2009 CarswellOnt 5202
Ontario Superior Court of Justice

Royal Bank v. Penex Metropolis Ltd.

2009 CarswellOnt 5202, [2009] O.J. No. 3645, 180 A.C.W.S. (3d) 258

Royal Bank of Canada (Applicant) and Penex Metropolis Ltd.et al. (Respondents)

G.R. Strathy J.

Heard: August 24, 2009
Judgment: September 4, 2009
Docket: CV-09-8157-00CL

Counsel: David Foulds, Jonathan Davis-Sydor for Van Wagner Communications Company, Canada
Hilary Clarke, Larry Crozier, Lisa Brost for Reciever, Ernst & Young Inc.
Liz Pillon for EPR Metropolis Trusts, Metropolis Entertainment Holdings Inc.
Fred A. Platt for Cambrian Court

Subject: Corporate and Commercial; Estates and Trusts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Financial institutions --- Deposits — Accounts impressed with trust — Miscellaneous forms of trust

Real property --- Interests in real property — Restrictive covenants — Enforcement — Subsequent purchasers — Miscellaneous

Table of Authorities

Cases considered by *G.R. Strathy J.*:

Air Canada v. M & L Travel Ltd. (1993), 1993 CarswellOnt 994, 1993 CarswellOnt 568, 15 O.R. (3d) 804 (note), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1 (S.C.C.) — referred to

Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123 (2002), 58 O.R. (3d) 481, 211 D.L.R. (4th) 1, 157 O.A.C. 135, 2002 CarswellOnt 850, 50 R.P.R. (3d) 1 (Ont. C.A.) — referred to

Bank of Montreal v. Probe Exploration Inc. (2000), 33 C.B.R. (4th) 173, 2000 CarswellAlta 1659 (Alta. Q.B.) — followed

Bank of Montreal v. Probe Exploration Inc. (2000), 33 C.B.R. (4th) 182, 2000 CarswellAlta 1621 (Alta. C.A.) — referred to

Bank of Montreal v. Scaffold Connection Corp. (2002), 2002 ABQB 706, 36 C.B.R. (4th) 13, 2002 CarswellAlta 932 (Alta. Q.B.) — referred to

Bayhold Financial Corp. v. Clarkson Co. (1991), 10 C.B.R. (3d) 159, 108 N.S.R. (2d) 198, 294 A.P.R. 198, (sub nom. *Bayhold Financial Corp. v. Community Hotel Co. (Receiver of)*) 86 D.L.R. (4th) 127, 1991 CarswellNS 33 (N.S. C.A.) — considered

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd. (2008), 72 R.P.R. (4th) 68, 2008 CarswellBC 1421, 44 C.B.R. (5th) 171, 2008 BCSC 897, 86 B.C.L.R. (4th) 114 (B.C. S.C. [In Chambers]) — referred to

Citadel General Assurance Co. v. Lloyds Bank Canada (1997), 152 D.L.R. (4th) 411, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805, 66 Alta. L.R. (3d) 241, [1999] 4 W.W.R. 135, 19 E.T.R. (2d) 93, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 206 A.R. 321, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 156 W.A.C. 321, 219 N.R. 323, 47 C.C.L.I. (2d) 153, 35 B.L.R. (2d) 153 (S.C.C.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 154, 2005 CarswellBC 578, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) — referred to

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd. (2001), 2001 BCCA 268, 2001 CarswellBC 965, 42 R.P.R. (3d) 53, 155 B.C.A.C. 1, 254 W.A.C. 1 (B.C. C.A.) — referred to

G.R. Strathy J.:

1 There are two motions before the Court. First, Van Wagner Communications Company, Canada ("Van Wagner") moves for an Order declaring that Ernst & Young Inc., the Court-appointed Receiver (the "Receiver") of the Respondents [1] is not entitled to disclaim the Exclusive Sales Agency Agreement between Van Wagner and the Respondents (the "Agreement"). Van Wagner also seeks a declaration that certain funds are held in trust by the Receiver for the benefit of Van Wagner, pursuant to the Agreement.

2 Second, the Receiver brings a cross-motion for a declaration that the Agreement is not binding on a purchaser of the business of the Respondents and that the Receiver is entitled to sell the assets of the business free and clear of any obligations under the Agreement.

Factual Background

3 This proceeding concerns a 13-floor, 332,000 square foot, mixed use, multi-media entertainment, retail and office complex located on the northeast corner of Yonge-Dundas Square in Toronto (the "Property") that is owned by Penex Metropolis Ltd. ("Penex"). Yonge-Dundas Square, which is said to be modeled after Times Square in New York and Piccadilly Circus in London, is home to a number of digital and billboard-type signs. The Property itself is covered on all sides by approximately 25,000 square feet of digital and static signage used for outdoor advertising. Penex is the legal owner of the Property.

4 Van Wagner is in the business of developing, marketing and selling outdoor advertising signage. It is an affiliate of one of the largest privately held out-of-home communications companies in North America.

5 Royal Bank of Canada ("RBC") acts as agent for a syndicate of lenders that provided financing for the construction of the Property and is the first secured creditor. The second secured creditor is a subsidiary of Entertainment Properties Trust, a REIT with its head office in Kansas City, Missouri. The second secured creditor has entered into a strategic alliance with the parent of Penex.

6 Van Wagner and Penex entered into an Exclusive Third Party Exterior Signage License Agreement (the "Joint Venture Agreement") for the Property in June, 1999. Under the Joint Venture Agreement, Van Wagner was to own 35% of the signs and receive 35% of the advertising revenue from the signs, while Penex would own 65% of the signs and receive 65% of the advertising revenue. Among other duties, Van Wagner would exclusively market the signs.

7 The Property was delayed in construction and in the fall of 2005 had just started above ground construction. In September of 2005 Penex purported to terminate the Joint Venture Agreement. Van Wagner commenced litigation against Penex, which was settled in the summer of 2006 when Penex and Van Wagner entered into the Agreement that is the subject of this litigation.

8 The Agreement provides that Van Wagner is to be Penex's exclusive sales agent for the marketing and sale of advertising on a number of static signs located at the Property. Van Wagner is a non-exclusive sales agent on the "tri-vision" sign, which rotates through a maximum of three advertisements on the same sign. Van Wagner has no rights or responsibilities with respect to the digital video board.

9 The only exception to Van Wagner's exclusive agency rights on static signs relates to tenant advertising and sponsorship opportunities. Pursuant to paragraph 2C of the Agreement, these remain exclusive to Penex. Accordingly, should any tenant or sponsor of the Property require signage rights on any one of the static signs, Penex has the right to grant such signage rights (per paragraph 2F of the Agreement), but must pay Van Wagner a sales commission as detailed below. This commission is in recognition of Van Wagner's surrender of its rights to part ownership of the signs and the limitations placed on Van Wagner's marketing efforts.

10 As consideration for the services to be provided by Van Wagner as Penex's exclusive sales agent, paragraph 4A of the Agreement provides that Penex is to pay Van Wagner a sales commission equal to:

> 22.5% of "Net Advertising Revenues" (as defined in paragraph 4C of the Agreement) derived from signs sold by Van Wagner; and 20% of Net Advertising Revenues derived from signs other than sign 2 or sign 3 that are sold to sponsors and tenants by Penex.

11 As a result of allegations that Penex had breached the Agreement by causing its personnel to sell advertising on static signs in competition with Van Wagner, Van Wagner commenced an action in this court against Penex to enforce the Agreement.

12 Van Wagner also sought an interim and interlocutory injunction to prevent Penex from violating the exclusivity provisions of the Agreement until trial. That motion was heard before Patillo J. on December 5, 2007, following the exchange of extensive affidavit materials and cross-examinations.

13 After a full day of argument, Patillo J. agreed that if Penex was allowed to continue breaching the Agreement, Van Wagner would be irreparably harmed and granted Van Wagner an injunction until trial. Following the language of the Agreement, the injunction is binding on any successors or assigns of Penex.

14 Penex sought leave of the Divisional Court to appeal the decision of Patillo J. In a decision released April 23, 2008, Carnwath J. found that there was no good reason to doubt the correctness of the decision and denied Penex's motion for leave to appeal to the Divisional Court.

15 Van Wagner alleged that Penex continued to breach the Agreement in spite of the order of Pattillo J. As a consequence, Van Wagner brought a motion for appropriate relief. This motion was ultimately settled on consent in March, 2009, with the parties agreeing to an Order setting out the terms of the relationship between Van Wagner and Penex until trial. This Order was issued by Lederer J. on March 10, 2009.

16 On April 27, 2009, RBC applied to this Court to appoint Ernst & Young as the Receiver of all of the assets, undertakings, and properties of Penex, including the Property. This Court granted the relief sought. The initial appointment order (the Initial Order) is based on the model receiving order of the Commercial List, and contains the following standard provisions:

> 3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
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> .....
>
> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

17 Neither Van Wagner nor its counsel was provided with notice of the application to appoint a receiver. Van Wagner was not informed of RBC's application until the afternoon of Friday, May 1, 2009, when Van Wagner received a letter from the Receiver attaching a copy of the Initial Order and advising that the Receiver did not intend to perform the Agreement. The letter further stated that the Receiver would not require Van Wagner's further services, and would not be making any payments or be responsible for any amounts payable under the Agreement.

The Issues

18 There are three issues before me: First Issue: Was the Receiver entitled to disclaim the Agreement? Second Issue: Are the fees due to Van Wagner by Penex held in trust? Third Issue: Does the Agreement bind a purchaser of the Property?

19 I will discuss these in turn.

Discussion

First Issue: Was the Receiver entitled to disclaim the Agreement?

20 The Appointment Order authorizes the Receiver to cease to perform any contracts of Penex. This reflects the established law and practice: *Bank of Montreal v. Scaffold Connection Corp.*, 36 C.B.R. (4th) 13, [2002] A.J. No. 959 (Alta. Q.B.) at para. 11. A receiver must have the ability to refuse to adopt contracts in order to give meaning to its power to convey the assets free and clear of other parties' interests: *New Skeena Forest Products Inc., Re*, 9 C.B.R. (5th) 267, [2005] B.C.J. No. 546 (B.C. C.A.) at paras. 18 and 20.

21 There is little dispute about the principles concerning disclaimer of contracts by a receiver. The real issue is the application of those principles to the facts of this case. I will begin, however, by briefly outlining the principles.

22 Both counsel refer to the leading text, *Bennett on Receiverships*, 2nd ed. (Toronto: Thompson Canada Limited, 1999) in support of the proposition that the receiver is an officer of the court. The learned author states at p. 180:

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court disclosing not only facts favourable to pending applications, but also facts that are unfavourable.

23 The author notes that a court-appointed receiver is not bound by existing contracts, but the receiver must exercise discretion before disclaiming a contract. If it seeks to break a *material* contract, it must seek leave of the court. At p. 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court.

24 I also accept the general proposition, set out in *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.) affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (Alta. C.A.), at para 40, that a receiver is not entitled to prefer the interests of one creditor over another. Its duty is to act for the benefit of all interested parties:

> The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

25 A receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. In deciding whether or not to adopt a contract, the duty of the receiver is to exercise the care "comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own": *Bayhold Financial Corp. v. Clarkson Co.*, 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (N.S. C.A.) at para. 15; *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.) at para. 21.

26 If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court. As noted by the Ontario Court of Appeal in *Ravelston Corp., Re*, 24 C.B.R. (5th) 256, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40.

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable differences. These decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others...The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

See also *Royal Bank v. Soundair Corp.*, 4 O.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at para. 14.

27 A receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (B.C. S.C. [In Chambers]) at para. 96.

The Receiver's Position

28 The Receiver says that after its appointment it considered the Agreement for the purpose of determining whether it should continue to perform it. As part of its analysis, the Receiver says that it:

(a) reviewed the terms of the Agreement;

(b) reviewed the historical sales revenue generated from all signage by both Van Wagner and Penex;

(c) had discussions with the former manager of the Property, regarding signage issues and with the individuals who formerly managed the signage;

(d) on the recommendation of the Receiver's court-approved property manager, had discussions with a Toronto signage company, about the signage business, including the market conditions for signage, the market participants and the locations within Dundas Square;

(e) reviewed with Penex: (i) signage contracts to which Penex was party on the Receivership Date; (ii) signage contracts that were out for signature on the Receivership Date; (iii) Penex's process for dealing with Van Wagner; and (iv) the amounts owed to Van Wagner by Penex as at the Receivership Date;

(f) met with representatives of Penex's second secured creditor, who are familiar with the signage at the Property;

(g) reviewed the websites of certain major signage companies operating in Canada as well as industry associations, to obtain market information;

(g) had discussions with representatives from Brookfield Financial Real Estate Group Limited ("Brookfield") regarding the sales process previously undertaken by Penex regarding the Property, including the impact of the Agreement on that sales process;

(h) reviewed an appraisal report dated January 30, 2009 that set out information on current utilization of the signage and the signage market; and

(i) reviewed pleadings in the 2007 litigation between Penex and Van Wagner as well as the decision of Patillo J. in that litigation.

29 The Receiver reports that after considering this information, it concluded that it was not in the interests of Penex or its stakeholders to continue to perform the Agreement. Broadly speaking, there were three reasons for this decision.

30 First, the Receiver had concerns that there were terms of the Agreement that were not in the interests of Penex or its stakeholders: (a) there was an indemnification clause in the Agreement that requires Penex to indemnify Van Wagner for claims arising in connection with the operation of the sign structures except in cases of Van Wagner's gross negligence - the Receiver felt that this term was excessively onerous; (b) the Receiver concluded that the rate of 22.5% for third party sales commissions was above market, which it considered to be in the range of 15%; (c) the Receiver concluded that the exclusivity provisions in the Agreement had a negative effect on Penex's ability to earn advertising revenue, created inefficiencies and confusion in the marketplace, and limited Penex's marketing options; and (d) the Receiver concluded that performance of the Agreement would require the Receiver and its advisors to work closely with Van Wagner in relation to the signage issue. In view of the history of the relationship between Van Wagner and Penex, which the Receiver considered to be "plagued by recriminations,

acrimony and disagreements", the Receiver was concerned that there would be continued discord and that a viable business relationship would not be possible.

31 Second, the Receiver had concerns about Van Wagner's performance of the Agreement, including: (a) it had only one sales representative in Canada; (b) sign utilization appeared to be considerably less than market; and (c) since the opening of the Property in 2008, static signage revenues were about $3.75 million, of which Van Wagner was responsible for only about a third, the balance being generated through sales to tenants of the Property or leads of Penex staff or other agents.

32 Third, the Receiver considered that adoption of the Agreement would give Van Wagner a higher interest than it had prior to the making of the appointment order. The Receiver says that the first and second secured lenders provided financing before the Agreement came into effect and were unaware of the Agreement. They, and other secured creditors, are entitled to sell the Property free of any claims of unsecured creditors. The Receiver believes that Van Wagner's pre-receivership claim is an unsecured claim against Penex and does not anticipate that the proceeds of sale of the Property will be sufficient to satisfy the claims of any unsecured creditors. The Receiver says that Van Wagner is seeking payment of its pre-receivership claim and the effect of this would be to elevate that claim above the claims of the secured creditors, who had negotiated for and took security in the property.

Van Wagner's Position

33 I will briefly summarize the arguments made on behalf of Van Wagner. They are set out extensively in the factum filed by counsel on behalf of Van Wagner and my summary is not intended to be exhaustive, nor is it in precisely the same order as addressed by counsel.

34 First, Van Wagner says that the Receiver should have sought court approval for the disclaimer of the Agreement, because the contract was a material one.

35 Second, it submits that the Receiver had no experience in the signage market and it should have made greater investigations of the market and should not have relied upon advice received from Penex employees, whose views about Van Wagner were biased and who were themselves the cause of the disruptive relationship between the parties.

36 Third, it says that in light of the history of the relationship between the parties and Van Wagner's knowledge of the market, the Receiver should have discussed the issues with Van Wagner before terminating the contract and should have given Van Wagner an opportunity to respond to the Receiver's concerns.

37 Fourth, Van Wagner says that the Receiver erroneously concluded that the Agreement was not advantageous to Penex and the 22.5% commission rates in the Agreement were "well above market rate". Van Wagner says that while rates may be lower where the agreement is for brokerage only, this was not a simple brokerage contract and therefore it has a higher rate. As well, Van Wagner says that the rate is partly for the purpose of compensating Van Wagner for the loss of part ownership of the signs as a result of Penex's breach of the earlier Joint Venture Agreement.

38 Fifth, Van Wagner takes issue with the Receiver's conclusion that the Agreement is detrimental to the stakeholders and fundamentally disagrees with the Receiver's analysis of the Agreement. I will not set out the various arguments made by Van Wagner under this heading, which occupy some five pages of the factum and took up a considerable part of oral submissions.

39 Sixth, Van Wagner says that its performance to date has not been detrimental to the Property and that the Receiver's investigation of this issue was neither balanced nor informed. Van Wagner says that the Receiver relied upon tainted information from former Penex employees whose conduct was responsible for the prior litigation between the parties that was successfully resolved in favour of Van Wagner. Again, the submissions on this issue were extensive.

40 Seventh, the Receiver failed to give adequate consideration to the impact of termination of the Agreement on Van Wagner, particularly in light of the previous conclusion of Patillo J. that Van Wagner would suffer irreparable harm if the Agreement was breached.

41 Eighth, Van Wagner says that continued performance of the Agreement is actually financially beneficial to the stakeholders.

42 Ninth, the disclaimer of the Agreement has the effect of expropriating the commissions that were earned by Van Wagner and transferring them to the secured lenders. It is alleged that this is unfair to Van Wagner and confers a windfall on the secured lenders.

Conclusion on the First Issue

43 Having considered the Receiver's reasons and the concerns raised by Van Wagner, I have come to the conclusion that, although there are points to be made on both sides as to whether the Agreement was advantageous or not, it cannot be said that the Receiver acted in a commercially unreasonable manner, unfairly, or in bad faith in deciding to disclaim the Agreement. On the contrary, the Receiver's report indicates that the Receiver made appropriate inquiries and investigations prior to disclaiming the contract. Based on the evidence before me, the Receiver could reasonably conclude that the rates paid to Van Wagner under the Agreement were above market value and included a premium to compensate Van Wagner for rights it had given up under the Joint Venture Agreement. The Receiver could also reasonably conclude that the exclusivity provisions of the Agreement fettered its ability to negotiate signage agreements with potential users, limited the flexibility that it would require to deal with signage issues, and was potentially cumbersome, inconvenient, and inefficient.

44 This is precisely one of those cases, referred to in *Ravelston Corp., Re*, above, in which a receiver must choose between several courses of action, none of which is obviously preferable to another. While I do not necessarily accept every reason advanced on behalf of the Receiver on this issue, or reject every one of Van Wagner's objections, I cannot conclude that the Receiver acted unreasonably, arbitrarily or inappropriately in disclaiming the Agreement.

Second Issue: Are the fees due to Van Wagner held in trust for Van Wagner?

45 In support of its submission that the fees are held in trust, Van Wagner refers to paragraph 4D of the Agreement, which provides, in part:

> All Gross Revenue shall be made payable to the Owner and deposited in a designated chequing account with Royal Bank of Canada in Toronto (with statements to both parties), or such other bank as is designated by Owner, with cheque signing to be a person representing and designated by the Owner. <u>The Fee due to Van Wagner shall be held in such account in trust for Van Wagner and shall be remitted to Van Wagner</u>, and the balance of the Gross Revenue shall be remitted to Owner, in each case, within fifteen (15) days following the end of each calendar month together with a statement showing the amounts collected and the manner in which compensation is calculated. [...] <u>The parties shall hold all funds received in trust for the benefit of the parties hereunder in accordance with their interests.</u> Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time and the parties hereto agree to follow such other payment and banking procedures as reasonably may be required by Owner's lenders from time to time and which are consistent with the principles set forth in this Agreement and are approved by Van Wagner (which approval shall not be unreasonably conditioned, withheld or delayed).
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> [emphasis added]

46 Van Wagner submits that the "three certainties" required to establish a trust are present -certainty of intention, certainty of subject matter, and certainty of object: see: *Air Canada v. M & L Travel Ltd.*, [1993] S.C.J. No. 118 (S.C.C.); *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92 (S.C.C.). It submits that paragraph 4D shows a clear intention to create a trust, that the subject matter of the trust is clear (fees owing to Van Wagner), and the object of the trust is clear (Van Wagner).

47 The difficulties with Van Wagner's submissions are set out in the Receiver's factum. First, clause 4D itself contemplates that the trust arrangement was subject to the approval of Penex's lenders. It provides:

> ... Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time ...

48 There is no evidence that the lenders approved the trust arrangement and at least some evidence that one lender did not approve it. There is certainly an argument that a condition-precedent to the establishment of a trust was not satisfied.

49 The second problem with Van Wagner's submission on this issue is that no trust account was in fact established, and that Van Wagner was either aware, or ought to have been aware, that one had not been established. One could conclude from this that the parties never gave effect to their intention to create a trust.

50 The third problem is that revenues from sales of static signage advertising space, from which Van Wagner was entitled to fees, were in fact deposited in Penex's general operating account where they were co-mingled with other funds. The Receiver submits that the co-mingling of the trust funds is fatal to the existence of a trust: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 7 C.B.R. (5th) 202, [2005] O.J. No. 589 (Ont. C.A.).

51 These concerns are serious and more than simply technical objections. I have concluded, however, that it is not necessary to resolve the issue at this time. I accept the submission of counsel on behalf of the Receiver that this issue should be addressed when the Court is asked to make an order regarding the distribution of the proceedings of the Property. That motion will be made on notice to all potential claimants and can be considered, if necessary, on a more complete evidentiary record than exists before me.

Third Issue: Does the Agreement bind a purchaser of the property

52 Van Wagner takes the position that any purchaser of the Property must assume and be bound by the Agreement. The Receiver reports that, having consulted with the financial adviser engaged and approved by the Court to sell the property, it is concerned that uncertainty about the existence of a legal obligation to assume the Agreement will have a detrimental affect on the marketability of the Property. Based on this submission, I agree that the issue should be resolved at this time and not deferred until offers to purchase the Property have been submitted.

53 Van Wagner relies upon paragraph 13(k) of the Agreement, which provides:

> This Agreement shall be binding upon and inure to the benefit of [Penex] and its successors and permitted assigns, <u>including, without limitation, any subsequent fee owner of the Building</u> and shall be binding upon and inure to the benefit of Van Wagner and its successors and permitted assigns.
>
> [Emphasis added]

54 Van Wagner submits that, in light of the history between the parties, it would be fair and equitable to require the Receiver to abide by this term of the Agreement.

55 Apart from this, Van Wagner offers no authority for the proposition that the Agreement runs with the Property, such that a purchaser would be bound to assume it.

56 Paragraph 13(k) is, with variations, a standard clause in many forms of agreement, including agreements for the supply of services. It cannot reasonably be construed as creating an interest in land so as to bind a subsequent purchaser from the Receiver. I accept the submission of counsel on behalf of the Receiver that in order to run with the land, two conditions must be met. First the covenant must be negative in substance and a burden on the covenantor's land: *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, [2001] B.C.J. No. 852 (B.C. C.A.), at para. 16; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, 58 O.R. (3d) 481, [2002] O.J. No. 1023 (Ont. C.A.) at paras. 18 and 20. A positive covenant does not run with the land. Second, in order to run with the land, the Agreement must touch and concern the land. This covenant does not concern the Property. It concerns services to be provided to the owner of the Property.

57 It is not disputed that the Appointment Order gives the Receiver the authority to market the Property, to sell the Property, and to "apply for a vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property." In view of the authorities cited by counsel for the Receiver, and in the absence of any authority put forward by counsel for Van Wagner, I find that the Agreement does not run with the Property. The Receiver is entitled to a declaration that a purchaser of the Property is not bound by the Agreement.

Conclusion

58 For these reasons, Van Wagner's motion is dismissed and the Receiver's motion is granted. If costs cannot be agreed upon, they may be addressed by brief written submissions, including a costs outline, addressed to me care of Judges' Administration. Counsel for the Receiver and for EPR Metropolis Trusts shall serve and file submissions within fifteen days. Counsel for Van Wagner shall file responding submissions within fifteen days of receipt of the other parties' submissions. Those parties may file brief reply submissions, if necessary, within five days thereafter.

Footnotes

1 The Respondents are Penex Metropolis Ltd., in its capacity as general partner of, and as nominee and trustee of, and for, Metropolis Limited Partnership and Metropolis Limited Partnership.

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