TAB 6

Court of Queen's Bench of Alberta

Citation: Kasten Energy Inc. v. Shamrock Oil & Gas Ltd., 2013 ABQB 63

Date: 20130128
Docket: 1203 15035
Registry: Edmonton

Between:

Kasten Energy Inc.

Applicant

- and -

Shamrock Oil & Gas Ltd.

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice Donald Lee

Introduction

[1] This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

Facts

[2] Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

[3] Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

[4] The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of $567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

[5] On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

[6] By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

[7] As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was $777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

[8] On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

[9] At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

[10] On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was $760,059.18. As of October 9, 2012, the indebtedness had climbed to $799,595.06 taking into account the sum of $45,130.58

which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

[11] The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

[12] The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

> An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Parties' Positions and Analysis

[13] Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27, 316 AR 128 [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

See also, ***Lindsey Estate v Strategic Metals Corp***, 2010 ABQB 242 at para 32, aff'd 2010 ABCA 191; and ***Romspen Investment Corporation v Hargate Properties Inc***, 2011 ABQB 759 at para 20.

Kasten's Submissions

[14] The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

[15] Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

[16] Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors

since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

[17] The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: ***Amoco Canada Resources Ltd v Amax Petroleum of Canada Inc***, 1992 ABCA 93 at para 10, [1992] 4 WWR 499. Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: ***Highway Properties Ltd v Kelly, Douglas and Co Ltd***, [1971] SCR 562 at 576, [1972] 2 WWR 28. The contract is assignable and subject to seizure.

Shamrock's Submissions

[18] The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

[19] Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

[20] The Alberta Court of Appeal notes in ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

[21] The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: ***Paragon Capital*** at para 27. I am also not

persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

[22] Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

[23] In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

[24] In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

[25] Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

[26] After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial

Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

[27] Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

[28] Shamrock agrees that a Receiver could only be appointed over its personal property, which includes the oil when it is produced and removed from the ground. However, it contends that the authority of the Receiver does not extend to the lease or the sale of Sawn Lake Well since Kasten has no security over the PNG lease under the GSA and can only receive revenue from the Well. Shamrock takes the position that the oil and gas lease is a *profit à prendre*, which is an interest in land excluded under Alberta's *PPSA*, s 4(f).

[29] I note that the Supreme Court of Canada in ***Saulnier v Royal Bank of Canada,*** 2008 SCC 58, [2008] 3 SCR 166 [Saulnier] discussed the term "property" in the context of a commercial fishing licence under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 [*BIA*] and *Nova Scotia's Personal Property Security Act*, SNS 1995-96, c 13 [*PPSA*]. The provision of the relevant section of Nova Scotia's *PPSA* is identical to that of *Alberta's Personal Property Security Act*, RSA 2000, c P-7.

[30] The Supreme Court in ***Saulnier*** held that the *BIA* and *PPSA* should be interpreted in a way best suited to enable them accomplish their respective commercial purposes. Binnie, J, writing for the Court, observed that:

> [28] … [A] fishing licence … bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds …
>
> [29] Fichaud J.A. in the court below noted numerous cases where it was held that <u>"during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) … The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.</u>
>
> [30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on The Law of Real Property (4th ed. 1975), at p. 779:
>
> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down

a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree.

And at p. 822:

A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.

[31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in ***Harper v. Minister for Sea Fisheries*** (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:

A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]
…

[33] In my view these observations are helpful … there are important points of analogy between the fishing licences issued to the appellant ***Saulnier*** and the form of common law property called a *profit à prendre …*

[34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.

(emphasis added)

[31] In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in ***Saulnier***. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: ***Saulnier*** at para 29. The right to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": ***Saulnier*** at para 34.

[32] In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: ***Saulnier*** at para 34;

Stout & Company LLP v Chez Outdoors Ltd, 2009 ABQB 444 at para 39, 9 Alta LR (5th) 366 [***Chez Outdoors***]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": ***Chez Outdoors*** at para 15. That right is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

[33] This Court has the authority to make an Order either "unconditionally or on any terms and conditions" it thinks just, including a restriction of the powers of a Receiver and Manager if necessary in the circumstances of the case before it: *Judicature Act*, s 13(2).

[34] Kasten seeks a court-appointed Receiver who is a court officer owing a fiduciary duty to all parties, including the debtor: ***Philip's Manufacturing Ltd v Coopers & Lybrand Ltd***, 92 DLR (4th) 161 at para 17, [1992] 5 WWR 549 (WL). It argues that the court-appointed Receiver would take instructions from the Court and not from Kasten. The Receiver would be bound to act in the best interests of all parties. In a *volte-face*, Kasten seeks in its supplemental brief that this Court should appoint it as a Receiver. There was no reason specifically advanced by Kasten for its new position.

[35] Shamrock submits that a Consent Receivership Order should be granted and the Receiver should not be conferred with a power of sale. It wants the Order held in abeyance until April 1, 2013 or when Shamrock/Stout fails to make a payment of interest as scheduled, whichever occurs first, in order to allow for the sale of Sawn Lake Well.

[36] The Respondent notes that Kasten now seeks to be appointed as the Receiver and Manager instead of the earlier proposed independent body corporate, MNP Ltd. which had given its consent to act as Receiver and Manager of Shamrock, the debtor.

[37] In the absence of any clear objection to the appointment of MNP Ltd., an independent and neutral entity in this matter, an Order will issue to name MNP Ltd. as the court-appointed Receiver and Manager of all the current and future assets, undertakings and properties of Shamrock Oil and Gas Ltd. until Kasten and other creditors (secured and unsecured) are paid in full. The Receiver and Manager will have no power of sale, except as approved by an Order of this Court. However its authority is suspended until April 1, 2013 in order to accommodate any potential sale of Sawn Lake Well by Shamrock. To be clear, if Sawn Lake Well is not sold on or before April 1, 2013, the power and authority of the Receiver and Manager is to become effective immediately on that day.

[38] If parties are unable to agree on costs, they should arrange to speak to me within 30 days of the issue of this decision.

Heard on the 29th day of November, 2012.
Dated at the City of Edmonton, Alberta this 24th day of January, 2013.

Donald Lee
J.C.Q.B.A.

Appearances:

Terrence M. Warner
Miller Thomson LLP
for the Applicant

Brian W. Summers
Fraser Milner Casgrain LLP
for the Respondent

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***United Savings Credit Union v. F & R Brokers Inc. et al ,***
2003 BCSC 640

Date: 20030506
Docket: H021226
Registry: Vancouver

Between:

UNITED SAVINGS CREDIT UNION,
(formerly United Civic Savings Credit Union)

PETITIONER

And

F & R BROKERS INC., EVERPARKS VENTURES INCORPORATED, MOO PARK, SANG WON PARK, J.T.S. MORTGAGE INVESTMENTS CORPORATION, LDS TRADEHOUSE INC., FRED CARLINE, WORKERS' COMPENSATION BOARD, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA,
CITY OF VANCOUVER

RESPONDENTS

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment
(From Chambers)

Counsel for the Petitioner	J.I. McLean
Counsel for J.T.S. Mortgage Investments	E.P. Morris
Date and Place of Trial/Hearing:	December 9, 2002 Vancouver, B.C.

[1] This is an application by the first mortgagee, United Savings Credit Union ("United") for the appointment of a Receiver Manager of this hotel. The request is made despite the fact that United only has a mortgage charge against the land and building of the hotel. United also seeks an order that the Receiver Manager have the conduct of the sale of the hotel. These applications are made pursuant to the inherent jurisdiction of the Court, Rule 47 of the ***Rules of Court***, and s. 39 of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253.

[2] The application is opposed by the second mortgagee, J.T.S. Mortgage Investments Corporation ("J.T.S.") on the basis that the Court is not in a position to appoint a Receiver Manager at the instigation of a land mortgagee. As to whether a Receiver should be appointed, J.T.S. submits that such an appointment is unnecessary as most of the income for the hotel is already being collected under an informal arrangement between J.T.S. and the owners of the hotel. J.T.S. also opposes the Receiver Manager having the conduct of the sale of the hotel as J.T.S. has already been granted the ability to offer the hotel for sale.

[3] J.T.S. obtained an order *nisi* in its own foreclosure proceedings. The redemption period in those proceedings will

expire on January 17, 2003. On November 26, 2002, J.T.S. obtained an order for conduct of sale. J.T.S. contemplates listing the property at a listing price of 7% on the first $100,000 and 2-1/2% on the balance of the sale price over $100,000.

BACKGROUND

[4] This hotel operates in the Gastown area of Vancouver. It has a limited number of rooms which are mostly rented on a monthly basis. There is also a restaurant and pub within the building. These operations are leased to third parties. The information which is before me allows me to conclude that there are unpaid taxes of approximately $150,000, that only some of the room rents are being collected by J.T.S. who has exercised its right under its assignment of rents, and that the balance of the rents are either not being paid or are being paid to the current owners. There is no evidence that any funds being paid to the owners are being expended for the benefit of the property or for the benefit of those parties having claims against the equity of the owners in the property.

[5] As well, there is a very real danger that the property will be subject to a cease and desist order from the City by

virtue of problems associated with the property. There are a number of judgments which have been registered against the property so that it is unlikely that the owners have any equity which they will want to protect.

STATUTORY PROVISIONS

[6] Section 39 of the ***Law and Equity Act*** provides:

> 39(1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[7] Rule 47 of the ***Rules of Court*** states:

> 47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

THE "USUAL" FORM OF ORDER

[8] The Annotated Supreme Court Chambers Orders dealing with the appointment of a Receiver provides the following form of order where a Receiver is appointed under Rule 47:

> 1. *[name of receiver]* is appointed as receiver *[and, where applicable add: without bond or security]* of the rents and revenues of the property at *address]* (the "Property") with power and liberty to do any or all of the following things:

(a) to recover and enter forthwith into possession of the Property;

(b) to collect, get in, and receive any and all rents, revenues, security deposits, and prepaid rents of, from, and collected with respect to the Property, including rents in arrears, and to enforce payment to the receiver of any such rents, revenues, security deposits, or prepaid rents or any part thereof at such time or times as the receiver may think fit and may take such proceedings as the receiver considers necessary or advisable;

(c) to rent, re-rent, or enter into a lease or leases of the Property or any part thereof from time to time at such rentals and otherwise upon such terms as the receiver may consider necessary or advisable under the circumstances;

(d) to take whatever steps the receiver may consider advisable for repairing and preserving the Property or any other part thereof, including any buildings and improvements thereon, but the receiver shall not be liable for waste;

(e) to retain and employ some person or persons to assist in doing any of the things contemplated by this order and to assist generally in the receivership;

(f) to apply at any time or times to this court for directions as to the discharge of any of its duties as receiver or for the determination of any matter arising out of the receivership;

(g) to apply any money received by the receiver as rent or revenue of or from the Property in payment of the following items in the following order:

(i) to the receiver in respect of the services as receiver a reasonable amount, either monthly or at such longer intervals as the receiver deems appropriate, which amount shall constitute an advance against the remuneration of the receiver when fixed;

(ii) any costs, charges, and expenses incurred in respect of carrying on any of the foregoing activities, and all operating expenses relating to the Property;

(iii) any charges for utilities or insurance premiums which relate to the Property;

and the balance, if any, in accordance with the further order of this court;

2. any person or person in occupation of the Property or any part thereof attorn and become tenants of the receiver and pay to the receiver rents, arrears of rents, and accruing rents so long as the receiver shall continue in office;

3. the respondent, *[name of party in possession]*, forthwith deliver over to the Receiver all keys necessary to gain access to the Property or any part thereof and all books, documents, papers, and records of every kind and nature relating thereto;

4. it shall not be necessary for the receiver to pay any money received by the receiver as rent or revenue arising from the Property into court and that the said receiver shall be liable to account only for money that actually comes into the receiver’s hands or into the hands of any person or persons retained or employed by the receiver in the preservation or management of the Property;

5. all monies properly expended and all costs and charges properly incurred by the receiver in respect of all the receivership shall be paid primarily out of the rents and profits of the Property, and in the event of the said rents and profits being insufficient for such purposes, such monies so expended and such costs and charges so incurred shall be and form a first charge on the Property in favour of the receiver;

6. all questions relating to the passing of the accounts of the receiver and the discharge of the receiver and the remuneration of the receiver shall be reserved until further order of this court.

DISCUSSION AND CASE AUTHORITIES: APPOINTMENT AS OF RIGHT?

[9] Prior to the ***Judicature Act*** of 1873, an English Court of Equity would only appoint a Receiver at the instigation of an equitable mortgagee who, unlike a legal mortgagee, had no right to possession. Subsequent to the passage of that ***Act***, the Court could appoint a Receiver at the instigation of a legal mortgagee in order to prevent the mortgagee from becoming a mortgagee in possession.

[10] The decisions in England are consistent in stating that such an Order will be made as a matter of course once default under a mortgage can be shown. The Court in ***Re Crompton & Co.***, [1914] 1 Ch. 954 stated:

> I think the right to the appointment of a Receiver is one of the ordinary rights which accrue to a

> mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security has become realizable as one of the steps in such realization. (at p. 967)

[11] Similarly, in ***Truman v. Redgrave*** (1881), 18 Ch. 547, the Court was prepared to make an order appointing a “Receiver and Manager” if the principal and interest owing under a mortgage was in arrears. The ability to obtain the appointment of a Receiver and Manager was described as being a “... mere matter of course ...”. (at p. 549) See also ***Prachett v. Drew*** [1924] 1 Ch. 280.

[12] In British Columbia, the English line of authorities was adopted in ***Eaton Bay Trust v. Motherlode Developments Ltd.*** (1984) 50 B.C.L.R. 149 (B.C.S.C.) where McTaggart, J. stated:

> In practice, the appointment of a Receiver in a mortgage proceeding is frequently made without proof of jeopardy (***Kerr*** on Receivers (15th ed.) (1979) pp. 6, 30 (***Crompton & Co. In Re: Player v. Crompton & Co.*** [1914] 1 Ch. 954).

[13] Of similar result is the decision in ***Royal Trust Corp. of Canada v. Exeter Properties Ltd.***, [1985] B.C.J. (Q.L.) No. 942 (B.C.S.C.). However, the decision of Huddart, J., as she then was, in ***Korion Investment Corp. v. Vancouver Trade Mart Inc.*** [1993] B.C.J. (Q.L.) No. 2352 (B.C.S.C.) is often cited as authority for the proposition that the appointment of a

Receiver or Receiver Manager will not be made as a matter of course.

[14] After noting that the indebtedness to the mortgagee represented only 6.6% of the assessed market value of the property, that the total indebtedness of the mortgagor represented only 29% of the value of the mortgaged assets, and that the mortgagor had offered to pay an amount equal to the monthly interest to the mortgagee during the remainder of the redemption period, Huddart, J. stated:

> ***Korion*** rests its application on the usual practice and its right to enjoy the profits from its property. ... .
>
> The willingness to appoint a receiver in a mortgage action, even post-judgment, seems to derive not so much from an analysis of the facts of an individual situation as from an accepted view of commercial reality. Kerr on Receivers, supra, says (at 6) that "[w]here there is an alternative legal remedy, as in the case of legal mortgages, the court has a discretion, but the appointment is now frequently made without proof of jeopardy" ... .
>
> Kerr suggests that "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled.
>
> It is on such a rule that ***Korion*** relies. However, it could not provide any B.C. authority for a presumption in favour of the appointment of a receiver in all mortgage foreclosure actions. In ***Citibank Canada v. Calgary Auto Centre*** (1909), 58

D.L.R. (4th) 447 (Alta. Q.B.) McDonald J. adopted as correct this approach from Price and Trussler, Mortgage Actions in Alberta, (1985) at p. 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is “just and equitable” the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is “just and equitable” that a receiver be appointed.

I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument. (at paras. 8-12)

[15] I am satisfied that the ***Korion*** decision must be limited to the facts which arose in that proceeding. First, counsel appears not to have drawn the long-established English practice to the attention of the Court. Second, the mortgagor appears to have established very good reasons why the appointment should not be made. In accordance with the English decisions and the decisions in ***Motherlode*** and ***Exeter,*** I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.

[16] The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in

payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

[17] A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[18] In the case at bar, the second mortgagee, J.T.S. has shown no good reason why a Receiver Manager should not be appointed. The situation which would allow the owners of this hotel to continue to collect some of the income available should be unacceptable to all charge holders. Accordingly, it is appropriate that a Receiver or a Receiver Manager be appointed. The second question which arises is whether United should be entitled to the appointment of a Receiver Manager even though United has no charge against either the chattels

which are used in the hotel operation or the goodwill of the company that owns the hotel.

DISCUSSION AND CASE AUTHORITIES: RECEIVER OR RECEIVER MANAGER?

[19] The text of s. 39 of the ***Law and Equity Act*** like similar provisions across Canada relating to the jurisdiction of courts to appoint a Receiver or Receiver Manager is based on s. 25(8) of the 1873 English ***Judicature Act***. The provision allowing such an appointment was introduced in British Columbia in 1879 when s. 3(8) of the ***Judicature Act*** 1879, c. 12 incorporated the exact words from the English legislation in effect at the time:

> A mandamus or an injunction may be granted or a Receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made ... .

[20] That provision remained relatively unchanged in British Columbia until 1979 when the words “or Receiver Manager” were added after “Receiver”. The explanation for this amendment provided in the explanatory notes to the first reading of Bill 29 (***Attorney General Statutes Amendment Act***, 1979) was:

> Amends section 30 of the ***Laws Declaratory Act*** to clarify that a person acting as a Receiver may also manage the assets he receives prior to distribution.

[21] The current English statute does not contain the words "or Receiver Manager". The inclusion of the words "or a Receiver Manager" was made in the Ontario and Manitoba legislation after the 1979 amendment to the British Columbia legislation.

[22] I am satisfied that a Receiver Manager can be appointed at the instigation of a mortgagee in foreclosure proceedings even though the applicant has no charge against chattels or the goodwill of a company. Section 39 of the ***Law and Equity Act*** makes reference only to "all cases in which it appears to the Court to be just or convenient ...". There is no requirement that the case must involve the enforcement of security where the chattels and the goodwill of a company are charged.

[23] The addition of the words "receiver manager" in what was formerly known as the ***Laws Declaratory Act*** was a clear indication by the Legislature that the person appointed could not only receive rents and profits but could also manage. Provisions in the ***Law and Equity Act*** and formerly the ***Laws Declaratory Act*** are statutory declarations of what the law is and usually represent changes thought by the Legislature to be

appropriate. I am satisfied that that was what was intended by the Legislature in 1979.

[24] In the case of foreclosure proceedings where the mortgage is against a hotel or apartment, to allow a receiver to be appointed without the ability of that receiver to manage the property creates an illusory protection of the interests of a mortgagee. The "usual" form of order for an appointment under Rule 47 of the ***Rules of Court*** allows the management necessary to make effective the right of possession given to a mortgagee under a mortgage. The ability to enforce payment of rents, to re-rent, to repair and preserve, to employ assistants and to pay operating expenses gives effectiveness to the rights of the mortgagee. These rights are given to the mortgagee under the standard form of mortgage and it has become the practice of the Court to grant these powers to a Receiver appointed under Rule 47 of the ***Rules of Court*** even though that Rule only refers to the appointment of a "Receiver".

[25] In the case of a hotel or an apartment, these "usual" powers are required so that the ability to collect rents and profits is effective. In the case at bar, the ability to manage the hotel is the only effective way for United to

realize on its mortgage security and give effect to the contract agreed to by the mortgagor.

[26] The English authorities are consistent in establishing the proposition that a receiver of the rents and profits of a property appointed on the application of a mortgagee would also not be appointed manager of the business unless the business or its good will is expressly or impliedly included in the mortgage security: ***Whitley v. Challis***, [1892] 1 Ch. 64 (C.A.); ***Truman & Co. v. Redgrave*** (1881), 18 Ch. D.547 (C.A.); ***County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.***, [1895] 1 Ch. 629 (C.A.); and ***Re Leas Hotel Co.***, [1902] 1 Ch. 332. However, these statements must be tempered by the fact that the British Columbia, Manitoba and Ontario legislation contains the words “or Receiver Manager” whereas the English legislation does not. As well, the ability of the Court in England to appoint a Receiver Manager is subject to the caveat that such an appointment can be made if it can be implied that a charge on the business or its good will is included in the mortgage security.

[27] ***Whitley*** has been applied in Canada in ***Big Country Holdings Ltd. v. Bodale Holdings Ltd.***, unreported, 20 March 1986, Supreme Court of British Columbia action number H860054

(Vancouver Registry) and ***First Investors Corp. Ltd. v. 237208 Alberta Ltd. et al*** (1982), 20 Sask. R. 335 (Sask. Q.B.). In ***Big Country***, Leggatt, L.J.S.C., as he then was, refused to appoint a Receiver Manager where the mortgagee had only a chattel mortgage, an agreement for sale and where the chattel mortgage charged the “goods, personal chattels and personal property” of the mortgagor. However, I am satisfied that this decision must be limited in that Leggatt, L.J.S.C. found that: “... the charge does not cover good will and the chattels covered do not of necessity imply the business is included.” The mortgage in question makes specific and repeated reference to chattels only and no where indicates that good will is covered by the charge.” In ***First Investors***, Walker, J. refused the appointment of a Receiver Manager of a hotel and tavern where there was no chattel mortgage and there was no mention that the mortgage covered the business or good will of the mortgagor.

[28] However, a Receiver Manager of a hotel business was appointed in ***Brooks v. Westshores Inn Ltd.***, [1989] B.C.J. (Q.L.) No. 1633 (B.C.S.C.) despite the fact that the mortgage in question did not include a charge against the chattels and

the good will of the mortgagor. In appointing a Receiver Manager, Houghton, L.J.S.C., as he then was, stated:

> In my opinion, the court should not put the petitioner in the position of running a risk of having the summer proceeds stripped without any payments being made. (at unnumbered paragraph 6).

[29] Even if I am wrong in concluding that the change in 1979 made it clear that a Receiver Manager could be appointed even if the security of a plaintiff or a petitioner did not include a charge against chattels or the good will of the company, I am satisfied in the case at bar that the mortgage of United impliedly includes a charge against the chattels on the premises and the business and good will of the mortgagor. The definition of “lands” includes “all buildings, improvements and fixtures located on the land”. Additionally, under paragraph 15.01 of the mortgage, any “receiver” appointed by United may: “(c) lease out the Lands or any parts of Lands on any terms the receiver decides; (d) collect all income from the Lands; ... (g) manage the Lands and maintain them in good condition; ... (i) carry on any business which the Mortgagor conducted on the Lands.”

[30] I am satisfied that the agreement by the mortgagor to allow any receiver appointed to carry on the business that the mortgagor conducted on the lands is sufficient evidence of an

intention the mortgage charge would also charge the business and the good will of the mortgagor so as to permit the appointment of a Receiver Manager even though United did not have a General Security Agreement.

[31] Accordingly, a Receiver Manager is appointed. The third question which arises is whether the Receiver Manager should be entitled to offer the property for sale even though an order for conduct of sale has already been granted to J.T.S.

DISCUSSION: SHOULD THE RECEIVER MANAGER BE GRANTED THE ABILITY TO OFFER THE HOTEL FOR SALE?

[32] Despite the fact that J.T.S. was granted an order for conduct of sale on November 26, 2002, I am satisfied that the Receiver Manager should be granted the power to offer the hotel for sale as an ongoing operation.

[33] First, the Receiver Manager will have the best access to the actual income and expense figures which will be relied upon by any prospective purchaser. That information would not necessarily be available to J.T.S. from the current owners. As well, the figures that were formerly available will not necessarily reflect any improvements to the income and any reductions in the expenses which can be occasioned by the Receiver Manager.

[34] Second, the Receiver Manager will be charging on a time basis whereas any agent employed by J.T.S. will insist upon the payment of a negotiated real estate commission. Even if the “usual” rate of 7% on the first $100,000 and 2-1/2% on the balance of any sale price above $100,000 can be reduced by negotiation, I am satisfied that any negotiated fee would be far in excess of the fees charged on a time basis for the Receiver Manager to market the property. Third, I cannot be satisfied that the efforts of the Receiver Manager will be any less effective than any real estate agent that might be retained by J.T.S. In the circumstances of this case, I am satisfied that the Receiver Manager should be granted the ability to offer the property for sale.

“G.D. Burnyeat, J.”
The Honourable Mr. Justice G.D. Burnyeat

TAB 8

Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

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

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

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

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

[4] On his cross-examination, Mr. Freure admitted:

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

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

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

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

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

Receiver/Manager

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

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

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

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank’s attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor’s solicitors themselves refer to the prospect of “costly, protracted and unproductive” litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court’s approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

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

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

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

Motions granted.

TAB 9

CITATION: Caisse v. River, 2013 ONSC 6809
COURT FILE NO.: CV-13-0742
DATE: 20131031

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CAISSE DESJARDINS DES BOIS-FRANCS	)	
Plaintiff	)	M. Abramowitz, S. Wolpert, for the Plaintiff
– and –	)	
RIVER ROCK FINANCIAL CANADA CORP., RIVER ROCK DISTRIBUTION CORP., RIVER ROCK INTERNATIONAL LIMITED, 2126628 ONTARIO LIMITED, HUBERT BELANGER and JACLYN NICOLE BELANGER	)	
Defendants	)	D. Magisano, E. Eski, for the Respondents
	)	B. Frydenberg, for Scotia Mortgage Corp.
	)	D. Crabbe, for 2nd Mortgage Respondents (Falconi et al)
	)	J. Willis, for PwC, as monitor and proposed Receiver
	)	**HEARD:** October 17 and 23, 2013

REASONS FOR DECISION

J.R. McCARTHY J.:

The Motion

[1] This is a motion for the appointment of a receiver over certain assets of the Defendants. This was a bi-lingual proceeding in which the court agreed to receive evidence in both French and English.

The Parties

[2] The Plaintiff (the "Caisse") moves for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing PricewaterhouseCoopers Inc. ("PwC") as receiver, without security, of the receivables of River Rock Financial Corp. ("Financial"), River Rock Distribution Corp. ("Distribution"), River Rock International Limited ("International"), 2126628 Ontario Limited ("212"), [collectively known as the "Corporate Debtors"] and the real property of Hubert Belanger and Jaclyn Nicole Belanger, [collectively known as the "Individual Debtors"]. All Defendants are collectively referred to as the Debtors. The motion is opposed by the Defendants. The proposed scope of any receivership order is of concern to Scotia Mortgage Corporation and 1350430 Ontario Inc., Pina Bitonte and Marisa Falconi, hereinafter referred to as "the mortgagees". The mortgagees hold first and second mortgages respectively over the residence owned by the individual debtors, described as: Lot 14, Plan 51M788 except right of re-entry in SC 295290; Innisfil (PIN 58089-0128) (LT), and the municipal address 980 Shoreview Drive, Innisfil, Ontario ("the real property"). The mortgagees do not oppose the appointment of receiver *per se*; rather, they take the position that the receiver's mandate should not extend to the real property. A third mortgagee, The Canada Trust Company, did not appear on the motion. The proposed order is appended to these reasons as Appendix "A" (the "proposed order").

Background

[3] On January 8, 2013 and January 17, 2013, respectively, Distribution and Financial each opened corporate operating accounts (the "accounts") at the Caisse. The account agreements did not contain any overdraft protection or credit facility for the account holders; instead, were the accounts to become overdrawn, the Caisse could demand payment of the overdrawn amount at any time, plus interest at 21% per annum.

[4] During February and March 2013, certain electronic fund transfers ("EFTs") in favour of Financial and Distribution were credited to the accounts. Many of those EFT's were later reversed, resulting in the accounts going into overdraft in the amount of $2,148,093.81. There being no overdraft agreement between the Caisse and the account holders, the Caisse found itself as an involuntary creditor of Financial and Distribution.

[5] Upon learning of the situation, the Caisse demanded repayment of the overdrawn accounts. The individual debtors advised that they were not in a position to repay the Caisse the outstanding amounts. However, because the individual debtors closely controlled both of Financial and Distribution, as well as two additional corporations, International and 212, and because these corporations collectively owned outstanding receivables, the debtors claimed to be in a position to repay the Caisse once the receivables were collected. The parties subsequently agreed to convert the outstanding overdraft into a secured loan, to be repaid by the debtors not later than June 25, 2013. A security agreement pledged the receivables of the corporate debtors. The individual debtors granted the Caisse a collateral mortgage over the real property. Additionally,

Hubert Belanger executed a "general suretyship" in favour of the Caisse. In exchange, the Caisse agreed to forbear on its right to seek immediate overpayment on the overdraft and to a revised rate of interest for the purposes of the loan.

[6] The demand loan agreement, security agreement, general suretyship and the collateral mortgage were all executed on or about April 5, 2013. The security agreement provided that, if the debtors failed to pay the loan on the stipulated date, the debtors would be in default and the Caisse would be entitled to appoint a receiver.

[7] The Debtors did make a payment of $352,715.10 towards the loan on March 28 2013, reducing the debt to $1,837,000. The balance of the loan was not repaid as per the agreement. On June 28, 2013 the Caisse demanded repayment of the outstanding balance owing and notified the debtors of its intention to enforce its security interests.

The Just and Convenient Test

[8] Pursuant to section 243(1) of the BIA and section 101 of the CJA, the court may appoint a receiver or receiver and manager where it is just or convenient to do so, on such terms as are just. Where a security agreement provides the right to the appointment of a receiver, a court appointed receiver is not considered to be an extraordinary remedy. The just or convenient test will be met where such a court appointment will enable the receiver to more effectively carry out its duties than it could if it were privately appointed. (see: *The Bank of Nova Scotia v. D.G. Jewelry Inc. et al.,* [2002] O.T.C. 762, 2002 CanLii 12477 (ONSC) at para. 3; see also: *Business Development Bank of Canada v. 2197333 Ontario Inc.,* 2012 ONSC 965)

[9] I have no hesitation in finding that a receiver should be appointed pursuant to the BIA and the CJA. The moving party has met the test. The report of the monitor appointed by this court in July and whose appointment was renewed and whose task was clarified in August, leaves the court with no doubt that the Defendants are involved in business dealings which are, to say the least, suspect. The Defendants have been unable or unwilling to produce to the monitor or the court business documentation that would shed light on the significant deposit, withdrawal and reversal activity in the accounts since January 2013. There has been nothing of substance to support the Defendants' assertion that a receivership order would jeopardize their ongoing business activities. Those activities are manifestly lacking in any kind of substance. They appear to involve transfers between accounts belonging to closely held corporate and business entities at various financial institutions. The credibility of the principal and directing mind of the corporation debtors is seriously open to question. It appears that the financial statement for "212" was not prepared by Business Affairs Ltd., as purported. I do not accept that Hubert Belanger has forgotten whether that financial statement was given to the Caisse since it was an integral component of the documentation required by the lender in consideration of it increasing the *transit* (which afforded a kind of provisional credit on held deposits) from $10,000 to $500,000. I am troubled by the unaudited financial statement for "212" for the fiscal year 2012. PwC's monitoring reports indicate that there are no financial statements for this entity. PwC could find no accounts receivable,

purchase orders or invoices; in short, nothing to substantiate the existence of a viable business enterprise.

[10] In respect of balance of convenience, it is abundantly clear to me that it favours the Plaintiff. The Defendants conceded that there was no documentation to support any significant level of business activity which would be in harmony with the inflows and outflows of monies from the accounts. The Defendants were unable to demonstrate how the corporate debtors would suffer irreparable harm if a receiver was appointed. The businesses do not appear to be operating at any appreciable level. I was referred to no contracts or projects that would be frustrated or any receivables compromised. In short, the Defendants failed to satisfy this court that it is presently operating a viable business whose enterprise would be impaired by the appointment of a receiver.

[11] The Defendants submit that there is a tri-able issue as to whether the loan agreement and security agreements were given under duress. There is an utter lack of compelling evidence at this stage to support that assertion. The Defendants directed the court's attention to electronic mail exchanges which took place between representatives of the Caisse and Hubert Belanger following the accounts going into overdraft. That evidence cannot support the assertion that Hubert Belanger was the victim of any threats or intimidation on the part of the Caisse or that he was exhibiting any signs of being under duress in the days leading up to the execution of the loan and security documentation.

[12] The Defendants also assert that there is a tri-able issue as to whether the EFTs were irrevocable upon deposit in the accounts given that the account agreement did not call for holds on EFTs. I cannot accept that assertion for two reasons. First, under Section C (*Fonctionnement Du Folio*), the account agreement contains the following wording at sub-section 10.3:

> *La personne morale reconnaît qu'un chèque ou autre effet de commerce crédité à son folio ou payé par la caisse n'est payé que s'il est honoré à la suite du traitement qui en est fait par le centre de compensation.*

[13] In my view, this clause contemplates that a credit to an account is not considered paid until the instrument or means by which a sum is deposited is honoured at its point of origin. Second, treating the EFT as irrevocable would leave the Caisse in the position of having to extend credit involuntarily whenever a payor's institution declined to honour the instrument or confirm the transaction by which funds were transferred into the operating accounts. These were simple deposit and operating accounts. They were not lines of credit. There was no overdraft agreement in place. The *transit* was granted by the Caisse to the account holders as a means of affording them a limited draw on a held deposit. It was in the nature of provisional credit only. The *transit* was only increased from $10,000 to $500,000 at the request of Hubert Belanger upon him providing the Caisse with certain requested documentation, including the requested financial statements, business organization charts and a *bilan personel* or personal statement. There is no evidence that the Caisse did anything improper in reversing the EFTs out of the accounts. Counsel for the Defendants suggested that details from the Caisse's

internal investigation had not been divulged to date and that this should raise the court's suspicion as to the propriety of the reversals. This rather ignores the fact that these were transactions related to the Defendants' business. One would have thought that it would be the Defendants who would come to court with answers rather than questions as it pertains to the reversed transactions. It defies commercial sense that a business person in charge of closely held corporate entities would not have intimate knowledge of why six figure payments failed to clear the payor's accounts. This is especially so when at least a portion of the reversed deposits originated from accounts controlled by the corporate debtors at other financial institutions.

[14] The Defendants argue that there is a tri-able issue as to whether the loan and security agreements were supported by adequate consideration. It is clear on the record before me that the parties arrived at a commercially reasonable solution in the short term to the problem posed by the overdraft, or what has been termed the "involuntary loan". That solution was an arrangement which, on its face, was supported by adequate consideration. The Plaintiff agreed to forebear on its rights under the account agreement to demand that the Defendants bring the account balance above zero in return for the execution of a fixed term demand loan and a security agreement of wide scope. I agree with the counsel for the Plaintiff that the individual debtors offered up the additional corporate entities, International and 212, to form part of the security arrangement. They had the power to do so. The debtors benefitted from the Plaintiff's forbearance, a reduction of the interest rate applicable to the overdraft as well as time to pay off the involuntary loan. The Defendants had access to legal advice; indeed, Jaclyn Belanger obtained a certificate of independent legal advice. The individual debtors executed the documents personally and on behalf of the corporate debtors. The debtors even made a payment towards the loan, reducing the principal to its present total of $1.823 million dollars. I find it strange that, had Hubert Belanger believed that the reversals that created the overdraft been made in error, he would not have, circumspectly perhaps, nevertheless lodged a protest, stated his position, demanded an investigation or had his lawyers get involved. It is equally strange that a business person would execute a demand loan and provide general security because of the fear of litigation or having his business shut down. The account agreement did not call for the appointment of a receiver in the event of an overdraft. It is not clear to this court how the Caisse would have shut the business down by the issuance of a simple claim for repayment of an involuntary loan from a deposit account in the absence of a receivership clause. Presumably, the defendants would have opted to defend such an action based upon the irrevocability of the EFTs, a defence that they now claim is so meritorious that it can now serve to stave off of the appointment of a receiver.

[15] It seems to me that the absence of a strong *prima facie* defence should be one of the considerations of a court in the factual matrix underpinning a "just and convenient" analysis. The mere assertion of a defence based upon duress and absence of consideration does not dissuade this court from finding that it is just and convenient that a receiver be appointed. Nor am I persuaded that the irrevocability of the EFTs is a legitimately tri-able legal issue that should weigh heavily on the "just and convenient" analysis.

[16] There is no doubt that the demand loan went into default. The Defendants failed to pay it off in its entirety by June 25, 2013. The loan documentation contemplates the appointment of a receiver. The relief sought by the Plaintiffs cannot be said to be extraordinary. I am not prepared to give any weight to the patently bald assertion that there are tri-able issues. The Defendants have failed to demonstrate that the corporate debtors are solvent, viable and active business entities which will be irreparably harmed by the appointment of a receiver. The conduct of the Hubert Belanger gives rise to a grave concern that the business practices of the debtors have been deceitful. It is both just and convenient that a receiver be appointed.

The Scope of the Order

(a) The position of the mortgagees

[17] The mortgagees take no position as to the appointment of a receiver but argue that the real property over which they hold security by way of first and second mortgages respectively should be carved out of any receivership order. They assert that there is no practical connection between the business receivables and the real property. Moreover, there are no built in efficiencies, costs savings or advantages to having the receiver handle the real property. There is no interdependence between the receivables of the business and the sale of the real property. This is not the case of selling a commercial building together with chattels and receivables as a going business concern in order to maximize recovery for the creditors. The mortgagees refer to paragraph 102 of the report of PwC and point out that what the prospective receiver is proposing as it pertains to the real property is no different than how a mortgagee in possession would conduct itself. A receiver would do no more than add a layer of expense and procedure to the handling of the real property, resulting in increased expense but adding nothing of convenience. The mortgagees rely on the decision in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088, wherein the court stated that in deciding whether or not to appoint a receiver under the just and convenient test, regard should be had to all of the circumstances but in particular to the nature of the property and the rights and interests of all parties in relation thereto. They also rely on the Ontario Court of Appeal's decision in *Alma College v. United Church of Canada* (1996), 62 A.C.W.S. (3d) 710, 1996 CarswellOnt 1370.

[18] The mortgagees point to the fact that they rank in priority to the Caisse, that they are conventional mortgagees who actually loaned money to the debtors on the understanding that mortgage law would apply and mortgage remedies would be available. They emphasize the fact that their interest in the property is some $6.4 million compared to the Caisse's general security interest of $1.823 million in all of the debtor's property. The Caisse has alternate remedies (the right to the receivables) available to collect the amount owing to it. The Caisse knew when it took the mortgage on the property that it ranked behind the mortgagees. It could not have reasonably expected that it would be entitled to such an extraordinary remedy in the event of default. The Caisse now comes in the back door as a subordinate creditor looking to dictate how the property should be handled. The Caisse should not be allowed to insinuate itself into a position equal to the mortgagees and supplant the reasonably held expectations that their rights as mortgagees would be

sacrosanct. While the appointment of a receiver would not be considered an extraordinary remedy vis-à-vis the Defendants in light of the security agreement, it nevertheless remains extraordinary vis-à-vis the mortgagees, who enjoy discrete rights to the real property only. The mortgagees suggest that the Caisse has failed to satisfy the onus on it to demonstrate that it would be just and convenient for the appointment of a receiver over the real property. Moreover, the Caisse can demonstrate no prejudice: its own evidence would place the value of the real property at $13.5 million while the overall debt held by the creditors is in the neighbourhood of $8.2 million. Finally, the interest of the Caisse is protected by the mortgagees' obligation at common law to realize fair market value on the asset and to have regard to the interests of creditors ranking behind them.

(b) Analysis

[19] In the case of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84, the Ontario Court of Appeal confirmed that the overall purpose of a general receivership is to preserve and realize the property for the benefit creditors in general. While confirming that, 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, the Court also enumerated the exceptions to that general rule, the second of which was 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.

[20] Having considered all of the circumstances, including the nature of the real property and the rights and interests of the parties, I find that it is just and convenient that the receiver's mandate extend to all of the real property. The Caisse is a secured creditor no less than the mortgagees. I fail to see any utility or fairness in distinguishing between a conventional mortgagee and a collateral mortgagee. I was not referred to any authority that would. In the case of *BNS v. Freure, supra*, Blair J. (as he then was) stated that the exercise of the Court's discretion should involve an examination of all of the circumstances, "…including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." Although the latter case dealt with the appointment of a receiver rather than the scope to be assigned to his or her mandate, in my view, those considerations should still apply.

[21] I find that it is just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors. While the real property has no connection to the business, I find it to be in the interests of all parties that one person, assigned by the court, operating under an order tailored to the circumstances, and responsible to the court for its actions, should control the process or processes under which the receivables and real property are managed, preserved and ultimately disposed of. This strikes me as convenient to all. It is also guarantees

transparency and accountability. I agree with counsel for the Caisse that, under a private sale, the mortgagees would be entitled to transfer the real property without providing notice to the Caisse or accounting to it until late in the process. Under a court-appointed receivership, PwC would be required to keep all stakeholders informed of the sale process and would be obliged to seek court approval of any transaction. This would provide all stakeholders with the opportunity to raise any concerns that they have with the receiver, and if need be, to bring these concerns to the attention of the court.

[22] Moreover, with four outstanding mortgages and a demand loan in default, a multiplicity of proceedings would be inevitable. Indeed, the individual debtors have already delivered a Notice of Intent to Defend in the one mortgage action that has been commenced. In light of the defence to that action, protracted litigation is a distinct possibility. It is far more convenient, in my view, for one party, with no personal interest in the business or the property, to act as receiver manager for the benefit of the collective. That receiver, a court appointed officer, acting under a fiduciary duty to all, will have the right to take immediate possession of the property. This is clearly in the best interest of all of the creditors. I see no injustice or prejudice to the mortgagees under such an arrangement: there is no evidence before me that the real property is worth any less than the $13.5 million put forth by Hubert Belanger. I cannot conceive of any scenario wherein the receivers' costs or disbursements would compromise a full return on the mortgagees' interest. The proposed order contains a limit on the right of the receiver to borrow in order to fund the receivership (see paragraph 24 of Appendix "A"). To the extent that the receiver conducts itself in a manner similar to a mortgagee in possession, one must assume that some of its costs in that regard would simply be incurred in the stead of the costs that a mortgagee in possession would incur or charge. This assurance can be enhanced by a clause in the order which would serve to ensure that the priority of a receiver's charge or borrowing charge should rank ahead of the three conventional mortgages only to the extent that those charges relate exclusively to the preservation, maintenance, upkeep or condition of the real property. The proposed order put forward by the Caisse contains such a clause at paragraph 28. In my view, it is just and convenient that the costs of the receiver as they pertain to the real property be allocated amongst all creditors. Moreover, this arrangement ensures that the realization of the mortgagees' security will not be subjected to the operation of the business, matters which are of no concern to them as mortgagees. On the other hand, it is only reasonable and fair that the receiver be given priority for expenditures incurred for the necessary preservation and improvement of the property. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no good reason why the mortgagee should not have to pay its proportionate share of the receivership costs [see: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp* (2006), 25 C.B.R. (5th) 156, 2006 CanLii 25352 (ON SC) at para. 45.

[23] As well, paragraph 28 of the proposed order would respect the priorities of the charges on the real property, with the mortgagees lined up in step behind the "Receiver's Charge" and "Receiver's Borrowings Charge" only.

Changes to Proposed Order Sought by Mortgagees

[24] I am not prepared to accede to the requests of the mortgagees to insert in the order a duty to bring a motion to approve a sale process for the real property. I accept that PwC is a sophisticated and experienced entity which is well aware of its obligation to act in a commercially reasonable and responsible manner. The discharge of its duties will be subject to the ultimate scrutiny of the court. I see no need to burden its mandate with unnecessary court attendances. It is in the best interest of all concerned to minimize court attendances which necessarily involve delays and expense. Nor I am prepared to impose any obligation for an interim distribution of the proceeds of disposition of sale within 30 days of the closing any deal on the real property. The mortgagees have not demonstrated a pressing need for such a distribution. Finally, I am not prepared to permit the mortgagees to move forward with their present or contemplated actions on the covenant and for possession. That would add an unnecessary layer to the process, allow a multiplicity of proceedings and result in additional costs that the litigants would no doubt look to recover out of the proceeds of disposition from the sale of the Debtors' property. The mortgagees have failed to persuade me that any of these proposals would serve the interests of all parties.

Vacant Possession

[25] It is clear that the proposed order put forward by the moving party includes many of the terms and clauses found in the standard receivership orders granted by this court in commercial settings. The form and content of the proposed order is generally acceptable to the court. In order for the receiver to realize on the assets of the debtors, PwC should be afforded unfettered rights to manage, preserve and market the property. This requires vacant possession of the property within a reasonable period of time. I am unable to accept that the individual debtors should be obliged to pay the amount of $47,663.49 monthly as a condition of remaining in possession until the vacancy date. While this may be the rough equivalent of the monthly payment on the first three mortgages, I am reminded that the mortgages are in default and that the debt to the Caisse remains unpaid because the debtors collectively were unable to make any payments. I am also reminded that the real property includes a residence where human beings live. It is neither a factory, nor a plant nor a warehouse. In light of the circumstances and in light of the fact that there appears to be sufficient market value in the property to cover the secured interests of the Caisse and the mortgagees, I am unable to agree that it is just and convenient that the individual debtors make a payment on account of the debts or for occupation rent pending their vacating of the premises. The court orders, however, that the individual debtors shall vacate the real property and buildings by no later than November 30, 2013 (the "Vacancy Date").

Changes Suggested by the Defendant Debtors

[26] The changes suggested by the Defendants are largely cosmetic and practical rather than substantive. They involve simple and largely non-contentious matters such as the right to serve documentation by electronic mail and a 24 hour notice period for a right of property inspection. I am prepared to adopt them into the order of the court.

Disposition

[27] For the foregoing reasons, the motion is allowed. There shall be an order to go under section 243(1) of the BIA and section 101 of the CJA appointing PwC as the Receiver, without security, of the receivables of the corporate debtors and the real property of the individual debtors. For the convenience of the parties, the court is providing each party with a draft copy of an order containing the content which flows from the Reasons for Judgment and in the form suggested by the moving party and upon which each party was afforded the opportunity to make submissions. The parties shall have seven (7) days within which to indicate their approval as to form and content. In the event that approval as to form and content is not forthcoming, the parties shall arrange an appointment with me via teleconference through the Trial Co-ordinator in Barrie to settle the order.

[28] If the parties are unable to agree on the issue of costs of the motion within 30 days of today's date, then they shall file submissions in writing on the issue of costs, according to the following schedule: (a) the Plaintiff shall serve and file submissions, limited to 3 pages, on or before December 31, 2013; (b) the Defendants and the mortgagees shall have until January 17, 2014 to serve and file responding submissions, limited to 2 pages; (c) the Plaintiff shall have until January 24, 2014 to serve and file reply submissions, if any, limited to 1 page.

J.R. McCARTHY J.

Released: October 31, 2013