice to applicant while no such prejudice existed to respondent.

Creditors and debtors law -- Execution -- Stay of execution -- Receiver in aid of execution -- Application by Haunert-Faga for order lifting stay under receivership order in order to bring application for bankruptcy against respondent Faga allowed -- Receiver had been appointed after applicant unable to realize on divorce judgment -- Receiver discovered respondent and his family concealed and/or dissipated respondent's income and assets -- Receiver decided not to continue with recovery action against respondent and other defendants after receiver was denied motion for declaration it would not be personally liable for costs -- To have denied applicant opportunity to

continue recovery action would have resulted in prejudice to applicant while no such prejudice existed to respondent.

Application by Haunert-Faga for an order lifting a stay of proceedings under a receivership order so as to bring an application for a bankruptcy order against the respondent Faga. The receiver had been appointed after the applicant was unable to realize on a divorce judgment of over $4.4 million that had been granted in her favour. Based on the findings of forensic accountants, the receiver alleged that the respondent and members of his family had engaged in actions to conceal and/or dissipate the respondent's income and assets. As such, the receiver commenced an action for declarations that certain assets had been fraudulently transferred and for damages ("the Recovery Action"). However, the receiver decided not to proceed with the Recovery Action after its motion for an order declaring that it would not have personal liability for the costs of the Recovery Action was denied. The applicant wished to continue to prosecute the Recovery Action. The respondent took the position that the receiver had made a representation in the costs motion that if the order was not obtained it would discontinue the action. As such, he asserted that the receiver could not resile from that position and that the applicant should not be permitted to proceed with the receiver's action.

HELD: Application allowed. The applicant would have been prejudiced if she was not granted the order lifting the stay and permitted to apply for a bankruptcy order. She would not have been able to proceed with the Recovery Action and some of the relief sought in that action would not have been available to her. Moreover, a limitation defence would have opened up to the respondent. On the other hand, the Court saw no prejudice to the respondent or any other defendant in the Recovery Action. All parties to the receiver's motion undoubtedly understood that the applicant could decide to pursue the Recovery Action if the receiver did not. Additionally, there was no evidence that the respondent or the other defendants to the Recovery Action had put any reliance on statements made by the receiver on the costs motion. Accordingly, the applicant was granted leave to bring an application for bankruptcy against the respondent and, if the order was made, to request an assignment of the Recovery Action.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 38

Counsel:

Robert Rueter and Sara J. Erskine, for the applicant, Christine Marie Haunert-Faga.

M. Susan Balz, for the respondent, Stephen Leonardo Glen Faga.

Megan Marrie, for the respondent, Presta Caparrotta LLP.

Michael McQuade, for the respondents, Guiliana Caprara et al.

Jeffrey Long, for the respondent, Domenico Faga.

Chris E. Reed, for the receiver, A. Farber & Partners Inc.

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- The applicant Christine Haunert-Faga ("Christine") applies for an order lifting a stay of proceedings under a receivership order of December 8, 2010 to bring an application for a

bankruptcy order against the respondent Stephen Leonardo Glen Faga ("Stephen"). The receiver was appointed an equitable receiver in aid of execution of a 2007 divorce judgment against Stephen in the amount of $4,434,825.47. For the reasons that follow, the application is allowed.

Proceedings to date

2 In May 2007, the Superior Court of Justice Family Court Branch granted a divorce judgment in favour of Christine against Stephen. Pursuant to the judgment, Stephen was ordered to pay Christine $4,434,825.47 for spousal support, child support, Section 7 expenses, costs and equalization of net family property. As part of the divorce judgment, Stephen was ordered to transfer his 50% ownership in Delzap Construction valued at $686,000 to Christine as partial settlement of the equalization of net family property. Subsequent to the issuance of the divorce judgment, Christine made numerous attempts to execute on the assets of Stephen and was only able to recovery payments of $61,000.

3 As a result of Christine's inability to realize on the divorce judgment, she brought an application to appoint an equitable receiver in aid of execution. By order dated December 8, 2010, A. Farber & Partners Inc. was appointed as the equitable receiver in aid of execution of the divorce judgment over all of the past and present assets, income and properties of Stephen. The order contained the usual stay of proceedings provision requiring the consent of the receiver or court order to proceed with any action.

4 Froese Forensic Partners Ltd. was retained by the receiver to assist the receiver and its counsel with investigations into and tracing the location of property belonging to Stephen. It is alleged by the receiver that the forensic analysis revealed that Stephen, members of his family and the accountant for the Faga family business, Presta Caparrotta LLP, had engaged in actions to conceal and/or dissipate Stephen's income and assets.

5 The receiver commenced an action in the Commercial List ("Recovery Action") in its capacity as the court appointed receiver of Stephen pursuant to the power conferred on it in paragraph 4(j) of the receivership order.

6 The Recovery Action seeks declarations that Stephen's 50% interest in the Faga family business was fraudulently transferred to his sister Giuliana Caprara and that she holds this interest in trust for Stephen. The Recovery Action further seeks damages against the defendants in the amount of $4,880,000 (with the exception of Marco Caprara and Christian Caprara in respect of whom a tracing order in the amount of $500,000 each is sought) for breach of trust and/or knowing assistant in breach of trust.

7 The allegations in the Recovery Action include an allegation that the assets and undertakings of Faga Group Limited were fraudulently transferred to a newly incorporated company, Faga Group Construction Limited without consideration. It is alleged that Stephen held a 50% interest in Faga Group Limited which was completely dissipated by the transfer of the assets and undertakings to Faga Group Construction Limited. Stephen is not a registered shareholder of Faga Group Construction Limited.

8 The Recovery Action also asserts a claim of oppression against Giuliana Caprara in her personal capacity and in the capacity as the estate trustee without a will of the Estate of Bruno Caprara (her late husband), both of whom were officers, directors and/or shareholders of Faga Group Construction Limited. The receiver pleads that it stands as a security holder or creditor in respect of Stephen's interest in the Faga Group companies. In the alternative, the receiver seeks leave of the court to commence a derivative claim on behalf of the companies against the defendants for the recovery of assets transferred to Faga Group Construction Limited and for the recovery of funds and assets wrongfully removed and/or dissipated from Faga Group Construction Limited.

9 The statement of claim was served on the defendants in the fall of 2012. However, pursuant to an

order of October 24, 2012, the defendants were not required to file any statements of defence until after a motion by the receiver for a protective costs order.

10 On March 8, 2013, the receiver brought a motion for an order declaring that the receiver would not have personal liability for the costs of the Recovery Action ("Protective Costs Order Motion"). On the motion, the receiver took the position that it was not satisfied that there were sufficient assets in the receivership estate to provide the receiver with an indemnity in respect of any potential costs award, and accordingly the receiver was not prepared to proceed unless it was granted a protective costs order.

11 By endorsement dated March 15, 2013, Justice D.M. Brown dismissed the receiver's Protective Costs Order Motion.

12 As at June 5, 2013, the amount owing to Christine under the divorce judgment including post-judgment interest was approximately $4.98 million.

13 Christine wants to continue to prosecute the Recovery Action. Once a bankruptcy order is obtained, Christine will request that the trustee in bankruptcy continue prosecution of the Recovery Action, failing which she will apply to the court for an order authorizing her to take the proceeding in her own name pursuant to section 38 of the BIA.

14 The receiver takes no position on the application by Christine. Stephen and the other parties appearing oppose the orders sought, essentially on the grounds that on the Protective Costs Order Motion, the receiver made a representation to the Court that if the order was not obtained, it would discontinue the action. They assert that the receiver cannot resile from that representation and that Christine should not be permitted to proceed with the receiver's action.

Principles for Lifting a Stay of Proceedings

15 In considering whether a stay of proceedings should be lifted, the court must consider the totality of the circumstances and the relative prejudice to both the creditor and the debtor. The court should consider a balancing of the interests of all affected parties. In *General Motors Corp. v. Tiercon Industries Inc.*, [2005] O.J. No. 3750 (S.C.J.) at para. 18, aff'd [2006] O.J. No. 1804 (C.A.), Hoy J. (as she then was) stated:

> 18. Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the Courts of Justice Act or the Bankruptcy and Insolvency Act, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: *Toronto Dominion Bank v. Ty (Canada) Inc.*, [2003] O.J. No. 1552, (2003) 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

16 In considering an application for leave to lift a stay, there is no requirement to establish, nor is it the courts function to inquire into, the merits of any action sought to be commenced or continued. See *Re Ma* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.).

Analysis

17 There is no doubt that if Christine is not permitted to lift the stay in the receivership order and permitted to apply for a bankruptcy order, she will be prejudiced. She would not be able to proceed with the Recovery Action, as it is clear that the receiver has no intention of proceeding with it. Some of the relief sought in that action would not be open to Christine to assert in any action she commenced on her own, such as a derivative action against the company in which Stephen was a shareholder or an oppression action against the company and associated persons. As well, Mr. Reuter, counsel for the

receiver in the Recovery Action, stated that there would be limitation defences available to the defendants if Christine were to commence a new action for those claims open to her, and as none of the defendants appearing questioned that statement, I accept that there were be limitation defences available if Christine is not able to pursue the Recovery Action. This further compounds the prejudice to Christine if she is not able to pursue the Recovery Action.

18 There is no requirement that an applicant for a bankruptcy order must exhaust all other remedies open to him or her before proceeding with a bankruptcy application. Further, it is not improper to make a bankruptcy application to gain remedies not available outside of the bankruptcy regime. See *Re Mastronardi* (2000), 21 C.B.R. (4th) 107 (Ont. C.A.). Bankruptcy and a resulting use of a section 38 assignment of a cause of action is a proper use of the BIA. See *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, (1994), 24 C.B.R. (3d) 302.

19 On the other hand, I do not see any prejudice to Stephen or to the other defendants in the Recovery Action. They are defendants now to that action, and cannot contend that they would be prejudiced by continuing to have to defend that action.

20 Stephen and the other defendants assert that they will be prejudiced by reason of the position taken by the receiver in the Protective Costs Order Motion. In its third report to the court, the receiver stated:

> The Receiver is not prepared to assume personal liability for the costs of the Recovery Action. The Receiver will not personally benefit from the Recovery Action. If the Court does not grant an Order that the Receiver has no personal liability for the costs of the Recovery Action, then the Receiver will discontinue that action and the Receivership estate will be deprived of any benefit of the claims advanced in that action.

21 Stephen and the other defendants assert that the receiver made a representation to the court that it would discontinue the action if it did not get the protective order it sought, and thus as it did not get that order, it must now discontinue the action, failing which these parties assert they will be prejudiced. I do not accept that assertion for a number of reasons.

22 The receiver in its factum on its Protective Costs Order Motion stated its position a little differently. It was stated:

> The Receiver is not prepared to assume personal liability for the costs of the Recovery Action. If the Receiver is not protected from personal liability for the costs of the Recovery Action, then the Receiver is not prepared to continue with that action and the receivership estate will be deprived of any benefit of that action.

23 The receiver's position was confirmed on the present motion. The receiver will not continue to pursue the action and, if Christine does not take it over under the procedure of a bankruptcy and a section 38 assignment to her, the receiver will discontinue the action. It is quite apparent that Brown J. understood the dynamic that Christine might take over the action. In paragraph 28 of his endorsement, he stated that he was not prepared to conclude that Christine would not proceed with the Recovery Action on her own. Undoubtedly all of the parties on that motion understood that the Recovery Action might be pursued by Christine.

24 I do not see how Stephen and the other defendants relied in any way on the statements of the receiver to the court on the Protective Costs Order Motion. If the receiver had stated on that motion that it would proceed with the Recovery Action regardless of whether it obtained the protective order that it sought, the respondents would have taken the same position in opposing the order sought, as the order

sought would be against their interests, and Ms. Marrie, counsel for the respondent Presta Caparrotta LLP, confirmed that in argument. Thus there is no basis to contend that they should be entitled to rely on a "representation" of the receiver to the court, even assuming the statement of the receiver's position was as clear as they contend, which I also have some difficulty with . The fact is that they put no reliance on that statement.

25 Moreover, it cannot be said that the receiver obtained some relief on its Protective Costs Order Motion based on the statement that it made regarding its intentions. To the contrary, the receiver lost its motion. Thus there can be no suggestion that the receiver is improperly trying to obtain something now by not taking any position on the motion by Christine for leave to commence bankruptcy proceedings and then respond to a section 38 assignment process by her.

26 Moreover, I do not understand why Christine should suffer from anything done by the receiver. Christine is not responsible for what the receiver said to the court on the motion before Brown J.

27 The receiver as an officer of the court has fiduciary duties to the parties. It takes the position that it could be construed as a breach of that duty to Christine and other creditors of Stephen if it had discontinued the Recovery Action without affording Christine or the creditors the opportunity to proceed with the Recovery Action on their own. I agree with that. The receiver has no obligation to Stephen and the other defendants in the Recovery Action to discontinue it. It is opposite in interests to those defendants in that action.

28 Stephen raises another ground of prejudice. He contends that if Christine is allowed to proceed with bankruptcy proceedings, it will be unfair to him as the receiver for two and a half years has refused to allow him to file for bankruptcy and has opposed or refused to agree to him applying to the family court to reduce the size of the award made in favour of Christine. He says that a bankruptcy would have relieved him of the equalization and costs portions of the judgment in the family court and that an application to reduce the size of the award would have succeeded.

29 There is no basis for this argument. There is no evidence at all on the record as to his dealings with the receiver on these issues. Counsel for the receiver advised that while Stephen raised these issues with the receiver, the response of the receiver was that Stephen should apply to court for whatever order he wished, and that the receiver would take no position on any such motion, just as it takes no position on the current motion by Christine. Stephen chose not to apply to court to vary the receivership order to permit him to take any steps he wished to take.

30 On this motion, counsel for Stephen asserted that Stephen could find no one to act as trustee in bankruptcy for Stephen if the bankruptcy was to be contested as it would be more expensive. There is no evidence of this and it makes little sense. It is not the role of a trustee in bankruptcy to contest a bankruptcy application. In any event, if Stephen could not afford a trustee in bankruptcy, the failure of the receiver to consent to a bankruptcy would have made no difference to Stephen.

31 Accordingly, leave is granted to Christine to bring an application for a bankruptcy order against Stephen and, if the bankruptcy order is made, to request an assignment of the Recovery Action under section 38 of the BIA. While she has asked for a bankruptcy order in this motion, I think it preferable that the bankruptcy application be first issued and issues regarding the right to such an order, if any, can be dealt with on that application.

32 Christine is entitled to her costs. If they cannot be agreed, cost submissions in writing of not more than three pages, along with a proper cost outline, may be made within 10 days, and the responding parties will have 10 further days to make cost submissions in writing of not more than three pages.

F.J.C. NEWBOULD J.

cp/e/qlcct/qlrdp/qljac

TAB 8

Indexed as:

Janodee Investments Ltd. v. Pellegrini

IN THE MATTER OF the Intended Proposal of Rieso Jim Pellegrini under the Bankruptcy and Insolvency Act
Between
Janodee Investments Limited, applicant, and
Rieso Jim Pellegrini and Shiner Kideckel Zweig, Trustee in Bankruptcy, respondents
And between
Leroy McQuaid, applicant, and
Rieso Jim Pellegrini and Shiner Kideckel Zweig, Trustee in Bankruptcy, respondents

[2001] O.J. No. 1388

[2001] O.T.C. 247

25 C.B.R. (4th) 47

104 A.C.W.S. (3d) 627

Court File Nos. 01-CL-003995 and 01-CL-003996

Ontario Superior Court of Justice

Lax J.

Heard: January 15, 2001.
Judgment: April 12, 2001.

(35 paras.)

Bankruptcy -- Proposals -- Effect of proposal -- Stay of proceedings, what proceedings stayed.

Application by Janodee Investments and McQuaid for an order declaring that a stay pursuant to the Bankruptcy and Insolvency Act did not apply. In the alternative, they sought an order lifting the stay. Janodee and McQuaid were the first and second mortgagees on property owned by Pellegrini. Both obtained writs of possession against Pellegrini. The sheriff attended at the property to execute Janodee's writ of possession. Pellegrini's wife asked him to delay the execution until her husband returned home. In the meantime, Pellegrini filed a notice of intention to make a proposal under the Act. Janodee and McQuaid were the only two secured creditors, and the value of the property was less than the amount owed on the mortgages.

HELD: Application allowed. When the sheriff entered the premises and indicated his intention to remove the Pellegrinis from the premises, he had taken possession of the property. The writ of

possession was not fully executed when the notice of intention was filed as the sheriff had not yet departed from the property. However, the Act did not require that the execution had taken place, but merely that possession had occurred. The sheriff merely offered a grace period to Pellegrini. There was nothing that Pellegrini could propose that could have any effect on other creditors. His notice of intention to make a proposal constituted an abuse of the bankruptcy process. The creditors had proceeded diligently.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50.4, 50.4(1), 50.4(11), 50.3(11)(b), 69(2), 69 (2)(a), 69(2)(b), 69.2(a), 69.31, 69.4, 69.4(b), 244, 244(1).

Landlord and Tenant Act.

Counsel:

M.L. Solmon, for the applicant, Janodee Investments Limited.
A. Schorr, for the respondent, Pellegrini.
H. Gerson, for the applicant, Leroy McQuaid.

LAX J.:--

Nature of Application

1 On January 9, 2001, Rieso Jim Pellegrini ("Pellegrini") filed a Notice of Intention to Make a Proposal under s. 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA"). Janodee Investments Limited ("Janodee") and Leroy McQuaid ("McQuaid") brought applications for an Order declaring that the stay pursuant to the BIA did not apply to their Writs of Possession and their execution against Pellegrini's property at 2 Hearthstone Crescent, Richmond Hill. In the alternative, the applicants sought an Order lifting the stay pursuant to s. 69.4 of the BIA. The Janodee application was granted on terms with reasons to follow. These are the reasons.

Facts

2 Janodee and McQuaid are first and second mortgagees respectively of the Pellegrini property at 2 Hearthstone Crecent, Richmond Hill. Default in payment of the McQuaid mortgage occurred on October 1, 1997. McQuaid commenced an action in May 2000 and default judgment was signed in July. In October, McQuaid obtained a Writ of Possession.

3 Janodee acquired the Pellegrini mortgage from Royal Trust in September 1998. It was to be a short-term loan as the Pellegrinis had been evicted from their home by the prior mortgagee and wished to re-enter to complete a purported sale of the property which was scheduled to close on September 30, 1998. The sale was never completed. The purchasers who were identified on the Agreement of Purchase and Sale turned out to be the wife (Maura Pellegrini, under a different name) and mother-in-law of Pellegrini.

4 After a formal demand letter and a section 244 BIA Notice of Intention to Enforce Security were served upon the Pellegrinis, Janodee commenced an action against them. In May, 1999 default judgment was signed, but the Pellegrinis were successful in having it set aside.

5 In May, 2000, there was a consent Order made by Stong J. which granted the Pellegrinis leave to deliver an Amended Statement of Defence and Counterclaim, but imposed payment terms. The Pellegrinis continuously breached Justice Stong's Order. On December 5, 2000, Janodee was granted summary judgment on its mortgage and judgment for possession. On December 20, 2000, it obtained a Writ of Possession.

6 On January 4, 2001, the Pellegrinis served Janodee with a Notice of Appeal from the Summary Judgment. Within the body of the Notice of Appeal, the Pellegrinis requested an Order from the Court staying the enforcement of the Writ of Possession pending the disposition of the appeal. Although entitled to do so, the Pellegrinis did not bring a motion before the Court of Appeal for this relief. Instead, on January 9, 2001, Pellegrini obtained the consent of Shiner Kideckel Zweig to act as Trustee in Bankruptcy and signed a Notice of Intention to Make a Proposal under section 50.4(1) of the BIA, which was filed with the Official Receiver at 3:46 p.m. on that day. The following day, the Pellegrinis abandoned their appeal of Janodee's summary judgment.

7 On the afternoon of January 9, 2001, the Sheriff went to the Pellegrinis' Richmond Hill residence, accompanied by Mr. Randy Goldman, to execute Janodee's Writ of Possession. There is disputed evidence as to what occurred there that afternoon. Where there is conflict between the evidence of Maura Pellegrini and that of Randy Goldman, I prefer Mr. Goldman's account.

8 The Sheriff and Mr. Goldman arrived at approximately 2:15 p.m. Some 10 or 15 minutes elapsed before Maura Pellegrinio answered the door. Initially, she refused the Sheriff entry and the Sheriff contacted the police who arrived at 2:50 p.m. After the police advised Mrs. Pellegrini of the consequences of refusing entry, she allowed the Sheriff and Mr. Goldman to enter the property.

9 Mrs. Pellegrini told the Sheriff that her husband and their lawyer were doing something to resolve the problem and requested that the Sheriff provide her and her husband with a grace period. The Sheriff agreed that he would not execute the writ until 4:30 p.m. Mr. Goldman then left the residence. When he returned at 4:15 p.m., Goldman found the Sheriff on the telephone either with his superiors at the Ministry of the Attorney General or with a Trustee in bankruptcy. Soon after, Mr. Pellegrini's lawyer arrived and endeavoured to convince the Sheriff that he had no right to execute the Writ of Possession.

10 At 4:30 p.m., a locksmith who had previously arrived at the property began changing the locks. Mr. Pellegrini arrived at the property and threatened criminal charges if the eviction proceeded. At approximately 5:30, the locksmith had completed the changing of the locks. At 6:00 p.m., the Sheriff received a telephone call from his superior. On the basis of the information he received, the keys for the new locks were turned over to the Pellegrinis and the Sheriff departed.

Issues

11 The applicants submit that the stay which resulted from the filing of the Notice of Intention to Make a Proposal does not apply to Janodee's Writ of Possession dated December 20, 2000 and its execution against the property at 2 Hearthstone Crescent by virtue of sections 69(2)(a) or 69(2)(b) of the BIA. Alternatively, they seek an Order lifting the stay against Janodee and its execution of its Writ of Possession pursuant to section 69.4 of the BIA. It is to these sections that I turn.

Section 69(2)(a)

12 Upon the filing of a Notice of Intention to Make a Proposal, all proceedings against Mr. Pellegrini and his property are stayed under section 69.1 of the BIA. Section 69(2)(a) of the BIA provides as follows:

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the Notice of Intention under section 50.4 was filed from dealing with those assets.

13 Given the sequence of events that occurred on the afternoon of January 9th, it is the Applicants' position that the Sheriff "took possession" of 2 Hearthstone Crescent before 3:46 p.m. when the s. 50.4 (1) Notice was filed and that section 69(2)(a) therefore operates to exempt Janodee from the stay.

14 Mr. Solomon submitted that once the Sheriff was in the door, he had possession. There is limited guidance in the case law as to what conduct will constitute possession, but it is at least arguable that the Sheriff took possession when he gained entry with the assistance of the police and made known his intention to remove the Pellegrinis from the premises. During the "grace period", the Sheriff remained in the home. Over the objections of Pellegrini and his lawyer, he instructed a locksmith to change the locks. His actions are consistent with having taken control of the property.

15 In The Office of the Sheriff (Vancouver: Law Reform Commission of British Columbia, 1983), Turiff and Edinger state at p. 176:

> Execution of a writ of possession is complete when the Sheriff has delivered possession and departed. Delivery is constituted by handing over some part of the property such as a key, a twig or some dirt. (citing C.Churchill, Law of the Sheriff (1882) at 410)

16 In Wigan and Weston, Mather on Sheriff and Execution Law, 3d. (London: Stevens, 1935), the authors, citing Upton v. Wells (1589), 1 Leon. 145 state that the "Sheriff, or his officer, should remove all persons from off the premises, for if any persons are left thereon the execution is not complete" (at p. 184). In addition, the authors state that "execution is not complete until the bailiffs are withdrawn and possession completely given" (at p. 187)

17 On these authorities, it is clear that the Writ of Possession was not fully executed when the Notice of Intention was filed. This is consistent with the law that applies to a Writ of Execution or a Writ of Seizure and Sale. In these cases, execution is not complete until the property has been seized and sold and the proceeds turned over to the execution creditor: see, for example, Oxley, Re (1997), 5 C.B.R. (4th) 258 (Alta. Q.B.).

18 Nevertheless, the language of section 69(2)(a) is not the language of execution. It is the language of possession. ("took possession of secured assets for the purpose of realization"). The neat question is whether a secured creditor, in the process of executing a Writ of Possession, can be considered to have taken possession for the purpose of section 69(2)(a) when the Sheriff has taken possession but has neither evicted the occupants nor delivered possession to the secured creditor.

19 I was not referred to any authorities on point and I am not aware of any, but the "foot in the door" argument of the applicants is not persuasive. The execution of a Writ of Possession appears to require three distinct steps: possession, eviction and delivery of possession to the creditor. Here, the Sheriff may have taken possession, but he returned it to the debtor before eviction and the transfer of possession to Janodee. Janodee had a right to possession by virtue of its judgment and Writ of Possession, but, it never "took possession" as the writ was not fully executed.

20 Mr. Solomon submitted that the Sheriff had no discretion to offer a grace period and that in doing

so, he prejudiced Janodee's execution. In support of this proposition, he relied on the decision in Central Guaranty Trust Co. v. McRae et al. (1993), 13 O.R. (3d) 295 (Gen. Div.). In this decision, the Sheriff had refused to execute a writ of possession, relying on a statutory declaration by an occupant that he was a tenant. In fact, there was evidence before the Master attesting to the fact that the purported tenant was not a tenant under the Landlord and Tenant Act. At p. 298, McCombs J. stated:

> A writ of possession is an order of the court. It is granted only after a judge or master has made a judicial determination which includes consideration of the rights of the occupants. A Sheriff is an officer of the court, sworn to uphold the law. Refusal by a law enforcement officer to enforce an order of the court can only serve to undermine respect for the judicial system and bring the administration of justice into disrepute. A sheriff, therefore, has no discretion to refuse to execute a writ of possession.

21 In my view, there is a difference between refusing to execute a Writ of Possession and executing a Writ of Possession in a manner that is respectful to the occupants of the property. The above authority makes clear that in levying execution, the Sheriff acts on the direction of the court and is not the agent of the execution creditor: see also, Frontec Corp. v. Halifax (Regional Municipality) (1999), 182 N.S.R. (2d) 130 (N.S.S.C.). It would bring no credit to the administration of justice for a Sheriff to enforce the court's order in a harsh and insensitive manner. It was appropriate for him to offer a modest "grace period" to the occupants.

Section 69(2)(b)

22 Section 69(2)(b) of the BIA provides as follows:

> (2) The stays provided by subsection (1) do not apply
>
> (b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than 10 days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay.

23 Janodee served the Pellegrinis with a Notice of Intention to Enforce Security on February 23, 1999. Pellegrini filed the section 50.4 Notice on January 9, 2001, which was long after the 10-day period. Janodee submits that its s. 244 Notice invokes the exception in s. 69(2)(b) and the stay does not apply to it.

24 A Notice of Intention to Enforce Security is only given where it is required to be sent under subsection 244(1). The BIA requires it to be sent where the secured creditor intends to enforce security on all or substantially all of the (a) inventory, (b) accounts receivable, or (c) other property of an insolvent person that was acquired for, or used in relation to, a business carried on by an insolvent person .... There is no evidence that the property at 2 Hearthstone Crescent was acquired or used for a business. It is the family home of the Pellegrinis. The subsection has no application.

Section 69.4

25 Under section 69.4 of the BIA, a creditor who is affected by a stay imposed under sections 69 to 69.31 may apply to the court for a lifting of the stay in circumstances where the court is satisfied that:

> (a) the creditor or person is likely to be materially prejudiced by the continued

operation of those sections; or

(b) it is equitable on other grounds to make such a declaration.

26 The BIA contemplates greater interference with the rights of secured creditors and greater flexibility for debtors than did the former legislation. Nonetheless, as Farley J. pointed out in Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 at 228 (Ont. Bktcy.), the BIA does not allow debtors "absolute immunity and impunity from their creditors". While a debtor is entitled to an automatic stay by merely filing a Notice of Intention to Make a Proposal, it does not guarantee the insolvent person a stay without review. The BIA allows the Court to (a) shorten the 30-day time frame for the filing of the proposal (s. 50.4(11)); or (b) lift the stay of proceedings as against a particular creditor (s. 69.4).

27 As cutting short the time for filing a proposal under section 50.4(11) has the effect of deeming the debtor to have made an assignment in bankruptcy, there has been some difference of opinion as to when the provision should be resorted to: Cumberland Trading, supra; Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy); N.T.W. Management Group Ltd., Re (1993) 19 C.B.R. (3d) 162 (Ont. Bktcy.)

28 Section 69.4(b) gives the court discretion to lift the stay if it is "equitable on other grounds" to do so. This subsection has been applied in circumstances where the creditor is able to demonstrate that the operation of the BIA would treat it unfairly or that it will be prejudiced to a greater degree than other creditors. For example, in Schroeder v. Schroeder (1993), 47 R.F.L. (3d) 290 (Sask. Q.B.), the court applied s. 69.4 in circumstances where a husband used the bankruptcy process to defeat his wife's entitlement to a portion of a property settlement. By way of contrast, in Ingles, Re (1997), 46 C.B.R. (3d) 202 (B.C.S.C.), the court refused an application by the government insurance corporation which was a creditor of the bankrupt. The court rejected the argument that it should be treated differently from other creditors in order to enforce a social policy objective, which was to collect money from drivers who caused losses while in breach of their policies.

29 In Oxley, Re, supra, the court upheld a Master's lifting of a stay of proceedings resulting from the debtor's filing of a Notice of Intention to File a Proposal. The stay was lifted in favour of a group of execution creditors in a situation where the debtor's property had been seized and sold, but because the proceeds had not yet been distributed, the execution was not complete. The Master found that it would be inequitable to allow the vigilant execution creditors to be prejudiced by the failed bankruptcy proposal and the court declined to interfere with the exercise of his discretion.

30 Cumberland, supra, is authority for the proposition that material prejudice is objective prejudice and means significant harm or injury in terms of the indebtedness or the security held by the creditor. It refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor subjectively.

31 While Janodee did not submit that it was prejudiced by the stay, it did submit that maintaining the stay was prejudicial to the second mortgagee, McQuaid. Counsel for McQuaid offered the Court some rough and ready calculations to demonstrate the magnitude of the erosion of McQuaid's security if the stay remained in place, but the evidence falls short of meeting the test in Cumberland, supra. As well, McQuaid took no steps to enforce his security for three years. In these circumstances, it is difficult to make out a persuasive case for prejudice. Neither applicant demonstrated material prejudice within the meaning of s. 69.4(a).

32 The futility of waiting out a proposal which is sure to fail has been recognized by the courts in applications under s. 50.4(11)(b): Cumberland, supra; Triangle Drugs, supra. The same principles can be applied under section 69.2(b).

33 In this case, the two mortgagees constitute the class of secured creditors. The outstanding balance on the mortgages owed to Janodee and McQuaid is well in excess of the current appraised value of the property. Neither mortgagee is willing to entertain a proposal. There are no other secured creditors who can enforce security against this asset. As there is no value in the property beyond the mortgagees' security, there is nothing that Pellegrini can propose with respect to the property that could have any effect on other creditors. To maintain the stay of proceedings against Janodee's Writ of Possession cannot assist Pellegrini in putting forward a viable proposal to creditors. It will merely assist the Pellegrinis in remaining in the property at no cost, while further eroding its value for the second mortgagee.

34 The last minute nature of the filing of the Notice of Intention is also relevant. If the appeal of the summary judgment had been a genuine appeal, Pellegrini would have applied to the Court of Appeal for Ontario for an order staying the execution of the Writ of Possession pending the appeal. Instead, the day after Pellegrini filed the Notice of Intention, the appeal was abandoned. This is an abuse of the bankruptcy process and the court should not lend its assistance to it. It is inequitable to continue the stay in circumstances where the creditor has proceeded diligently and in conformity with the court process, while the debtor's conduct is an affront to the process.

35 The conduct of the Pellegrinis is more consistent with a desire to delay and to frustrate the rights of their creditors than with a desire to make serious efforts to resolve their financial difficulties. This does not advance the goals and policies of the BIA. The proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors. This is therefore an appropriate case to exercise my discretion and to lift the stay pursuant to section 69.4(b).

LAX J.

cp/d/qlala

TAB 9

Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.

[1975] O.J. No. 2363

9 O.R. (2d) 84

59 D.L.R. (3d) 492

21 C.B.R. (N.S.) 201

Ontario
Court of Appeal
Jessup, Lacourciere

and Houlden, JJ.A.

May 5, 1975

H. Lorne Morphy and Sheila R. Block, for appellant, Monte Denaburg.

John G. Reid, Q.C., for plaintiffs, respondents.

Leon Klug, for receiver, respondent, Jerry Friedman.

The judgment of the Court was delivered by

1 **HOULDEN, J.A.**:-- This is an appeal from an order of the Honourable Mr. Justice Holland dated December 13, 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

2 On November 30, 1971, a charge under the Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known at 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on December 1, 1971, as instrument No. B-306317. By transfer of charge dated December 31, 1971, and registered in the Office of Land Titles at Toronto on January 17, 1972, as instrument No. B-310301, the charge was transferred to the appellant Monte Denaburg.

3 In February, 1972, the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property, there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of the car wash.

4 In January, 1974, serious differences arose between the partners concerning the management of the business. On January 17, 1974, the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On February 7, 1974, the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

5 By a consent judgment dated March 13, 1974, the Honourable Mr. Justice Wright made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver in so far as he was unable to recover them from the assets of the partnership.

6 On May 9, 1974, the Honourable Mr. Justice Goodman made a consent order varying the judgment of March 13, 1974. Paragraph 13 of the order of May 9, 1974, provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

7 The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after March 13, 1974, the appellant was aware of the appointment of the receiver. From March to September, 1974, the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

8 By notice of motion dated October 18, 1974, the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of May 9, 1974, and for an order that the sum so borrowed and the $25,000 already borrowed, should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On October 24, 1974, Holland, J., dismissed the application without written reasons.

9 By notice of motion dated December 9, 1974, the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made, and obligations incurred, by him. The appellant received notice of this application. On December 13, 1974, Holland, J., made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

10 The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

11 The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In Boehm v. Goodall, [1911] 1 Ch. 155, a receiver and payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington, J., said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

12 Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark On Receivers, 3rd ed., by Ralph Ewing Clark of the Cincinnati Bar, vol. 2, s. 638, pp. 1070-1, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": Clark, op. cit., vol. 1, s. 22, p. 25, in this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

13 There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One

would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of, his appointment, the receiver will have priority for charges and expenses properly incurred by him.

14 The priority which is given to a receiver in this type of situation is illustrated by Strapp v. Bull, Sons & Co.; Shaw v. School Board of London, [1895] 2 Ch. 1. In that case, a building company became involved in serious financial difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow 5,000 pounds by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed 1,750 pounds from Strapp and 2,500 pounds from the unsecured creditors. The receivership worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the 4,250 pounds that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams, J., but on appeal, his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the 4,250 pounds, A.L. Smith, L.J., said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred, applies, and consequently they [the receivers and managers] are are entitled to be paid their charges.

15 However, the exception to the general rule enunciated in Strapp v. Bull has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

16 The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors:

> Greenwood v. Algesiras (Gibraltar) R. Co., [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: Greenwood v. Algesiras (Gibraltar) R. Co.; and it will require compelling and urgent reasons for the Court to grant its approval if the secured creditors oppose the making of the order: Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. The Company, [1912] W.N. 66.

17 The appointment of a receiver in these circumstances is illustrated by Braid Builders Supply & Fuel Ltd. et al. v. Genevieve Mortgage Corp. Ltd. (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305. In that case, a receiver was appointed of all the undertaking, property and assets of a building company which was in the course of construction of an apartment block. There was a first mortgage on the premises of $1,100,000. Unfortunately, the sale of the building by the receiver did not realize sufficient to pay the first mortgage in full. While admitting that certain disbursements of the receiver were in order and entitled to be paid in priority to its mortgage, the first mortgagee claimed that the balance of the disbursements and the fees of the receiver should not be given priority over the mortgage.

18 Although the judgment makes no mention of whether or not the first mortgagee was served with the motion to appoint the receiver, it would seem that service must have been made on the mortgagee, since Dickson, J.A. (as he then was), who delivered the judgment of the Manitoba Court of Appeal, pointed out that the first mortgagee did not appeal the order appointing the receiver. The report does not indicate, either, whether the secured creditor consented to or approved of the appointment of the receiver. The Court of Appeal for Manitoba held that, the appointment having been made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property, the receiver should be given priority for all his fees and disbursements over the secured creditor. Dickson, J.A., said (at pp. 375-6):

> The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?

19 The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman, J., of May 9, 1974, supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security having priority to the registered charge of the appellant. Although the Court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly, notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: Allan v. Manitoba and North Western R. Co. (1894), 10 Man. R. 143.

20 The third exception which should be noted is this: If the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In Re Oriental Hotels Co.; Perry v. Oriental Hotels Co. (1871), L.R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision in Re Regent's Canal Ironworks Co., Ex p. Grissell (1875), 3 Ch. D. 411, James, L.J., in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

21 In Clark On Receivers, vol. 2, s. 640, p. 1078, the law on the point is stated in this way:

> By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
>
> However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

22 Counsel for the respondents and for the receiver argued strenuously that the moneys paid by the receiver to the appellant were necessary costs of preservation of the property and hence should be given priority over the appellant's charge. However, in my opinion, the payments cannot be regarded as a necessary cost of preserving the property. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. The payments in the present case were made primarily for the benefit of the partners, and incidentally for the benefit of the unsecured creditors, but not for the benefit of the appellant. It is true that the appellant received payments on his charge, but the payments were made not to benefit the appellant; rather, they were made to prevent him from taking action to enforce his security.

23 The payments mentioned in the Regent's Canal case are the type of payments that in my opinion fall within the scope of payments necessary for the preservation of property for the benefit of all interested parties. If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose. Again, if the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties, including the appellant. But a payment to a mortgagee of sums to which he was legally entitled under his charge, in my judgment, falls in a different category; it is not made to preserve the property for all interested parties but only to preserve the property for a certain group of interested parties; namely, the partners and the unsecured creditors. If the order under appeal is allowed to stand, the appellant will receive little or no benefit from the payments that were made, since the receiver will have priority over his charge for those payments. I do not think, therefore, that the third exception to the general rule has any application to the facts of this case.

24 To sum up, I can see no basis for granting the receiver priority over the appellant's charge for the sum of $24,043.26 paid by the receiver to the appellant.

25 The appeal should be allowed with costs, and the order of Holland, J., of December 13, 1974, should be varied by striking out para. 2 thereof.

Appeal allowed.

TAB 10

Indexed as:

Royal Bank of Canada v. Vulcan Machinery & Equipment Ltd.

Between
Royal Bank of Canada, plaintiff, and
Vulcan Machinery & Equipment Ltd., defendants

[1992] A.J. No. 1216

[1992] 6 W.W.R. 307

3 Alta. L.R. (3d) 358

13 C.B.R. (3d) 69

No. 9001-14546

Alberta Court of Queen's Bench
Judicial District of Calgary

Cairns J.

June 5, 1992.

(37 pp.)

Statutes, Regulations and Rules Cited:

Alberta Business Corporations Act, s. 95. Judicature Act, s. 13.
Rules of Civil Procedure, Rules 387(2), 548.

Practice -- Judgments and orders -- Ex parte orders -- Variation -- Receivers -- Compensation -- Court appointed receiver -- Bars -- Lack of notice.

Motions by Mitsubishi and Mitsui, creditors of the bankrupt Vulcan, to vary an order making them subject to the first charge of the receiver-manager for its costs and expenses. When Vulcan experienced financial difficulties and was unable to salvage the business, the Bank, by way of ex-parte motion, had a receiver-manager appointed, without notifying the other principal creditors until after the fact, despite the fact that the Order issued could seriously prejudice the secured creditors' rights. Within a week of formal notice, Mitsubishi demanded the equipment over which it had a voluntary surrender agreement. Mitsui had an interest in 13 units of equipment on which it had garnered possession prior to the receiving order. Mitsubishi and Mitsui later brought their motions for variation, submitting that they should not be bound by an ex-parte Order adversely affecting them, and that they did not fall under any of the common-law exceptions to the rule that a person could not be bound by a court order of which he had no notice.

HELD: Applications allowed. Mitsubishi and Mitsui exempted from the priority clause's ambit. There was no legal justification for enforcing the priority clause against the moving parties. The Bank did not establish that Mitsubishi and Mitsui fell within the common-law exceptions, which would have precluded their exclusion from the Order's application. The need for a court-appointed receiver was not so emergent, unusual, or extraordinary as to justify the Order granted which, with its priority clause, seriously prejudiced the secured creditors' rights. The Bank had several other options available to it which would not have had less drastic effects on the other creditors. Neither moving party consented to, approved, or acquiesced in the Order respecting priority. Mitsui maintained its position that it had possession of its property, and wanted nothing to do with the receiver-manager, while Mitsubishi stood fast in claiming that all it wanted was its equipment. There was no service of notice, and no benefit accrued to Mitsui or Mitsubishi, so neither could be liable for fees ex parte. There were no monies expended to maintain or preserve Mitsui's security, since it already had possession of it. Despite the manager-receiver's performance of many actions to safeguard Vulcan's assets, those activities did not benefit Mitsubishi and were conducted knowing of Mitsubishi's position regarding the manager-receiver and that it would have applied for and likely been exempted from the receivership Order had it received notice. No liability therefore attached to Mitsubishi.

Counsel:

J. Ircandia and D. Kohlenberg for the Royal Bank of Canada.
J.T. McCarthy and T. Czechkowskyj for Mitsui and Mitsubishi.
L. Robinson for Price Waterhouse (Receiver-Manager of Vulcan).

REASONS FOR JUDGMENT

1 CAIRNS J. (orally):-- These are reasons for judgment in the action Royal Bank and Mitsubishi and Mitsui. These matters came before the court by way of special chambers hearings on the motions of 1) Mitsubishi Canada Ltd., hereinafter referred to as "Mitsubishi" filed 10 January 1991, and originally returnable 4 February 1991; and 2) Mitsui Machinery Distribution Ltd., hereinafter referred to as "Mitsui" motion filed December 20, 1991, and originally returnable 20 February 1992, wherein the applicants, Mitsubishi and Mitsui seek to vary the Order of the Honourable Mr. Justice Medhurst dated 9 October 1990, hereinafter referred to as the "Medhurst Order" such that neither Mitsubishi or Mitsui are subject to the first charge, stipulated therein, of the receiver-manager for its costs and expenses. In other words, the applicants seek, pursuant to Section 95 of the Alberta Business Corporation's Act and pursuant to Rule 387(2) and pursuant to paragraph 24 of the Order - an Order excluding them from the effect of paragraph 14 of the Medhurst Order which stated:

> "14. Any expenditure which shall be properly made or incurred by the Receiver shall be allowed to it in passing its accounts and, together with its remuneration, shall form a charge on the undertaking, property and assets of the Defendant in priority to all security on the undertaking, property and assets of the Defendant presently held by the Plaintiff, or any other party, and all encumbrances subsequent thereto."

and further, for an Order excluding them at common law. The issues that I must address are therefore these:

1) Should Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst Order where in the receiver-manager of Vulcan Machinery & Equipment Ltd., hereinafter

referred to as "Vulcan Machinery", was given a first charge over all the assets of Vulcan Machinery including the secured assets of Mitsubishi and Mitsui; and,

2) If the answer to issue number 1 is in the negative, is there any other reason at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the receiver-manager's costs, fees, charges and expenditures in priority to the security held by Mitsubishi and Mitsui; and,

3) If either Mitsubishi or Mitsui or both are liable to the priority of the receiver-manager's fees, expenses, charges or expenditures, on what basis are the fees to be allocated to either Mitsubishi or Mitsui or both.

2 The facts of this lawsuit are complex, convoluted and multi-faceted, however, relatively simple as they relate to the granting of the Medhurst Order and events subsequent thereto. They may be simply stated as follows: Vulcan Machinery was in the business of sales, rentals and servicing of heavy equipment used in the construction and forestry industries, it having been incorporated in Ontario, and subsequently, registered extra-provincially in Alberta, Saskatchewan, Manitoba and British Columbia, in which provinces it conducted substantial business, having 13 offices and in the order of 170 employees. In other words, it was a substantial ongoing enterprise.

3 The principal banker and financier of Vulcan Machinery was the plaintiff in the within action, Royal Bank of Canada, who, at the time of the Medhurst Order was owed on outstanding loans nearly $14 million by Vulcan and in addition, in 1988, a deferred principal sum of $10 million. The Royal had been Vulcan's banker since 1982 and between then and October 1990, the date of the granting of the Medhurst Order, had advanced substantial loans, received substantial payments, taken various and sundry forms of security to include inter alia, fixed and floating charge debentures, pledge agreements, assignments of book debts, assignments of insurance, land mortgages, undertakings, guarantees, hypothecations and the like.

4 The debenture was in the amount of $50 million and provided, inter alia, 1) that the security was enforceable if the debtor Vulcan defaulted and, 2) that the bank, upon the security becoming enforceable or crystallising could appoint a receiver or a receiver-manager of the undertaking property and assets charged.

5 Over the course of time and having particular reference to the financial difficulties encountered by the debtor from time to time, the Bank and Vulcan entered into loan restructuring agreements in 1986, 1987 and 1988. The object of those exercises was to permit the debtor an opportunity to resolve its financial difficulties. It is also worthy of note that these various security documents between Vulcan and Royal permitted, expressly, Vulcan to grant security and encumbrances to its suppliers to include Komdresco, Mitsubishi and Mitsui, all in the ordinary course of business.

6 Despite efforts by the Bank and Vulcan to extricate itself from financial woes, Vulcan was not successful, as a result of which, by letter dated February 14, 1990, the Bank provided formal notice to Vulcan of default pursuant to the amended restructuring agreement and gave the debtor 30 days to rectify and remedy the default. The Bank did not immediately commence action, or, privately appoint by instrument a receiver or receiver-manager, but rather continued to work with the defaulting debtor in an attempt to resolve the financial difficulties or to effect a sale as a going concern of Vulcan Machinery. In fact, in May of 1990, some months after the default, Vulcan retained the accounting firm of Ernst and Young with a view to appraisal and possible sale.

7 By August of 1990, the principals of Vulcan, and the Vulcan Group has guarantors, conceded that they were unable to meet the bank's demands and further, conceded that if the sale were not consummated by mid-September, the debtor would consent to the appointment by the bank of a receiver-manager.

8 The September 17, 1990 deadline was extended to September 24, again to October 1 and again to October 8, 1990 to facilitate a resolve of financial difficulties or a sale, all without success. The sale that was anticipated was to a related company 'Vulmac', the shares of which were owned principally by Mr. Ken Knight, the principal of Vulcan Machinery and also the principal of another company of the Vulcan Group, known as Vulcan Machinery Sales Ltd.; and after offers and counteroffers were exchanged, up to and through October 3 and 4, no sale was consummated by October 8, 1990, or at all.

9 On October 5, 1990, a Friday prior to the 1990 Thanksgiving weekend (the Monday, October 8 being a holiday), the two major principals of Vulcan Machinery, Mr. Knight, the president, and Mr. Green, the vice-president and chief financial officer, both resigned their positions with notice to the debtor company with a copy to the bank dated October 5, 1990.

10 It is obvious from the evidence that the resignations shocked representatives of the Bank, Vulcan and Price Waterhouse and motivated the Order. In addition, Knight wrote also on October 5, 1990, to Vulcan's suppliers, inter alia, Mitsubishi and Mitsui, advising of the facts that, 1) no sale of Vulcan had been negotiated and 2) that he had resigned.

11 In addition, other events occurred on October 5 which are worthy of note. They are: 1) Mr. Steranka of the Royal Bank had several conversations this day with various people to include: a) Mr. Chuck Gerwing, Calgary counsel of Vulcan; b) Mr. Whent, general counsel of Vulcan in Thunder Bay, who first informed him of the resignations of Knight and Green; c) with Mr. Neil McManus, general counsel of one of the secured creditors, Komdresco.

12 In this conversation Mr. Steranka made no mention whatsoever of the already-formulated bank plans of obtaining a court-appointed receiver with its subject priority clause, and only stated to Mr. McManus, "The Bank would be doing what we consider necessary", reference transcript number 8, page 150, line 8. In fact, McManus specifically mentioned receivership to Mr. Steranka to which Mr. Steranka replied, "I will check with my superiors and we will do whatever is necessary". His explanation for this omission was two-fold: 1) he felt the receiver would so notify Mr. McManus after the granting of the Order and the creditor would then be able to exercise rights of appeal or variation, and, (2) "we were in an emergency and it was not a priority to contact McManus." All this despite his admission on cross-examination that he had all the documents to be presented to the court, prior to October 5, 1990. In fact, by September 19, 1990, he had a draft statement of claim, Order, and application which were reviewed at a meeting of Bank officials and solicitors September 20, 1990, and was aware of the priority provisiOns as to costs and that the pro-rata distribution of costs was, according to him, an advantage of going the "court-appointed route."

13 In other words, as he described on cross-examination, reference volume 19 page 303 lines 5 and 6:

> "We had all our ducks in order prior to the receivership, prior to October the 5th."

In addition, Mr. Steranka had conversations this day with Mr. Bourbonnais of the Royal Bank Special Loans Division to discuss "modus operandi" and a concern over the "rudderless ship" (being Vulcan) and it was determined that the only course was a court-appointed receiver. Further on this day Mr. Steranka had conversations with Mr. McPhedran of Price Waterhouse in conjunction with his retainer as receiver-manager and in conjunction with securing the properties, principally in Calgary and Thunder Bay, over the weekend. In fact, the evidence indicated that numerous "drive-bys" were conducted over the weekend October 5 to 8, 1990 by personnel of Price Waterhouse in Calgary and Thunder Bay and by representatives of the Royal Bank in Calgary.

14 In addition, the Bank in response to these continuing financial difficulties and the resignations

again demanded payment on its security which demand, of course, was not satisfied, with the result that the Bank deemed it expedient and necessary to apply for what was to become the Medhurst Order which application was made in the early afternoon hours of Tuesday, October 9, 1990.

15 There was, however, an incident of note which occurred at or about 9:00 a.m. October 9, 1990, prior to the application, and that related to a conversation between Mr. Steranka of the Bank and Mr. McPhedran of Price Waterhouse wherein it was conceded by each that "things were quiet at each of Thunder Bay and Calgary" and further that they had each driven by the Calgary property of Vulcan and saw "no activity -- everything was quiet." The evidence further indicated that at all branches of Vulcan across Canada there were various branch managers who were responsible people and Mr. Steranka testified on cross-examination that he had no reason to be suspicious of these branch managers, from a theft or misappropriation standpoint, in the face of the resignations of Knight and Green.

16 It is apparent from the evidence that the Bank had taken a considerable number of steps in anticipation of an application of a court-appointed receiver well in advance of October 5, 1990, to include:

1) A meeting in August of 1990 between Bank officials and Mr. McPhedran of Price Waterhouse Limited respecting its options and possible receivership; and
2) A meeting in mid-September between Bank officials and Mr. McPhedran wherein it was determined that, in the absence of an acceptable offer, the Bank would apply for a court-appointed receiver.

17 Mr. McPhedran stated in cross-examination that these preparatory meetings merely put Price Waterhouse on stand-by and were standard, normal practice.

3) The Bank's solicitors in mid-September prepared draft documents including draft statement of claim and draft application, affidavit and order; and
4) The Bank solicitors obtained, in late September of 1990 consent of Price Waterhouse to act as receiver-manager if appointed by the court on a subsequent application; and
5) The Bank's solicitors arranged for agent solicitors in British Columbia, Saskatchewan, Manitoba and Ontario.

18 One step, however, which neither the Bank nor its solicitors, nor the anticipated receiver-manager, Price Waterhouse, took was to notify any of the three principal secured creditors, Komdresco, Mitsubishi or Mitsui, of its plans to place Vulcan in receivership by way of court-appointed receiver-manager despite its planning and deliberation prior to and up to October 5, 1990, nor, and this is most germane to my deliberations, did it give any form of notice whatsoever to those secured creditors prior to the granting of the Medhurst Order, October 9, 1990, which Order, by at least two paragraphs thereof, specifically paragraphs 14 and 29, had the capability of seriously prejudicing the secured creditors and their security. This Order was granted pursuant to section 13 of the Judicature Act on an ex parte basis.

19 In addition, I am satisfied on the evidence that the Bank knew of these three secured creditors, Komdresco, Mitsubishi and Mitsui prior to the date of the application such that some form of notice, formal or informal, could have been given to them. Indeed at the hearing, Mr. Ircandia on behalf of the Royal Bank conceded that the Royal knew of Mitsubishi and Mitsui as suppliers, although it did not have a contact person for them, such as was the case with Komdresco and its contact, Mr. McManus. In fact, a review of the affidavit in support of the ex parte application, i.e., that of Mr. Peter Steranka sworn October 9, 1990 alludes, although not specifically to these secured creditors by name, to "numerous classes of claimants including trade creditors."

20 Subsequent to the granting of the Medhurst Order, the same was formally served upon the secured creditors, Mitsubishi and Mitsui on or about 19 October, 1990 at which time the provisions as to priority for the receivers administration expenses (paragraph 14) was specifically brought to the attention of Mitsubishi and Mitsui.

21 In addition, it would appear that the three secured creditors knew of the ex parte Medhurst Order and the appointment of Price Waterhouse sometime earlier than October 19, 1990, and within a few days of the Order having been granted. However, despite that, one thing is clear and uncontradicted; it was granted ex parte, Mitsui and Mitsubishi, and upon no notice of any kind or form to them. Mr. Steranka admitted on cross-examination that neither he nor anyone else at the Royal Bank canvassed the secured creditors prior to the appointment nor did he or anyone else at the Bank solicit their views or preference in relation to proceeding with a court-appointed receiver.

22 The security claimed by the two applicant secured creditors Mitsubishi and Mitsui is as follows:

23 1. as to Mitsubishi

a) it held individual conditional sales agreements on specific units of heavy equipment supplied to Vulcan Machinery; and

b) in addition, there was a priority agreement between Mitsubishi and the Royal Bank embodied in a subordination letter August 4, 1988, from Royal Bank to Mitsubishi; and

c) in addition, as at September 27, 1990, prior to the Medhurst Order, and resulting from negotiations between Mitsubishi and Vulcan Machinery, Mitsubishi had a voluntary surrender agreement from Vulcan as to specific machinery of Mitsubishi all as set forth in the voluntary surrender and schedule "A" attached thereto, all attached as Exhibit B to the Hasagawa affidavit sworn 7 January 1991.

24 Following advice of the Medhurst Order, Mitsubishi demanded its equipment by letter of October 26, 1990 (that is to say, within 1 week of formal notice), and again by solicitors' letters December 11 and 13, 1990, at which time Mitsubishi also advised as to an application to vary the Medhurst Order, the subject application now before me. By that time, specifically December 12, the receiver-manager, Price Waterhouse, had reported to the creditors, inter alia, that the receiver-manager was aware that Mitsubishi wished to realize on its security outside the administration of the receiverships by taking possession of its security and further that there was no apparent residual equity in the assets, the subject of the Mitsubishi security.

25 2. The security as it related to Mitsui was founded on its claiming an interest in 13 units of equipment on the basis of a verbal floor plan arrangement, and, in addition, possession having been garnered by it on or about September 21, 1990, prior to the receiving Order of Mr. Justice Medhurst.

The Law

26 I have been referred to several authorities by counsel herein for which I am grateful and I feel it appropriate to review and comment on these authorities.

1) Oberman v. Mannahugh Hotels et al. (1980) 34 C.B.R. (N.S.) 181 (Man. Q.B.).

27 This case involved an application by a receiver to determine priorities of claims against proceeds

realized from the sale of property. The receiver-manager had been appointed on application of a second mortgagee by the court on the consent of the first mortgagee. The property was ultimately sold, also by consent, and a dispute arose as to whether or not the first mortgagee ought to take a secondary position to the receiver's fees. The position of the first mortgagee was that the receiver must look to the equity of the defendant.

28 Mr. Justice Wilson, after discussing the facts and the positions of the parties stated at page 187:

> "And certainly, where the receiver acts under an appointment by the court, he may not (in the absence of an agreement for indemnity) look to the party at whose instance that Order was made, even where the appointment, as here, was made with the consent of all the interested parties: Boehm, supra, and Johnston v. Courtney, [1920] 2 W.W.R. 459 (B.C.C.A.). The reason for this is that a receiver so appointed is not the agent of any party, including the one whose initial request led to his appointment, but rather he is an officer of the court, and in the discharge of the responsibilities entailed by such appointment he is prima facie to be looked upon as the arm of the court in that behalf: see also Braid Bldrs. Supply & Fuel Ltd. v. Genevieve Mtge. Corpn. (1972), 17 C.B.R. (N.S.) 305 at 305, 29 D.L.R. (3d) 373 (Man. C.A.), per Dickson J.A. (as he then was):
>
> > 'In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration as was done in Howell v. Dawson (1884), 13 Q.B.D. 67 (D.C.).'

And he continued at page 307, 308:

> 'The argument is that a receiver can receive his remuneration costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: Strapp v. Bull, Sons & Co. Shaw v. London School Bd. [1895] 2 Ch. 1 (C.A.): Re Glasdir Copper Mines Ltd.: English Electro-Metallurgical Co. Ltd. v. Glasdir Conner Mines Ltd. [1906] 1 Ch. 365 (C.A.). It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of the creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?'"

Further at page 189, Wilson J. stated:

> "And see Credit Foncier Franco-Can. v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734, affirmed 56 W.W.R. 623n (Alta. C.A.), where Kirby J. at p. 743 accepted the opinion of Smith L.J. in Strapp v. Bull, Sons & Co., supra. at p. 9, that:
>
> > 'Now, it seems to me that so far as the general law is applicable to the position of the receivers and managers, it is not in dispute. It is laid down in Batten v. Wedgwood Coal & Iron Co. (1884), 28 Ch. D. 317, and in Re Bushell: Ex parte Izard (1883), 23 Ch. D. 75 (C.A.), by Sir George Jessel; and nobody on the one side or the other quarrels with the law which was there enunciated, that the receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed receivers and managers, and they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property'".

And further at page 189 Wilson J. stated:

> "The situation may be otherwise where the receiver was appointed by the creditor himself pursuant to the terms of the debenture or other security signed by the debtor..."

And further at page 190 Wilson J. stated:

> "Prima facie, then, the receiver is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the receiver (Re Sil-Van Consol. Mining etc. Co.; Can. Trust Co. v. Sil-Van Consol. Mining etc. Co. (1957), 23 W.W.R. 142 (B.C.)) will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the receiver himself..."

2) Re Lochson Holdings Ltds v. Eaton Mechanical Inc. et al (1984) 10 D.L.R. (4th) 630 (B.C.C.A.).

29 In this case a third mortgagee brought foreclosure proceedings and applied for and obtained a receiving order with no notice and thus, ex parte, FBDB who held both the first and second mortgage. The receiver expended monies in the renovation of the hotel. The property sold, and an application was brought to fix priorities. It was held at trial that the receiver's fees took priority. However, on appeal, it was reversed and no priority for the receiver's fees was granted.

30 The headnote which accurately reflected the decision read in part:

> "Since the FBD Bank was not a party to the third mortgage foreclosure proceedings and did not receive notice of the application for the appointment of the receiver and, therefore, did not consent to the expenditure by the receiver, the receiver could not be given priority over it, unless the expenses incurred by the receiver were necessary for the preservation or improvement of the property."

In this case Hinkson J.A. speaking for the court stated at page 632 and following:

> "It is fundamental that a person is not to be bound by a court order of which he has no

> notice. In the Lochson foreclosure proceedings the Federal Business Development Bank was not named as a respondent nor, as I have indicated, did it have notice of the application. That then is the starting point in these proceedings, namely, that the Federal Business Development Bank cannot be bound by the order made by the Honourable Judge Stewart."

And further at page 632, Hinkson J.A. stated:

> "As the receiver and the Canadian Imperial Bank of Commerce are unable to rely upon the order made by Judge Stewart on August 10, 1978, it has been necessary to fall back on the position at common law in order to sustain the priority granted by Judge Tyrwhitt-Drake."

And further at page 633 Hinkson J.A. stated:

> "In my opinion, the issue is to be resolved on the basis of the decision of the Ontario Court of Appeal in Robert F. Kowal Investment Ltd. et al. v. Deeder Electric Ltd. (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201. In that case a secured creditor received no notice of the application to appoint a receiver and the issue arose as to whether or not and upon what basis the secured creditor could become bound by the acts of the receiver so that the receiver would be entitled to priority over the secured creditor. Mr. Justice Houlden, in delivering the judgment of the court, made reference to Clark on Receivers 3rd ed., vol. 1, s. 22, p. 25, and quoted from that text at p. 496 D.L.R., p. 88 O.R. of the judgment, as follows:
>
> > 'When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.'
>
> I understand that statement to express the position at law.
>
> Then, Mr. Justice Houlden continued at p. 496 D.L.R., p. 88 O.R.:
>
> 'There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security

> given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.'

Pausing there for a moment, in my opinion the receiver and thus the Canadian Imperial Bank of Commerce do not fall within the first exception.

Then Mr. Justice Houlden continued to discuss a second exception, and he said this at p. 497 D.L.R., p. 89 O.R.:

> 'The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him.'

Mr. Meyer, on behalf of the Canadian Imperial Bank of Commerce, sought to come within the second exception. But Mr. Justice Houlden, after stating that to be a second exception, said this at p. 499 D.L.R., p. 91 O.R., in discussing it:

> 'Although the Court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly, notice would have to be given to the appellant [I interpolate - the secured creditor] of such an application and likely the appellant would have to be made a party to the proceedings.'

Now, on the facts of the present case, if that be the situation, then clearly the second exception has no application because no notice was given to the Federal Business Development Bank, nor was it made a party to the proceedings.

The third exception discussed by Mr. Justice Houlden is the situation where the receiver has expended money for necessary preservation or improvement of the property."

Further at page 635, Mr. Justice Hinkson stated:

> "An analysis of the three exceptions indicates that with regard to the first and second, the secured creditor must either apply for, consent to, or approve of, the appointment of a receiver or have notice under the second exception. The third exception, it seems to me, deals with a different type of situation, really one where there are circumstances which require the receiver to do something to preserve the property in an emergency situation where there is not time to come to the court beforehand and give notice to the creditors beforehand of what he intends to do, and thus obtain the approval of the court, and so he comes to the court after the event and in appropriate circumstances the court will approve the action of the receiver in those circumstances.
>
> In my opinion on the facts of the present case, the receiver does not come within the third exception.
>
> So, I go back to what Mr. Justice Houlden said with respect to the common law

position, namely, that a court under such circumstances has no power to authorize expenses for improving or making additions to the property for carrying on the business of the defendant at the expense of prior mortgages or lienholders without the sanction of such mortgagees or lienholders. It seems to me that that is the principle that applies in these circumstances."

3) Royal Bank of Canada v. Canadian Aero-Marine Industries Inc. Ct. of Q.B. (Alta) (1989) 74 C.B.R. (N.S.) 221.

31 In this case the Bank applied ex parte, for the appointment of a receiver-manager respecting the defendant. There were statutory claimants, Workers' Compensation Board and Revenue Canada, who continued to press their claims after learning of the appointment. Costs were incurred by the receiver-manager and the issue was one of priority. The headnote in part read:

> "As the receiver-manager proceeded to incur the expenses of preservation and realization with the knowledge that Revenue Canada and W.C.B. intended to press their claims, it must be taken to have assumed the risk that the court might be powerless to ensure reimbursement even though it was acting on behalf of the court. Consequently, the receiver-manager could not have priority over W.C.B. or Revenue Canada."

In this case, Mr. Justice D.C. McDonald stated at pages 230 and 231:

> "3. The claim of the receiver-manager for fees and certain disbursements
>
> Coopers claims priority for its fees, and for certain costs of preservation and realization. I have earlier indicated that those fees and disbursements totalled $159,406.52. In addition, in order to finance the process of preservation and realization, Coopers made borrowings of approximately $105,000.
>
> If Revenue Canada and the W.C.B. had been given notice of the application by the bank to a master of this court for the appointment of Coopers as receiver-manager, and had not opposed the appointment, Mr. Bondar might have succeeded in persuading me that by the application of one principle or another Revenue Canada and the W.C.B. should be precluded from asserting their statutory trust and charge respectively. I need not speculate as to what principle might properly be applied to achieve that result. The fact is that the bank made its application ex parte, without notice to Revenue Canada or the W.C.B. Since then, the bank and the receiver have been aware that neither Revenue Canada or the W.C.B. intended to retreat from their respective statutory redoubts. Yet Coopers proceeded to incur the expenses of preservation and realization, and must be taken to have assumed the risk in doing so that, although it acted on behalf of the court, the court might be powerless to ensure that it would be reimbursed for its outlay or paid fees for its services.
>
> Consequently, the claim of coopers for priority over the claims of the W.C.B. and Revenue Canada fails."

4) Bank of Montreal v. Shaw Ranches Ltd. et al (1984), 51 C.B.R. (N.S.) 292 - (B.C.S.C.)

32 The second mortgagee in an action applied, ex parte, for a receiver-manager on no notice or participation by the first mortgagee although the first mortgagee had supported an earlier application for

a receiver-manager which had been denied. The receiver-manager claimed priority for fees over the first mortgagee. The court held that the receiver-manager was not entitled to a priority over the plaintiff as the plaintiff was not present or represented at the time of appointment and the receiver-manager had failed to discharge its onus upon it to prove acquiescence, consent or approval by the plaintiff to its appointment or subsequent actions.

33 The court in this case distinguished both Oberman, due to consent, and the decision of the British Columbia Court of Appeal in Federal Business Development Bank and Persic (1981), 32 B.C.L.R. 75 where the court found acquiescence and therefore in exception to the Kowal decision.

5) Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84 (Ont. C.A.)

34 I have quoted extensively from this case in my review of the Lochson case and thus I intend to refer again only to a portion of the headnote which accurately and succinctly sets forth the decision:

> "As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed. ... vol. 2, s. 638, pp. (1070-1) ... applied.
>
> There are certain exceptions to the general rule. The first exception is this: If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of, his appointment, the receiver will have priority for charges and expenses properly incurred by him. Strapp v. Bull, Sons & Co.; Shaw v. School Board of London, [1895] 2 Ch. 1. Applied.
>
> ...
>
> The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: Greenwood v. Algesiras (Gibraltar) R. Co., [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: Greenwood v. Algesiras (Gibraltar) R. Co.; and it will require compelling and urgent reasons for the Court to grant its approval if the secured creditors oppose the making of the order.
>
> ...
>
> The third exception which should be noted is this: If the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors.

> In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties ... but a payment to a mortgagee of sums to which he was legally entitled under his charge ... falls in a different category; it is not made to preserve the property for all interested parties but only to preserve the property for a certain group of interested parties; namely, the partners and the unsecured creditors. In such a case, the receiver would be entitled only to priority over the monies of the partners and the unsecured creditors for the monies he had borrowed to make payments on the mortgage."

6) C.I.B.C. v. William Reiger (Alta) Q.B. unreported decision of Mr. Justice Peter Power, November 1991.

35 Similar to the instant case, this case involved an application by creditors to vary an, ex parte, Order with respect to a priority clause which required creditors to pay a portion of the fees and expenses of a receiver-manager. The Order appointing the receiver-manager had a similar provision to paragraph 14 of the Medhurst Order which read, in part, in paragraph 22, as follows:

> "The receiver's fees shall be paid from the assets of the estate of the Defendant, including the assets secured by parties other than the Plaintiff, on a basis proportionate to the amount of time spent by the Receiver in relation to the secured asset --"

In addition, the receiver was to maintain separate accounting records in order to ultimately attribute costs and expenses.

36 The debtor company, a substantial farm implement dealership, had experienced financial difficulties and had closed its doors approximately one week prior to the application for the Order. The Order was granted with the cooperation of the debtor company, however, on no notice to any of the creditors, other than AOC who had received notice, a draft of the Order, but who did not appear on the application. It was the suggestion of counsel for the company that clause 22 be inserted. It was also of record that none of the creditors, with the exception of AOC, were aware of the Bank's proceedings or the application, August 15, 1991, for the ex parte Order and further, that AOC did not, prior to it being granted, consent to or approve the Order.

37 The day following the granting of the Order, the same was forwarded to creditors together with a letter bringing attention to the priority paragraph.

38 Paragraph 23 of the Order gave interested parties the right to apply to vary, and the motion was launched approximately seven weeks after granting of the Order, and, after the receiver had stepped in and incurred substantial expenses in protecting, reviewing and insuring assets, and maintaining staff.

39 Mr. Justice Power stated at page 7 and following of the unreported decision as follows:

> "I recognize that when the Court takes the step of appointing a Receiver that the obligation then is clear that the Court must protect the Receiver by way of ensuring that the Receiver will be paid for all of its reasonable costs in undertaking that particular task. That principle is clearly set out in Strapp v. Bull, Sons and Co. [1895] 2 Ch. 1 by Smith L.J. where he says:

> 'And nobody on the one side or the other quarrels with the law that the Receivers and Managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed Receivers and Managers and that they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property.'"

Mr. Justice Power then referred to, firstly the Credit Foncier v. Edmonton Airport Hotel case and secondly, the Deloitte Haskins and PRD Travel Investment case to the same effect that the court must protect the receiver court appointed.

40 And then at page 8, Justice Power continued:

> "Reference is made to the decision of Houlden J.A. in Robert F. Kowal Investments Ltd. and Randy Construction Company Limited v. Deeder Electric Ltd. (1975) 21 C.B.R. (N.S.) 201 where Houlden J.A., stated that as a general rule the Court should not subject the security of a prior secured creditor to liability for fees and disbursements incurred by a Receiver, however, he listed the following three exceptions to the general rule:
>
> 1. If the Receiver has been appointed at the request of or with the consent or approval of holders of security.
> 2. If the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors.
> 3. If the Receiver has expended money for the necessary preservation or improvement of the property.
>
> Reference has been made to the decision of McDonald J., in the Royal Bank of Canada v. Canadian Aero-Marine Industries Inc. (1989) 74 C.B.R. 221 and in that particular case, the Court held the appointment of the Receiver had been ex parte and without notice to the interested creditors and that the Receiver knew that the creditors would not consent to the extraordinary expenditures. Where the rights of the interested creditors are affected, the requirement of notice cannot be waived unless exceptional physical emergency dictates immediate action after the Receiver is duly appointed.
>
> From the facts put before the Court by counsel, it is clear that Reiger was in financial difficulty, that the doors of the farm implement operation were closed. That a Receivership Order could have been granted advising all creditors that the assets were to be protected by way of a Receiver Order being put in place. That on proper notice, the Receiver would be seeking a specific order to protect him for fees and expenses. And that this application would be made a reasonable period of time after the Receivership Order was granted. In this case, that did not happen."

And further at page 10, Mr. Justice Power said:

> "In any event, the creditors did not realize that the method of allocating costs and expenses by the Receiver was going to affect them financially on a proportionate basis that most of the creditors found unacceptable. The Court is in full agreement with the statement made by the British Columbia Court of Appeal in Lochson Holdings v. Eaton Mechanical Inc. et al. (1984) 10 D.L.R. (4th) 630. At page 632, specifically, the Court states:

> 'It is fundamental that a person is not to be bound by a court order of which he has no notice.'
>
> In this case, I am satisfied there was sufficient time to get prior Court approval of the proposed extraordinary source of remuneration being sought by the Receiver. I am satisfied that the cost allocation schedule and the formula in paragraph 22 of the Receivership Order has the effect of depriving the secured creditors of a substantial portion of the benefit to which they are entitled."

Further at page 12 of the unreported decision, Mr. Justice Power stated:

> "The exceptions that the Court has to look at with respect to the appointment of the Receiver include: number one, the Receiver has been appointed at the request or with the consent or approval of the holders of security. I am satisfied from the material put before the Court that the Receiver was not appointed at the request or with the consent, approval, or acquiescence of any of the secured creditors with the exception of the fact that Alberta Opportunity Company was aware that the Receivership Order was going to be applied for but indicated it did not approve of the order.
>
> Secondly, that the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties including secured creditors. In my opinion, the secured creditors had no need to have their goods and equipment protected as they were perfectly prepared to remove them from the premises of Reiger to a place of safekeeping the majority of which had their own distribution network and dealers throughout the province and could have disposed of this farm implement equipment and parts without the intervention of a Receiver.
>
> The third condition, the Receiver has expended money for the necessary preservation or improvements of the property. In my view, the position of the secured creditors is that the preservation of their property by the Receiver was not an activity which was initiated at the request of the secured creditors nor was it something that was done with the acquiescence of the secured creditors.
>
> It is my opinion that there is no basis at law for enforcing the provisions of paragraph 22 of the Receivership Order as against the secured creditors. Facts of this case do not establish that there is any basis for an exception to the fundamental rule that a party not be bound by an Order granted on an application in respect to which it had no notice. The Receiver has not discharged its burden of establishing such an exception but rather the evidence establishes that the factual basis needed for the application of the exception to the fundamental rule are not present in this case."

7) Re Stenner Financial Services Ltd. [1988] B.C.J. 965, a decision of the British Columbia Supreme Court.

41 Stenner, a mutual fund dealer, failed to comply with regulations under the BC Security Act and accordingly, the BC Securities Commission applied ex parte for an Order appointing a receiver. The Order included a priority clause. The court was not obliged to rule on the priority question in view of a prior assignment, however stated at page 2 of the report:

> "-- that I make the passing comment that on the basis of such cases as Robert F.

Kowal Investments v. Deeder Electric Ltd. (1975), 59 D.L.R. (3d) 492, I would have been prepared in spite of the non-notification of the Canadian Imperial Bank of Commerce, to uphold the priority accorded the receiver on the basis that in my view,

1. The receiver was appointed to preserve or realize assets for the benefit of all interested parties including the secured creditor; or
2. That the receiver has expended monies for the necessary preservation of the property to the benefit of all parties."

In other words, he would have held, if so obliged, to grant the priority on exceptions 2 and 3 of Kowal despite no service, due to the emergent nature of the proceeding and need for the Order.

8) Deloitte Haskins et al v. P.R.D. Travel Investments Inc. (1984) 55 B.C.L.R. 38, a decision of the B.C. Court of Appeal.

42 In this case, the Registrar of Travel Agents was appointed a receiver with respect to a travel agent. On a subsequent application, the receiver applied for a first charge provision which latter application was opposed by a debenture holder on the basis of no acquiescence on the initial application by the debenture holder and secondly, on the basis of an indemnity provided the receiver.

43 In my view, this case has no application to the case at bar as it did not deal with an ex parte application for a receiver with the priority clause inserted at time of application, but rather was a case envisaged by Mr. Justice Power in Reiger, that is to say, a two-stage application; the second stage, for the priority, which was upheld in Chambers, and on appeal in the PRD case.

44 The respective positions of the two major litigants on this application, Mitsubishi and Mitsui on the one hand, and Royal Bank on the other are as follows:

45 1. Mitsubishi and Mitsui submit (a) that they ought not to be bound by an Order adversely affecting them on which they received no notice, that is to say an ex parte Order; and (b) that they do not fall within any of the three exceptions enumerated in the Kowal case in that, one, they did not consent, approve of or acquiesce in the Order and the priority clause, but rather showed no intent to retreat, (to use the words of Mr. Justice McDonald, in the Canadian Aero-Marine case) against the Order by simply demanding their security after the receiver-manager inquired as to one, validity and two, equity of the security held; and two, they did not receive notice and therefore exception number 2 of Kowal does not apply; however, even if it does, they derived no benefit from the services of the receiver-manager, but rather his services and conduct were a detriment to Mitsubishi and Mitsui or at the very best, a balance; and three, that they don't fall within exception of Kowal number 3 as no monies were expended to necessarily preserve or maintain their security and, therefore, they ought not to be obliged to satisfy any of the receiver-managers' fees, charges or expenses, either pursuant to paragraph 14 of the Order, or at common law on the exceptions of Kowal.

46 On the other hand, the Royal Bank submits that, while there was no prior notice, the secured creditors ought to share in payment of a portion of the receiver-manager's fees, costs, expenses and charges in that Mitsubishi and Mitsui one, acquiesced in the Order or by its delay in moving to vary, approved thereof and thereby took a benefit; and, two, despite lack of service, the matter was so emergent, so unusual, so extraordinary that exception number 2 of Kowal ought to be extended to include Mitsubishi and Mitsui in that the receiver-manager preserved and realized for the benefit of all creditors, including Mitsubishi and Mitsui; and, three, that they ought to share in the costs of expenses of the receiver-manager on exception number 3 to Kowal in relation to monies expended for the preservation and maintenance of Mitsubishi and Mitsui security.

47 As I stated earlier I must in this action address three issues.

48 The first issue is: Should either Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst Order wherein the receiver-manager of Vulcan Machinery & Equipment, namely Price Waterhouse, was given a first charge over all the assets of Vulcan, including the secured assets of Mitsubishi and Mitsui. I have no difficulty with the theories expounded to me as follows: One, I recognize the necessity that a court-appointed receiver-manager must be protected by the court in conjunction with its fees, expenses, charges and costs properly incurred in the administration of the estate on behalf of all creditors. Two, I also recognize and am in full and total agreement with the principles so aptly stated in the Lochson case wherein the British Columbia Court of Appeal stated, and Mr. Justice Power adopted in Reiger, that:

> "It is fundamental that a person is not to be bound by a court order of which he has no notice."

49 In my opinion, while there may have been a need, indeed an urgent need, for the court-appointed receiver, there was, in my opinion however no such emergent, unusual, or extraordinary need for the appointment of a receiver-manager with the priority clause (Section 14) such as to justify the so-called "double-barrelled" Order as granted therein, which Order, with the priority clause contained therein, had the effect of seriously prejudicing the rights of secured creditors such as Mitsubishi and Mitsui to the point of trammelling their rights. It is all well and good to argue that these parties had rights to apply to vary on a subsequent application, however that, in my view, puts the onus on entirely the wrong party.

50 I make these comments recognizing that the Royal Bank, in this case on October 5 and October 9, 1990, was most concerned as to its secured position. However, it had in my view, several options available to it which would have "stemmed the tide" and at the same time not adversely affected others' rights. While not necessarily exhaustive those options included: One, on October 5, 1990, on the resignation of Knight and Green, it could have appointed a receiver such as Price Waterhouse, who was ready to "swing into action", as indeed it did so by the evidence of the drive-bys, such appointment being private and by way of instrument as it was authorized by its debenture to do. That, of course, would have been short-term relief but effective nonetheless; or, two, it could have applied October 5 or October 9 for a receiver-manager only, leaving for another day, and upon proper notice the question of the priority. This, of course, was suggested by Justice Power in Reiger; or, three, it could have applied, giving informal notice to the secured creditors, as is often done in this jurisdiction; or, four, it could have formally applied on short notice, pursuant to Rule 548, on the Tuesday or Wednesday, October 9 or 10; or, five, it could have given an informal notice or indication in August or September of 1990 to the secured creditors of an anticipated application, that is to say it could have informed the secured creditors that in the event of no sale or resolve of financial difficulties they intended to apply for a receiver-manager with the priority clause. This is also a step, or was also a step taken in the Reiger case, as decided by Justice Power, qua AOC.

51 Instead the Royal Bank took none of these steps, but rather, applied and obtained the Medhurst Order, appointing Price Waterhouse as receiver-manager with the priority clause which, nearly two years later, has resulted in this long and no doubt expensive chambers application which has lasted seven days and resulted in countless hours of preparation, including days and days of cross-examination on affidavits, comprising some twenty volumes and approximately 1750 pages of exhibits, all of which could have been avoided in large measure by notice to those parties adversely affected, being the applicants herein Mitsubishi and Mitsui.

52 The applicants would have me say that lack of notice herein was deliberate and deceitful and that service was' avoided to facilitate the Order. However, I do not go that far, although my comments will

make it obvious that lack of notice has given rise to this rather difficult motion.

53 Having said all of that, and in specific response to the first issue to be addressed, it is my opinion that there can be no justification at law for enforcing the provisions of paragraph 14 of the Medhurst Order as against those challenging secured creditors, Mitsubishi and Mitsui.

54 As to issue number two, which is, is there any other justification at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the receiver-manager's cost, charges and expenses in priority to its security?

55 To succeed then, on this application, the Royal Bank has the onus to establish that the secured creditors, Mitsubishi and Mitsui or either of them fall within the Kowal exceptions or as otherwise stated, the common-law position. I intend to deal with each creditor and the three exceptions individually commencing with Mitsui.

56 As to exception 1 of Kowal, I have considered the matter and I am satisfied on the evidence that Mitsui neither consented, approved of nor acquiesced in the Order respecting priority. On the evidence, it maintained its position throughout that it had possession of its property, other than through what it says was intervention by the receiver-manager, and it wanted nothing to do with the receiver-manager whatsoever.

57 As to exception 2, this exception is not available in argument to the Bank in view of no service. However, if I am wrong in that, and there are circumstances whereby despite lack of service an unusual, emergent, extraordinary situation might arise (and I am hard-pressed to envisage such a situation what with the viable options available) where a secured creditor might be liable for fees ex parte. There was in this case no such situation, and further, no benefit accrued to the creditor Mitsui.

58 As to exception No. 3, there were, in my judgment, no monies expended to maintain or preserve the security of Mitsui however, if there were, they were monies either not properly expended, or if properly expended, on property over which they had no entitlement. In the result, Mitsui is liable for none of the receiver-manager's fees pursuant to paragraph 14 of the Medhurst Order or at common law.

59 As to Mitsubishi and exception 1 in respect of consent, approval, application for the Order or acquiescence, I have reviewed the evidence and I am satisfied thereon that Mitsubishi "stood fast" in its resolve that all it wanted was its equipment and that it would "go away."

60 That conclusion is reached by me notwithstanding the fact of two sales by the receiver-manager on behalf of Mitsubishi, in my view, on a case-by-case-contract basis, for which the receiver-manager, Price Waterhouse, was paid a commission or a fee or recovered on the equity therein or otherwise derived a pecuniary benefit or at least the Royal Bank did. And despite the fact that the receiver-manager expected to receive proposals from Mitsubishi and despite the fact that Mitsubishi knew the receiver was incurring costs and despite the fact it knew on or about October 19, 1990, of the so-called priority clause. It remained steadfast in its position as is evidenced by its letter, October 26, 1990, to the receiver-manager demanding its goods and its solicitor's letters December 11 and 13, 1990, threatening an application to vary the Medhurst Order, and for the return of its goods.

61 As to exception No. 2 in Mitsubishi for the reasons stated respecting Mitsui is aforesaid. Similarly Mitsubishi does not fall into this category or exception.

62 As to Mitsubishi and exception No. 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver-manger performed services such as employee retention, changing locks, inventory lists,

hiring Mr. McIvor (a former employee of Vulcan) dealing with landlords and ensuring that no restraints or seizures occurred, liquidating furniture, ensuring equipment, attending warranty work and service work, attending to statutory claims, dealing with parts over which Mitsubishi had no security and other miscellaneous matters, none of these activities, in my view, benefitted, on balance, Mitsubishi and were conducted by Price Waterhouse knowing of Mitsubishi's position that it simply wanted its goods back and wanted nothing to do with Price Waterhouse in its capacity as receiver-manager of Vulcan and would have, subject to Price Waterhouse, inquiring as to the validity and equity of their security, applied for and likely been exempted from the receivership Order had it received notice. On a strict wording of the third Kowal exception being:

> "The receiver has expended money for the necessary preservation and improvement of the property."

63 It is my opinion, somewhat reluctantly, that no liability attaches to Mitsubishi.

64 In the result then, Mitsubishi too, is exonerated from payment of the receiver-manager's fees, either pursuant to paragraph 14 of the Medhurst Order or at common law.

65 As to issue No. 3, as to apportionment and allocation, that issue need not be addressed in view of my rulings aforesaid.

qp/s/mmr/mjb/DRS/DRS/DRS

TAB 11

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2012 CarswellOnt 10902, 2012 ONSC 4693, 222 A.C.W.S. (3d) 854

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2012 CarswellOnt 10902, 2012 ONSC 4693, 222 A.C.W.S. (3d) 854

Romspen Investment Corp. v. Edgeworth Properties

Romspen Investment Corporation, Applicant and Edgeworth Properties - Derrick View Estates Inc., 1253122 Alberta Ltd., Edgeworth Properties - Heartland Ridge Inc., Edgeworth Properties - Southpoint Landing Inc., Edgeworth Place at Spruce Ridge Drive Inc., Edgeworth Properties — Creekside Estates Inc., Edgeworth Place at Heartland Inc., Edgeworth Properties — Wolf Creek Estates Inc., Edgeworth Estates at Manning Drive Phase I Inc., Edgeworth Properties — Ellerslie Ridge Inc., 1519560 Alberta Ltd., Derrick View Estates Phase II Inc., 1330433 Alberta Ltd., Respondents

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: July 31 - August 3, 2012
Judgment: August 15, 2012
Docket: CV-11-9452 CL

Counsel: David P. Preger, Lisa S. Corne, for Plaintiff, Romspen Investment Corporation

R. Shayne Kukulowicz, Kate Stigler, for Defendants, Edgeworth Properties Inc. et al.

Katherine McEachern, for Monitor

Craig A. Mills, Terrence Warner, Lesley Akst, for Receiver

Ken Lenz, for Edgeworth Mortgage Investment Corporation, Edgeworth Mortgage Investment II Corporation, Biggs Avenue Mortgage Investment Corporation and the preferred shareholders of same

John Salmas, for Canada Mortgage and Housing Corporation

Subject: Property; Corporate and Commercial; Insolvency; Securities

Real property --- Mortgages — Priorities — Between types of creditors — Registered and unregistered or equitable mortgagee

Cases considered by *C. Campbell J.*:

Dominion Stores Ltd. v. United Trust Co. (1976), 1 R.P.R. 1, 11 N.R. 97, [1977] 2 S.C.R. 915, 71 D.L.R.

(3d) 72, 1976 CarswellOnt 383, 1976 CarswellOnt 404 (S.C.C.) — considered

Holt Renfrew & Co. v. Henry Singer Ltd. (1982), 1982 CarswellAlta 92, 20 Alta. L.R. (2d) 97, 135 D.L.R. (3d) 391, 37 A.R. 90, [1982] 4 W.W.R. 481 (Alta. C.A.) — considered

RIC New Brunswick Inc. v. 1301725 Alberta Ltd. (2012), 2012 CarswellAlta 547, 2012 ABQB 213 (Alta. Master) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

Land Titles Act, R.S.A. 2000, c. L-4

Generally — referred to

s. 161(a) — considered

s. 203 — considered

APPLICATION by mortgagee for declaration of priority and for orders that receiver distribute proceeds of sale to it and permitting it to proceed with judicial sale or foreclosure.

***C. Campbell J.*:**

1 Romspen Investment Corporation ("Romspen") claims as the first secured mortgage creditor of the Respondents and seeks on this motion a declaration of the validity of its security over the real property and related personal property of the Respondents and an order as against Edgeworth (in CCAA) and other claimant creditors for the listing and sale of various remaining receivership properties.

2 The relief sought is opposed on behalf of the many holders of undivided interest investors (the "UDI Investors") and various lot purchasers (the "Lot Purchasers") in many of the properties over which Romspen claims for security. The UDI Investors also oppose the distribution proposed by the Receiver to Romspen of funds from the sale of properties previously authorized by orders of this Court.

3 As the UDI Investors and the Lot Purchasers were not represented by counsel at this time, the Court requested the Receiver of Edgeworth to undertake an investigation of the claims of the UDI Investors and Lot Purchasers and obtain a report from Alberta counsel to the Receiver with respect to the priority claim of Romspen.

4 The Romspen relief is also opposed on behalf of mortgage corporation investors (MIC) in respect of receivership properties over which they claim priority of security interest.

5 The Court having heard the Romspen position delayed rendering a decision to enable representatives on

behalf of UDIs and Lot Purchasers to make further submissions. Written submissions were received from Mr. Clinton Thierman who also made oral submissions as did Mr. Wei Cheng Tan and Mr. Edwin Neo. Mr. Murray Wotherspoon made oral comments.

6 Having heard submissions on behalf of all parties and for the reasons below, I am satisfied that Romspen is entitled to the relief sought and the Order with the amendments agreed on by counsel discussed in the telephone conference call of August 3 should issue.

7 Romspen seeks an order:

> a) declaring that it holds valid, enforceable, first, and in certain cases second, ranking security against the real properties and related personal property owned by the Edgeworth Respondents, subject only to certain charges created by the Receivership Order, the *Bankruptcy and Insolvency Act*, and liens for unpaid municipal realty taxes collectively;
>
> b) directing MNP Ltd. in its capacity as Court-appointed receiver to distribute to Romspen from the net sale proceeds realized from the Properties sold by the Receiver, all amounts required to repay the indebtedness of the Respondents to Romspen; and
>
> c) permitting Romspen to proceed with judicial sale/foreclosure proceedings in Alberta in respect of the remaining Receivership Properties (other than the property owned by Edgeworth Place at Spruce Ridge Drive Inc.).

8 Romspen advanced funds to the Respondents pursuant to a Commitment Letter dated September 27, 2010, as amended by Supplement No. 1 dated October 7, 2010. Of the funds advanced by Romspen, $9.7 million was used by the Respondents to refinance and replace preexisting mortgages registered against Spruce Ridge, $1.34 million was used to refinance and replace a pre-existing mortgage on a property known as Half Moon Lake and $5.5 million was used to purchase the Blackfalds property.

9 Romspen's advances to the Respondents are secured by a mortgage and supplemental mortgage registered against title to all of the Properties, and a security interest in all of the Respondents' personal property.

10 In addition, Romspen acquired an assignment of certain loans and security held by Liberty Mortgage Services Ltd., Sterling Bridge Mortgage Corp. and Hurlburt Farms Ltd., each of which rank in priority to Romspen's blanket mortgage.

11 Based on the material before the court, I accept the analysis by Romspen that all of the existing interests and encumbrances registered against the Receivership Properties and in particular as set out in the table in the material where the interests of Rompsen, the MIC investors, the UDI investors and the Lot Purchasers rank in terms of priority i set out.

12 There are seven properties in which postponements were given by Edgeworth Mortgage Investment Corporation to Romspen's $23.5 million blanket mortgage. In respect of each of those seven Properties, Romspen's $23.5 million blanket mortgage is either in first or second position (behind one of the assigned mortgages noted above). In respect of three of the seven properties, the first-ranking mortgage which has now been assigned to Romspen was registered before the MIC mortgage was registered. Therefore, Romspen as assignee of the first ranking mortgages, ranks in priority to the MICs with respect to those three properties regardless of whether the

postponements granted by the MICs are valid. Moreover, there are four Properties which are subject to a mortgage held by Edgeworth Mortgage Investment II Corporation or Biggs Avenue Corporation. However, in each case where there is a mortgage held by Edgeworth Mortgage Investment II Corporation, or Biggs Avenue Corporation, Romspen's $23.5 million blanket mortgage was registered before Edgeworth Mortgage Investment II Corporation's charge, and before Biggs Avenue Corporation's charge.

13 In response to the Edgeworth Group's application for relief pursuant to the *CCAA*, Romspen sought leave to commence foreclosure proceedings in respect of the Properties. In light of objections raised by the Respondents and certain other stakeholders, and a proposal for a compromise which would avoid seeing Romspen ensnared in a costly, full-blown *CCAA* proceeding, Romspen sought the appointment of the Receiver, as an alternative to foreclosure, provided that it was on terms which treated all mortgagees equally.

14 Although all mortgagees were initially treated equally under the Appointment Order, that changed with the Order dated December 12, 2011 lifting the stay of proceedings to permit Firm Capital Mortgage Funds Inc. to proceed with judicial sale/foreclosure proceedings to be supervised by this Court.

15 When Romspen proffered the receivership option, the Edgeworth group and its chief restructuring officer were optimistic that they would be in a position to seek approval of a sale of the Properties within 60 to 90 days which would generate sufficient proceeds to repay the third party mortgagees, including Romspen, in full. Unfortunately, that has not happened.

16 Romspen now wishes to realize upon the Judicial Sale Properties, without the associated costs of the Receiver. The expenses associated with the within the receivership are significant. For example, where a Receiver's sale of a property has been approved by the Court in Ontario, an associated recognition motion in Alberta has been necessary. The costs associated with the receivership could may well represent the difference between a partial recovery for MIC and UDI investors and lot purchasers (or some of them) and a shortfall for Romspen. In the circumstances, I conclude, there is no benefit to be gained by incurring further professional costs associated with the receivership which will only reduce potential recoveries for all of the stakeholders, including the MICs, UDIs and lot purchasers.

17 The position of the UDI investors is well set out in the written submissions by Mr. Thierman which in essence comes down to a statement of the UDI contractual position against Edgeworth which is urged was one of trust given the promise of registration of their interest which is urged should be binding on the Romspen given imputed or actual knowledge of the UDI interests.

18 Mr. Thierman in an impassioned written submission urges rejection of the Romspen position in summary as follows:

a) that UDI investors are innocent victims of the breaches of trust and contract by Edgeworth and its of- ficers;

b) since the UDI investors were entitled to property by their investment, Edgeworth could not issue the postponements to Romspen as it did not have the legal capacity to do so.

c) Romspen must have known that Edgeworth did not have the power to grant a mortgage in favour of Romspen and should not be entitled to priority.

lead to the conclusion that Romspen either acted fraudulently, or that its mortgage should be tainted by that alleged fraud. Absent evidence of collusion with intent to defeat the interests of the UDI and Lot Purchaser interests, we stand by our opinion that Romspen has priority.

23 Section 203 of the *Act* represents an unequivocal abrogation of the doctrine of actual notice in Alberta such that, absent fraud, an unregistered interest cannot under any circumstances trump a registered interest. This absolute rule, codified in section 203 of the *Act*, was recognized by the Supreme Court of Canada in *Dominion Stores Ltd. v. United Trust Co.*, 1976 CarswellOnt 383 (S.C.C.), in paragraph 75, where Spence J., on behalf of the majority, remarked as follows:

> ***There is no doubt that when such a term appears*** in the governing ***statute, the result is that unregistered encumbrances fail in any way to affect the title of the purchaser for value.***
>
> [emphasis added]

24 Further, in *Holt Renfrew & Co. v. Henry Singer Ltd.*, 1982 CarswellAlta 92 (Alta. C.A.), the Alberta Court of Appeal noted that the *Act* expressly provides that "knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud". The Court in *Holt Renfrew & Co. v. Henry Singer Ltd.* explained that there must be some additional element or dishonesty of some sort on the part of a mortgagee, in addition to knowledge of an unregistered interest, in order to defeat or subordinate a registered charge. Knowledge that a proposed charge or transfer will defeat an unregistered interest is not sufficient to subordinate a registered transfer or mortgage.

25 In *RIC New Brunswick Inc. v. 1301725 Alberta Ltd.*, 2012 ABQB 213 (Alta. Master), the court followed the interpretation of section 203 of the *Act* set out in *Holt Renfrew*, and upheld a mortgage over lands notwithstanding the mortgagee's knowledge of an unregistered agreement by the mortgagor to convey a portion of the lands to a third party after that portion of the lands had been subdivided. Although the mortgagee had knowledge of that agreement, there was no instrument registered on title to protect the third party at the time the mortgage was granted and the funds were advanced. The mortgagee was not a party to the agreement between the mortgagor and the third party, had not been party to any misrepresentations or discussions with the third party, or agreed to discharge its mortgage over the portion of the lands to be conveyed after subdivision. Accordingly, as there was no evidence of any bad faith or any element of *mala fides* or dishonesty on the part of the mortgagee, it was entitled to rely upon the certainty of title and the protection afforded to mortgagees by the *Act*.

26 The assertion on behalf of the UDI investors is that Edgeworth breached a contractual or trust relationship and that Romspen should not be able to take advantage of that failure even though Romspen advanced some $15 million by way of its mortgage and other first mortgages on some properties it assumed.

27 There is no evidence before the court to suggest that Romspen itself committed a fraud and in the absence of that finding, Romspen is entitled to have its priority confirmed. I accept the opinion of Alberta counsel for the Receiver that there are no facts before the court that would support an argument for Equitable Subordination of the Romspen debt even assuming the concept were to apply.

28 A further submission was made on the behalf of UDI investors by Mr. Wei Cheng Tan to the effect that Romspen should be required to first be repaid from properties that are not subject to UDI interests. A mortgage creditor such as Romspen is entitled to recover against any property over which it has priority of security.

29 There is no basis in Alberta land law to limit the Romspen recovery in the way the UDI investors pro- pose.

The MICs

30 The MIC Investors Committee opposes the declaration of validity of the postponements granted to Romspen by the corporations referred to as MICs.

31 It is the position of the MICs that these corporations raised some $57 million from investors on the basis that those investors would receive first or second priority security on specific properties covered by the mortgages granted in favour of the MICs.

32 The issue on this motion is whether the postponements granted by one of the MICs, [EMIC. 1] to Romspen are valid and enforceable

33 The position put forward by Mr. Lenz on behalf of the MICs is that Romspen is not entitled to rely on the postponements granted by the MICs since the MICs were not parties to either of the commitment letters or either of the mortgages relied on by Romspen.

34 Basically put, it is asserted that the MICs were not parties to the main agreement and there is no evidence of any consideration flowing from the MICs to Romspen since the MICs were not owned by Edgeworth.

35 The MICs position is that there may be a lack of corporate seals in respect of some of the postponements is also relied on as is the assertion of independent shareholders in the MIC's from those of Edgeworth.

36 The response of Romspen to the position of the MIC's is twofold. The first being that the MIC in question had at least one common corporate officer with Edgeworth and their officer signed postponements on behalf of the MIC.

37 The second response of Romspen is reliance on section 161 (a) of the *Alberta Land Titles Act* which reads as follows:

> "161 An instrument or caveat executed by a corporation notwithstanding anything to the contrary in the Act, statute, constating documents, charter or memorandum and articles of association incorporating the corporation, is for the purposes of this Act deemed to be sufficiently executed if the instrument or caveat is
>
> (a) ***sealed with the corporate seal of the corporation and countersigned by at least one officer or director of the corporation***, ..."
>
> [emphasis added]

38 On the material before the court I am prepared to conclude that the postponements granted by the MICs in favor of Romspen were executed by an authorized officer and there is no evidence to suggest that the were not sealed with the appropriate corporate seals.

Conclusion

39 For the foregoing reasons I conclude that Romspen be entitled to the declaratory relief requested and to the distribution of funds in the hands of the Receiver as set out in the motion record. The form of draft order that

was settled on the teleconference call on August 3, 2012 will issue in the form signed.

40 There will be an opportunity for the UDI investors and others to claim against future sums if any that may be recovered once Romspen has been repaid its debt.

Application granted.

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DBDC SPADINA LTD.
AND THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO
Applicants
- and -
NORMA WALTON, RONAULD WALTON,
THE ROSE & TIIISTLE GROUP LTD. and EGLINTON CASTLE INC.
Respondents
- and -
THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO,
TO BE BOUND BY THE RESULT

Court File No: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF COMPUTERSHARE TRUST COMPANY OF CANADA
(RETURNABLE December 18, 2013)

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