APPENDIX "A"

Court File No. 13-0742

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR.	)	, THE
	)	
JUSTICE J.R. McCARTHY	)	DAY OF OCTOBER, 2013

B E T W E E N:

CAISSE DESJARDINS DES BOIS-FRANCS

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

ORDER

THIS MOTION made by the Plaintiff 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 (in such capacities, the "**Receiver**") without security, of certain assets, as described herein, of River Rock Financial Canada Corp., River Rock Distribution Corp., River Rock International Limited, 2126628 Ontario Limited (collectively, the "**Corporate Debtors**"), Hubert Belanger and Jaclyn Nicole Belanger (collectively, the "**Individual Debtors**" and together with the Corporate Debtors, collectively, the "**Debtors**"), was heard on October 17, 2013 and October 23, 2013 at 75 Mulcaster Street, Barrie, Ontario.

ON READING the Motion Record, Supplementary Motion Record, Second Supplementary Motion Record, Factum, Supplementary Factum, Brief of Authorities, Supplementary Brief of Authorities and Second Supplementary Brief of Authorities of the Plaintiff, the Responding Motion Record, Cross Motion Record, Factum, Supplementary Factum, Brief of Authorities, Supplementary Brief of Authorities and Second Supplementary Brief of Authorities of the Defendants, the affidavit of Victoria Gifford, sworn August 21, 2013, the affidavit of Peter May, sworn August 30, 2013, the Responding Motion Record, Factum and Brief of Authorities of Scotia Mortgage Corporation, the First Report of PwC in its capacity as Court-appointed non-CCAA Monitor of the Debtors (PwC in such capacity, the "**Monitor**") dated August 21, 2013 (the "**First Report**") and the Second Report of the Monitor dated October 16, 2013 (the **"Second Report**") (collectively, the "**Court Materials**"), and on reading the consent of PwC to act as the Receiver, and on hearing the submissions of counsel for the Plaintiff, PwC, the Defendants, Scotia Mortgage Corporation, 1350430 Ontario Inc., Pina Bitonte, and Marissa Falconi, no one else from the Service List appearing although duly served,

SERVICE

1. THIS COURT ORDERS that service of the Court Materials is hereby validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, PwC is hereby appointed Receiver, without security, of the following assets of the Debtors, including all proceeds thereof (the "**Property**"):

> all of the Corporate Debtors' right, title and interest in and to all debts, accounts, claims, demands, monies, and choses in action which now are, or which may at any time hereafter be, due or owing to or owned by any Corporate Debtor and the related books and records of the Corporate Debtors (the "**Receivables**"); and

> all of the right, title and interest of the Individual Debtors in and to the real property with legal description LOT 14, PLAN 51M788 EXCEPT RIGHT

OF RE-ENTRY IN SC295290; INNISFIL (PIN: 58089-0128 (LT), and the municipal address 980 Shoreview Drive, Innisfil, Ontario (the "**Real Property**").

RECEIVER'S POWERS

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

(a) subject to paragraphs 4, 5 and 7 hereof, to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

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

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

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

(e) to settle, extend or compromise any indebtedness owing to any Corporate Debtor;

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

(g) to undertake environmental assessments of the Real Property;

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

(i) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, including terminating any existing listing agreements if the Receiver deems appropriate, and listing the Real Property on the Multiple Listing Service, and with such broker or listing agent as the Receiver may deem appropriate, and at such listing price as the Receiver may deem appropriate;

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

without the approval of this Court in respect of any transaction not exceeding $100,000.00, provided that the aggregate consideration for all such transactions does not exceed $250,000.00; and

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

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

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

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

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

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

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of any Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for the Real Property and any property owned or leased by any Corporate Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Corporate Debtors may have, to the extent related to the Receivables; and

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

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

DUTY TO PROVIDE VACANT POSSESSION TO THE RECEIVER

4. THIS COURT ORDERS that the Individual Debtors shall remove all chattels from the Real Property and the buildings situated thereon (the "**Buildings**") by no later than November 22, 2013 (the "**Vacancy Date**"), save and except for any chattels which the Receiver agrees in writing may remain on the Real Property and in the Buildings.

5. THIS COURT ORDERS that the Individual Debtors and any other occupants shall vacate the Real Property and the Buildings by no later than the Vacancy Date. The Individual Debtors shall deliver vacant possession of the Real Property and the Buildings to the Receiver by no later than the Vacancy Date. Notwithstanding any other provision hereof, the Individual Debtors' continued occupation of the Real Property and the Buildings from and after the date hereof until the Vacancy Date is conditional upon:

(a) payment by the Individual Debtors to the Receiver of occupation rent in the amount of $47,663.49 monthly, payable by October 30, 2013 for the period October 24, 2013 to November 22, 2013, which payment shall be subject to the priority of charges set out in paragraph 28(b);

(b) payment by the Individual Debtors of all utilities and insurance related to the Real Property directly to the applicable utility and insurance providers when due; and

(c) the Individual Debtors' maintaining the Real Property and the Buildings in substantially the same state and condition as in on the date hereof.

6. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to record (whether by video, photograph or otherwise) the Real Property and Buildings from time to time, including immediately upon the issuance of this Order, and upon 24

hours notice to the Individual Debtors, in order to document the state and condition of the Real Property and Buildings.

7. THIS COURT ORDERS that from the date of this Order to the Vacancy Date, with respect to the Real Property and the Buildings, the Individual Debtors shall grant access to the Receiver and its agents and prospective purchasers following at least 24 hours' written notice given by the Receiver to the Individual Debtors, provided that such entry is between the hours of 8 a.m. and 8 p.m. Notice is not required in cases of emergency or if an Individual Debtor consents to the entry at the time of entry.

8. THIS COURT ORDERS that the Sheriff of the County of Simcoe (the "Sheriff") shall have the discretion and authorization to evict or otherwise remove the Individual Defendants and any other occupants from the Real Property and the Buildings on the earlier of (i) the date on which the Receiver advises the Sheriff in writing that the Individual Debtors have been given three (3) business days written notice of their failure to comply with paragraph 5 hereof and have not cured such failure; and (ii) the date immediately after the Vacancy Date, in each case using such reasonable force as the Sheriff, in its sole discretion, determines to be reasonably necessary in the circumstances.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

9. THIS COURT ORDERS that (i) the Debtors, (ii) all of their respective current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on any of their instructions or behalf, and (iii) all other individuals, firms, corporations, banks and other financial institutions, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request, in each case subject to paragraphs 5 and 7 hereof.

10. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or

affairs of the Corporate Debtors or the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 10 or in paragraph 11 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

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

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE PROPERTY

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

NO EXERCISE OF RIGHTS OR REMEDIES

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

NO INTERFERENCE WITH THE RECEIVER

15. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in respect of or related to the Property (including, for greater certainty, any insurance contract related to the Property for which payments are current), without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

16. THIS COURT ORDERS that all Persons having oral or written agreements with any Debtor in respect of or related to the Property or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, insurance, transportation services, utility or other services in respect of or related to the Property are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods

or services as may be required by the Receiver, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

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

EMPLOYEES

18. THIS COURT ORDERS that this Order has no application to employees of the Debtors, if any, who shall remain employees of the applicable Debtor until such time as the applicable Debtor may terminate the employment of such employees. The Receiver shall have no authority or liability in respect of such employees (including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA), other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under section 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the

protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in Possession.

LIMITATION ON THE RECEIVER’S LIABILITY

20. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

21. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings (including such fees and disbursements of PwC and its counsel incurred in respect of PwC’s prior capacity as Monitor in these proceedings), and that the Receiver's Charge shall form a charge on the Property with the priority set out in paragraphs 28 and 29.

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

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

FUNDING OF THE RECEIVERSHIP

24. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $250,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, with the priority set out in paragraphs 28 and 29.

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

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

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

PRIORITY OF CHARGES CREATED BY THIS ORDER

28. THIS COURT ORDERS that the priorities of the Receiver's Charge and the Receiver's Borrowings Charge as among them and relative to other liens shall be as follows:

(a) on the Receivables,

(i) first, the Receiver's Charge; and

(ii) second, the Receiver's Borrowings Charge;

each in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise, on the Receivables in favour of any Person, but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA; and

(b) on the Real Property,

(i) first, the Receiver's Charge, but only to the extent such fees and disbursements relate exclusively to the preservation and safeguarding of the state and condition of the Real Property and the Buildings (the "**Real Property Condition**");

(ii) second, the Receiver's Borrowings Charge, but only to the extent such monies borrowed were used exclusively for the Real Property Condition (together with the charge described in subparagraph 28(b)(i), the "**Priority Charges**");

(iii) third, the charge/mortgage registered against the Real Property as instrument no. SC958873 in favour of Scotia Mortgage Corporation;

(iv) fourth, the charge/mortgage registered against the Real Property as instrument no. SC963409 in favour of 1350430 Ontario Inc., Pina Bitonte and Marisa Falconi;

(v) fifth, the charge/mortgage registered against the Real Property as instrument no. SC975734 in favour of The Canada Trust Company, as Trustee;

(vi) sixth, the Receiver's Charge, to the extent not already secured by the first ranking charge described above;

(vii) seventh, the Receiver's Borrowings Charge, to the extent not already secured by the second ranking charge described above; and

(viii) eighth, the charge/mortgage registered against the Real Property as instrument no. SC1049728 in favour of the Plaintiff.

29. THIS COURT ORDERS that each of the Priority Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise, on the Real Property in favour of any Person, but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

THE MONITOR

30. THIS COURT ORDERS that the First Report and the Second Report and the conduct and activities of the Monitor as described therein are hereby approved.

31. THIS COURT ORDERS that the Monitor is hereby discharged as Monitor, provided however that notwithstanding its discharge herein, the Monitor shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of PwC in its capacity as Monitor.

SERVICE AND NOTICE

32. THIS COURT ORDERS that the Plaintiff, the Receiver, the Debtors, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' e-mail addresses as recorded on the service list from time to time, and service of such court materials shall be deemed to be valid and proper service in these proceedings.

GENERAL

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

34. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any Debtor.

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

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

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

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

J.R. McCARTHY J.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that PricewaterhouseCoopers Inc., the receiver (the "Receiver") of certain defined assets, undertakings and properties (collectively, the “Property”) of River Rock Financial Canada Corp., River Rock Distribution Corp., River Rock International Limited, 2126628 Ontario Limited, Hubert Belanger and Jaclyn Nicole Belanger (collectively the "Debtors"), appointed by Order of the Ontario Superior Court of Justice (the "Court") dated the ____ of October, 2013 (the "Order") made in an action having Court file number 13-0742, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

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

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

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

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

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

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

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

DATED the _____ day of MONTH, 20YR.

PricewaterhouseCoopers Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: ______________________________

Name:

Title:

TAB 10

CITATION: Rompsen Investment Corporation v. 1514904 Ontario Ltd., 2000396 Ontario Inc., 1278502 Ontario Inc, 1259121 Ontario Inc., and Almonte Land Management Inc., 2010 ONSC 832
COURT FILE NO.: 09-47115
DATE: 2010-02-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROMPSEN INVESTMENT CORPORATION, Applicant

AND:

1514904 ONTARIO LTD., 2000396 ONTARIO INC., 1278502 ONTARIO INC, 1259121 ONTARIO INC., and ALMONTE LAND MANAGEMENT INC., Respondents

BEFORE: Justice Rick Leroy

COUNSEL: David P. Preger and Elisa Giacomelli, SOLOMON, GROSBERG for the Applicant

Mario Mannarino, BARNES, SAMMON for the respondents

Jahmiah Ferdinand-Hodkin, GOWLING LAFLEUR HENDERSON

HEARD: January 22, 2010

ENDORSEMENT

[1] This is an application by Romspen Investment Corporation (Romspen) for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA) and section 101 of the Courts *of Justice Act*, R.S.O. 1990 c. C.43 as amended (CJA) appointing SF Partners Inc. as receiver and manager (receiver) without security of all the assets, undertakings and properties of the Respondents. SF Partners Inc. consents in writing to act as Receiver.

[2] The application was returnable in Ottawa on December 17, 2009 on short notice. The respondents requested an adjournment to marshal and file materials and conduct cross examinations. The respondent argued that the conduct of Wesley Roitman, the managing general partner of the applicant, displayed animus toward the respondents in his dealings. The appointment of a receiver/manager is a serious matter. A hasty appointment made without proper foundation could cause serious financial harm and prejudice to innocent investors and third parties – Fisher Investments v. Nusbaum (1988), 31 C.P.C. (2d) 158. In the circumstances I granted the respondents an adjournment until January 22, 2010.

The parties graciously agreed to re-attend for argument in Cornwall in order to expedite the hearing.

[3] The issue to be decided on this application is whether the appointment of the receiver is just and convenient having regard to balancing the inconvenience facing the creditor in using the usual means of execution with the cost, ultimately to be borne by the debtors, of appointing a receiver. The appointment of a receiver derives from the court of equity and as such is an equitable remedy. The appointment of a receiver is intrusive and an appointment should be granted sparingly. In exercising its discretion the court should consider the effect of the order on the parties as well as their conduct.

Factual Overview

[4] The applicant is a secured lender to the respondents. The subject loan in the amount of $10 million was made July 18, 2006 and matured July 15, 2008, was not renewed and is in financial default. The aggregate amount owing on the loan on September 29, 2009 was $11,439,197.32. The per diem interest is $3,567.20. The applicant made demand and delivered the section 244(1) BIA notice on October 5, 2009. Payment has not followed. As a term of the adjournment on December 17, 2009 the respondent was ordered to remit all rent income from all of its income property to the applicant pending return of the application for argument on merits. No rent was paid. Mr. Bassile for the respondents in his affidavit deposed January 22, 2010 declared that he paid the expenses and trades, otherwise construction liens might have been registered.

[5] Over the adjournment period the respondents remitted the sum of $1.1 million on account which was paid and received on terms that the transaction and partial discharge do not affect the parties' standings in this application.

[6] The applicant's enforcement situation is complicated. The respondents are engaged in real property development and management in the Almonte area. There are 11 real properties involving four different owners encumbered by the applicant's security interest. They include 6 vacant commercially zoned lots, 1 commercial plaza and 1 commercial retail building – the only current income properties, eighty acres of residentially zoned land designated for a 420 lot residential subdivision, 1 residence and 1 cottage. The applicant discharged the residence and cottage from its charge in return for payment of the $1.1 million on account. While the residential subdivision is laid out services have not been installed.

[7] The applicant's security consist, *inter alia* of first mortgage security over the real properties and a security interest over the personal property of all respondents – first against all respondents but 1259121 Ontario Limited where it holds a fourth ranking charge..

[8] There are other stake holders. There is a second mortgage in favour of 1067278 Ontario Inc. on the eleven real properties securing payment of $2,500,000.00 with interest at the rate of 15% taken out in February 2006 that now stands at $5.5 million. The second

mortgagee consents to the instant application. The applicant's loan is personally guaranteed by three private individuals, namely Wilson Bassile, Jeffrey Jackson and David Simpson. Mr Bassille is the principal of the respondent development corporations. Jackson is the principle of the second mortgagee corporation and Simpson is an investor. The Township of Mississippi Mills has a direct option to purchase interest in two lots in the subdivision as well as a significant interest in development of the subdivision. Priority of rights issues between the municipality and second mortgagee may be unresolved.

[9] Mr. Bassille needs the lenders to indulge default and delay if he has any chance of successfully developing the subdivision to completion. Over the term of the adjournment the respondent did not initiate steps to examine the applicant and has not compiled further materials. Mr. Bassile acknowledges that the project suffers from lack of money. In addition to the debt and interests indicated there is another $300K in outstanding payables and engineering fees need to be paid before he can move forward on the subdivision. He is attempting to refinance all or part of the project.

Positions of the parties

[10] The applicant characterizes the respondent's circumstance as akin to engagement in a poker game with someone else's money. The respondent is asking that the applicant extend trust and indulgence on faith that it will all work out in the end. Meanwhile the loan account with the applicant grows at the rate of $3,000 daily. The second mortgage is in the same situation in that its account has doubled since inception for the same reason. The respondent is unable to pay municipal taxes as they come due, there are no sales pending, no offers and no firm mortgage commitments. The applicant argues that this is a serious default and that given the number of properties, interested parties and conflicts, enforcement in the usual fashion would lead to extended litigation and expense that will make the receiver's fees seem a bargain. The viability of the project is questionable. Every day that passes means less recovery for the second or other creditors. This is a classic case for a receiver. The second secured party endorses the appointment. The receiver is appointed by the court and is responsible to all parties in a fiduciary role. The receiver is expected to work closely and cooperatively with the debtor to achieve the best outcome in a liquidation. The debtor is protected from improvident dispositions as every proposed sale can be subjected to scrutiny of the court. The debtor does not relinquish the right to redeem and displace the receiver at any time. The applicant suggested as a term of the order that the receiver be precluded from entering in to any sales agreement for a period of 30 days to allow the debtor time to implement a refinance plan. In summary the applicant submits that the respondent developer will not be prejudiced by the insertion of a receiver unless the value is not there or there are structural sales and marketing deficits.

[11] The applicant cites the applicant's willingness to facilitate in a commercially responsible fashion vis a vis the payment of $1.1 million and discharge of the home and cottage as evidence of good faith and lack of animus.

[12] Mr. Bassille holds himself out as an accomplished developer who has invested everything he has into development in Almonte. He presented the residential subdivision to the lender in 2006 as the crown jewel of the development that would eventually serve to pay out the loan. He thought the lender was committed until completion. He argues that the shopping plaza alone appraised at $9.5 million as if complete and fully leased with normal vacancy in March 2007. He reports that following receipt of the BIA notice he was reassured by Mr. Roitman. The respondent argues that the applicant has orchestrated default in a fashion comparable to what was ascribed to the Royal Bank in Royal Bank of Canada v. Chongsim Investments Ltd. et. al. (1997), 32 O.R. (3d) 565. He suspects that Blake Cassidy, an 8% shareholder in the applicant has persuaded Mr. Roitman to bring enforcement proceedings for ulterior motives. He cites offers to purchase in October 2009 and concludes that Mr. Roitman wants all of the property to the detriment of the respondent and second mortgagee. The respondent argues that no one can complete this project as efficiently as he can. He suggests that the applicant is in error in its assessment of equity in the subject lands.

Analysis

[13] Successful real estate development requires a vision, a plan, dedication and committed financing. The respondent has three of four. In every such development there is a lag between the significant financial outlay and return on the project. It can and does take years as it has in the instant case. The respondent's mistake, if there is one, was made in 2006 when he accepted the applicant's $10 million promising to repay in two years. The developer respondent asks for more time, thereby converting a short term lender into a long term one.

[14] In terms of effect on the respondent's business, a distinction has to be made between the effects of appointment of a receiver on the day to day operations of, for example, a nursing home as in Fisher v. Nusbaum and a real estate development project. In Fisher/Nusbaum Mr. Nusbaum had been efficiently operating the nursing home for many years. It was not suggested that if he remained in control the business would be in jeopardy. There was no advantage to appointing a receiver pending the wind up hearing and there was serious risk of prejudice to the business operation inherent in appointing a receiver unfamiliar with the effective business operation. The prejudice to the respondent in that case outweighed the nominal advantage to the applicant in appointing a receiver.

[15] The developer is undercapitalized. As in Fisher/Nusbaum the applicant is not advancing an argument suggesting that the respondent is an incapable developer. The respondent does not have the resources to put toward debt. Unsecured payables are in the range of $300K and the respondent is unable to obtain credit from the engineer to complete and release necessary plans. The subdivision is some time and much money away from readying the property for market. The respondent requires more money than he has and can only offer third standing security behind $15 million.

[16] The just and convenient assessment involves consideration of the interests of lender and borrower. The wrap around financing in 2006 was such that the respondent had to know at the time that in the event of default and enforcement a receiver would be advanced. The number and nature of properties, the subdivision agreements, the involvement of the municipality, the second mortgage suggests that enforcement on a piecemeal basis is contraindicated. The fact that the second mortgagee under the direction of a guarantor to the instant indebtedness supports the appointment suggests that they, too, have seen equity evaporate and are concerned that this development is near or past the point of repayment in full. The principals and investors in the second mortgagee are familiar with the Almonte market and their support for the application is a significant factor.

[17] The developer respondents are insolvent. They owe more than $1K and are unable to pay. The first mortgage has been in default since July 2008. The developer respondents are unable to allocate any proceeds of commercial rent to the secured creditors as the rent is consumed by monthly expenses of operation.

[18] I don't discern the animus alleged by the developer. What I do discern is a very concerned group of lenders who has been in collection mode since July 2008 and achieving little. The exchange of money for discharges over the adjournment indicates that the principal of Romspen, Mr. Roitman continues to act in a commercially responsible fashion in interaction with the developer. Mr. Bassille has a personal interest in his holdings. It is only to be expected that Mr. Bassille is not going to part with his hard won assets without a contest. That does not translate into animus of the part of people with the means who offer less than he expects for property in a changed market.

[19] In the instant case as opposed to the circumstances in Fisher/Nusbaum there is advantage to bringing in a receiver to direct the resolution of the outstanding debt. The status quo is untenable even in the short term. There is a daily erosion of equity if there is any. If there is not, it is the second and unsecured lenders who are being compromised. A receiver is a significant intrusion but is clearly the most efficient in a difficult situation. It does not mean the end of the development. It does result in an orderly liquidation of assets bearing in mind the best interest of all parties and when required subject to court approval. The respondent developer is not precluded from obtaining alternate financing. The representation made is that the developer may be able to implement a refinance in 30 days.

Disposition

[20] In the circumstances the just and convenient disposition is to appoint the receiver on terms of the order attached hereto. Paragraph 3(l) will not come into force for a period of thirty days of even date.

Justice Rick Leroy

Date: February 3, 2010

TAB 11

CITATION: Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023
COURT FILE NO.: CV-13-10244-00CL
DATE: 20131203

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

APPLICATION UNDER S. 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c-B-3, S. 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c.C-43, and RULES 14.05(2), (3) (d), (g) and (h) OF THE *RULES OF CIVIL PROCEDURE*

RE: **BANK OF MONTREAL, Applicant**

AND:

SHERCO PROPERTIES INC., SHERK FARM LIMITED, COSHER PROPERTIES INC., AND DONALD SHERK, Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **S. D. Thom, for the Applicant**

R. B. Moldaver, Q.C., for the Respondents

HEARD: **NOVEMBER 4, 2013**

ENDORSEMENT

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

Background

[2] Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher

Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

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

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

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

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

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

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

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

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

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

The Bellisle Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) the remaining realty tax arrears;

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

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

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

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

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

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

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

Positions of the Parties

[28] Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

Law

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

[39] Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

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

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

[41] In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the

property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.).

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

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

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

[44] Similar comments were stated in *Royal Bank of Canada v. Whitecross Properties Limited Saskatchewan*, (1984) 53 C.B.R. (N.S.) 96.

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

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

[47] I have reached this conclusion for the following reasons:

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

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

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

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

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

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

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

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

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

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

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

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

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

MORAWETZ J.

Date: December 3, 2013

TAB 12

Supreme Court of British Columbia
Pirbhai Estate v. Pirbhai
Date: 1988-09-28

M.D. Andrews, for plaintiff.

W.E. Knutson, for defendants.

(Vancouver No. A841067)

[1] September 28, 1988. SCARTH L.J.S.C.:– The plaintiff applies for an order appointing a receiver-manager of Amu Bros.. Investments Ltd., its business and undertaking.

[2] The plaintiff is the administrator of the estate of his father, Ahmed Hassanali Pirbhai, who died on 6th June 1978. Prior to his death, the deceased and the defendant Amir Hassanali Pirbhai, to whom I shall refer, for the sake of convenience, as the defendant Amir, carried on a partnership here and in Pakistan By 1984, the plaintiff and the defendant Amir had not settled the partnership accounts. On 5th April 1984, the plaintiff commenced the action in this cause. Therein he sought, amongst other things, a declaration that prior to and at the time of his death the deceased Ahmed Pirbhai and the defendant Amir carried on business in partnership – a partnership the assets of which included the assets and business of the defendant Amu Bros. Investments Ltd. He sought, as well, relief ancillary to that declaration, including an order that the business and affairs of the partnership be wound up, an accounting and the appointment of a receiver.

[3] The trial of the action was heard by Murray J. in June 1986. In written reasons for judgment delivered on 21st July 1986 [[1986] B.C.W.L.D. 3537], Murray J. held the plaintiff to be entitled to the following, amongst other, relief:

> (a) A declaration that at all times between 1972 and 6th June 1978 the defendant. Amir Pirbhai earned on business in British Columbia in partnership with the late Ahmed Pirbhai.
>
> (b) A declaration that the plaintiff in his capacity as administrator of his father's estate has a one-half interest in the partnership business and assets as of 6th June 1978 which assets and business include:
>
> (1) The assets and business of the Defendant Amu Bros. Investments Ltd.
>
> (2) Any shareholders' loans payable or paid by Amu Bros. Investments Ltd. to Amir Pirbhai…
>
> (c) A declaration that the plaintiff is entitled to interest at a fair rate on his share of the partnership assets pursuant to s. 45(1) of the Partnership Act.

[4] The defendants' appeal from Murray J.'s judgment was dismissed by the Court of Appeal on 10th December 1987 [[1988] B.C.W.L.D. 579]; their application to the Supreme

Court of Canada for leave to appeal the judgment of the Court of Appeal was dismissed on 22nd February 1988.

[5] A hearing before the registrar for the purpose of taking the partnership accounts was then arranged for 14th June 1988. It appears from the evidence before me that the hearing was adjourned to the month of September 1988, because the original time estimate of 5 days for the hearing was thought to be insufficient, and accordingly the registrar directed 15 days be set aside.

[6] In support of his application for the appointment of a receiver--manager, the plaintiff filed the affidavit of Mr. W.S. Berardino, Q.C., a partner in the firm of solicitors representing the plaintiff. Mr. Berardino deposes in part as follows:

> 8. It appears from the evidence given in the proceedings herein that the business and undertaking of Amu Bros. Investments Ltd. which is the main business of the partnership, is controlled and managed by the Defendant Amir. While the Plaintiff has registered certificates of Lis Pendens over real property owned by Amu Bros. Investments Ltd., he has no control over the manner in which the Defendant Amir manages the company's business.
>
> 9. I am advised by the Plaintiff that he is extremely concerned about the security of the undertaking and assets of the Defendant Amu Bros. Investments Ltd. pending the completion of the partnership accounting and the winding up and sale of the partnership property, especially now that the Defendant Amir has exhausted all appeals open to him. This concern has been exacerbated by the fact that Amir has throughout denied the existence of the partnership and has refused to enter into any negotiations with the Plaintiff for the settlement of the partnership accounts without further legal proceedings.

[7] By way of response, the defendant Amir, in his affidavit, deposes as follows:

> 28. THAT I have not mismanaged nor dissipated the assets of Amu Bros. Investments Ltd. during this litigation or before and I have no intention of now doing so.

[8] The defendant Amir also deposes that he is a principal of Amu Bros. Investments Ltd. It appears that he and his wife own 95 per cent of the shares of the company. The assets owned by the company consist, at the present time, of three parcels of real property and the proceeds of sale of a fourth parcel. The total assessed value of the three parcels is in excess of $2,000,000. One parcel is bare land; the other two have industrial buildings situate on them. The plaintiff has registered against each title a certificate of lis pendens.

[9] The fourth parcel of land was sold in 1981 for $1,130,000 by way of an agreement for sale. In 1985, the final payment became due under the agreement for sale, and as a consequence of a certificate of lis pendens registered by the plaintiff against the property

the moneys were paid into a solicitor's trust account. The amount presently held is approximately $100,000.

[10] Revenue is derived from each of the three parcels of land presently owned by the company. The unaudited financial statements of the company for the year ended 31st December 1937 indicate total rental income for the year of $277,245 and net earnings, after provision for income taxes, of $12,710, against rental income of $250,723 for 1986, and a net loss of earnings for that year in the amount of $37,076. The statements also indicate that for 1983, the year prior to the commencement of the action, rental income amounted to $156,344 and loss of earnings for that year, before deduction of certain extraordinary items but after deduction for deferred income taxes, amounted to $42,267.

[11] The defendant Amir has produced copies of his income tax returns for the years 1984 to 1987, as well as copies of the returns of his wife and of the company. These indicate the defendant Amir received taxable benefits amounting to approximately $2,650 in each of the years 1986 and 1987; his wife was paid on average about $11,000 annually by way of salary during those years. In 1985, he states, in anticipation of possible government restrictions on the declaration by companies of tax-free capital dividends, the company declared a capital dividend of $260,000 to its shareholders. Approximately $10,000 of this dividend was paid out to the defendant Amir and his wife as shareholders; the balance of approximately $250,000 is reflected in the company's financial statements as a shareholders' loan. In 1984 that liability stood at $168,550. The $250,000 increase resulted in a liability in 1985 of approximately $419,000; the amount as at 31st December 1987 is indicated as being $407,564.

[12] Against this background the principles applicable to the appointment of a receiver-manager must be considered.

[13] Section 36 of the Law and Equity Act, R.S.B.C. 1979, c. 224, empowers the court to appoint a receiver or receiver-manager by interlocutory order in all cases "in which it appears to the court to be just or convenient that the order should he made." Rule 47 also confers upon the court a discretion to appoint a receiver in any proceedings, either unconditionally or on terms.

[14] Clearly, the discretion granted to the court is a broad one. The issue here is whether that discretion ought to be exercised in favour of the plaintiff.

[15] The plaintiff asserts that, by virtue of s. 36(1)(*a*) of the Partnership Act, the partnership was dissolved upon the death of Ahmed Hassanali Pirbhai on 6th June 1978. There has been a delay, he submits, in the winding up and realization of the partnership assets. In this situation, it is said, the appointment of a receiver ought to he made almost as a matter of course. In any event, the plaintiff submits, special circumstances exist here which make it appropriate for the court to intervene in order to protect the plaintiff's interest, including the facts that the defendant Amir controls and manages the company to the exclusion of the plaintiff, uses the assets of the company as if they were his own, aid has obtained the payment of dividends to himself and his wife. The plaintiff concedes that there is no evidence the assets of the company are being wasted; the focus of his concern is on the defendant Amir's conduct and position in relation to the assets of the company and to a winding-up.

[16] The defendant Amir, on the other hand, submits that the appointment of a receiver is usually made for either of two purposes: (1) to enable a person to collect on a judgment where there is a legal or prac- tical impediment to such collection; and (2) to preserve the property where there is a likelihood a defendant will abscond with it. Here, he argues, the circumstances of the case straddle those two areas. By virtue of s. 46 of the Partnership Act the legal effect of the plaintiff's judgment declaring that he has a one-half interest in the assets and business of the company, including an entitlement to interest at a fair rate on his share of the assets, is that there is a debt due to the plaintiff from the defendant Amir which has yet to be ascertained. The amount of that debt will be determined by the registrar, and a report then made to the court. Thus, it is argued, the principles applicable to cases where a partnership is finally dissolved and must be wound up do not apply. The circumstances here which might justify the appointment of a receiver will arise only after the debt is ascertained and recovery cannot be effected. Nor, it is said, are the assets imperilled, given the security by way of the certificates of lis pendens presently enjoyed by the plaintiff.

[17] Here, I conclude that a receiver-manager ought to be appointed. I base this conclusion on the following;

1. The assets and business of Amu Bros, Investments Ltd. appear to be the only assets of the partnership upon which the plaintiff will be able to realize the amount of his debt after the amount of that debt is ascertained.

2. The defendant Amir remains solely in control of those assets, including gross annual income in excess of $250,000 derived from them, to the exclusion of the plaintiff.

3. Although the plaintiff has some security in the form of the certificates of lis pendens registered against the real property, it is significant that after the plaintiff's action was brought the defendant Amir saw lit to have the company declare a $260,000 dividend and thus create a $250,000 shareholders' loan in his favour. The plaintiff's concern that the defendant may encumber the assets to his prejudice is justified.

[18] The position of control exercised by the defendant in relation to the assets must be viewed in the light of the findings made by Murray J. at the trial of the action herein:

> … I did not find Amir to be a credible witness. His demeanor in the witness box left a great deal to be desired. He was shifty and evasive in cross-examination. It is clear that a letter he wrote to the Canadian Immigrations. Authorities (Ex. 1, Tab 4) contains at least one deliberate lie. When cross-examined on the letter he adopted a cavalier approach which suggested that he believed the falsehood was appropriate under the circumstances. It is obvious to me that he carried on a successful business in Pakistan in a corrupt society and was a party to the illegal removal of money from that countryinto secret Swiss bank accounts. Further, in June 1984 he swore an affidavit (Ex. 1, Tab 34) para. 33 of which he admitted was false. Finally, his evidence at the trial on numerous occasions was directly contradictory to his sworn testimony on his examination for discovery. In the result I reject his evidence wherever it is in conflict with that of the plaintiff.

[19] Counsel for the plaintiff proposed the name of a firm which is, apparently, willing to act as receiver-manager. The appointment of that firm and the specific terms of the appointment may be spoken to by counsel.

Application granted.

TAB 13

1986 CarswellOnt 1898
Supreme Court of Ontario (High Court of Justice)

Reid v. Waddingham

1986 CarswellOnt 1898, 38 A.C.W.S. (2d) 67

John Raymond Roy Reid, Plaintiff and William Leonard Waddingham, Defendant

McRae J.

Heard: June 9, 1986
Judgment: June 9, 1986
Docket: 560/84

Counsel: *Robert D. Hammond*, for the plaintiff.
Morris M. Kertzer, for the defendant.

Subject: Corporate and Commercial
Headnote
Receivers --- Appointment — General

***McRae J.* (Orally):**

1 This is an application for an order requiring the defendant to deliver an affidavit of documents within ten days, an order requiring the defendant to produce for inspection the original or copies of the documents set out in his affidavit within ten days and compliance that paragraphs A and B of the Statement of Defence be struck and for an order appointing Bryson E. Comrie, C.A. as interim receiver and manager of Baycrest Properties.

2 The plaintiff and defendant are partners in Baycrest Properties an unincorporated partnership which acquired a property in 1976 on the main street of Brockville which is now rented to Canada Trust. In addition they acquired another undeveloped parcel of land on the outskirts of Brockville with the intention of developing it. Unfortunately, in 1981, other problems occurred between the two partners and there has been, to say the least, a breakdown of communication between them, and obviously bad feeling resulted.

3 Several things compel me to make the order appointing a receiver. They can be summarised by saying that there has been total lack of communication, bad feeling between partners, and a feeling that the other partner is not dealing fairly. This is apparently a mutual feeling between the partners involving other joint assets which I am not dealing with today. It is my view that the only way justice might be seen to be done between the partners is to have the Court appoint a receiver who will insure fairness and openness.

4 Counsel for the Respondent does not strongly oppose the making of this order, but makes the point that if this venture is to have a Receiver their other business should also.

5 While I do not in any way wish to interfere with the decision of the Distict Judge who will deal with that application in July, I tend to agree with this submission.

6 For those reasons the order will go as requested.

TAB 14

Alberta Court of Queen's Bench
Citibank Canada v. Calgary Auto Centre
Date: 1989-04-26

L.R. Duncan, for the plaintiff;

B.R. Crump, for the defendants.

(Calgary No. 8801-12922; 8801-12923)

April 26, 1989.

[1] D.C. McDonald J.: — This is an appeal from a decision of Master Alberstat who granted a receivership order in favour of a mortgagee, in regard to rents to be received by the mortgagors on several commercial premises.

[2] There are two actions. In each the plaintiff is Citibank ("the bank"). The defendant in one action is Calgary Auto Centre Ltd. ("Auto Centre"). It borrowed money from the bank to finance the purchase of certain land in Calgary. The land consisted of about a dozen commercial building sites. On one of these, Auto Centre built a commercial building. As security it granted the bank a debenture (which may be described as a mortgage) as well as general and specific assignments of rents. It leases that building to a Mercedes-Benz car dealership. That land is referred to as the "Mercedes land". Auto Centre also granted the bank a second mortgage on the other commercial sites in the proximity of the Mercedes land. All these sites were subject to a fixed mortgage in favour of Burnco which had sold the lands to Auto Service.

[3] The defendant in the other action is Western Securities Limited ("Western"). It gave Citibank a second mortgage and assignment of rents on a commercial property in Calgary. It gave an assignment of rents on a commercial property in Banff. The buildings in both properties are leased to commercial tenants. Western also gave the bank a general mortgage and assignment of rents on a 100-unit townhouse development in Calgary. These mortgages were given as security for the loan by the bank to Auto Centre.

[4] The bank advanced $6,067,749.29 in principal to Auto Centre. Auto Centre also owed the bank $75,000.00 for Letter of Credit commission. In May 1988 Auto Centre received a letter from the bank asserting that the Auto Centre was in default under the

debenture. It relied on a provision of the Loan Agreement between the bank and Auto Centre that stated that any default pursuant to another specified Loan Agreement would constitute an event of default for the purposes of the Loan Agreement between the bank and Auto Centre. That other Loan Agreement was between the bank and The Renaissance Shopping Centre Ltd. ("Renaissance") in respect of other lands that Renaissance had proposed to develop. The bank had agreed to provide certain financing for that development. There was thus a linkage between securities granted by the Auto Centre and Western to the bank and the lender-borrower relationship between the bank and Renaissance. This linkage is referred to by counsel as "cross-collateralization".

[5] In May, 1988 the bank wrote to Renaissance alleging default in Renaissance ' s obligation to repay to the bank all the money (some $21,000,000.00) which had been advanced by the bank to Renaissance. The bank then sued Renaissance for judgment for the full amount of principal and interest. Renaissance defended and counterclaimed. It alleged that the relationship that developed between the bank and Renaissance in 1986 to April 1988 went beyond that of lender and borrower, and that the bank and Renaissance were in reality joint venturers. The bank applied to a Master for summary judgment. That application was dismissed. The bank appealed. On March 31, 1989, after hearing oral argument, I held that the application for summary judgment should fail and accordingly I dismissed the appeal. I gave a detailed order designed to expedite the progress of the case to trial.

[6] In reaching my conclusion that there should not be summary judgment I held that, on the basis of the evidence placed before me, there was a triable issue. In view of that holding, in the present appeal, Mr. Crump solicitor for Auto Centre and for Western (as well as for Renaissance in the earlier appeal), argued that there has not been default. I need not decide whether the circumstances of disputed default of the Renaissance obligation entail that there has not been default in the obligations of Auto Centre and Western. For, since May 1988, Auto Centre has defaulted in its obligation, pursuant to the security documentation, to pay moneys as they came due under the Burnco mortgage, to pay interest on the bank's mortgage, and not to permit builders' liens to be filed against the Mercedes land.

[7] Since the commencement of the bank's actions against Auto Centre and Western, three of the building sites have been sold by Auto Service to strangers (for use as automobile dealerships). This has resulted in the payment of approximately $6,704,000.00 to the bank in reduction of the bank' s claim. Because of the accrual of interest, the indebtedness claimed by the bank as at March 22, 1989, was still $3,519,720.43, with per diem interest of $1,390.01 since then.

[8] Burnco obtained an order nisi of foreclosure in the fall of 1988. There was a six-month period of redemption. That period having since expired, Burnco has the right to proceed to advertise the lands over which it still retains its first mortgage security -that is, the lands (other than the Mercedes land) which remain unsold. The balance owing to Burnco is $3,253,-039.62 as of March 1, 1989 (after allowing for payments made to Burnco out of the proceeds of the three sites that were sold).

[9] Mr. Crump says that the bank unreasonably refused to permit the sale of a site to Terra Venture Developments Ltd. but I am not persuaded that Auto Centre's proposed distribution of sale proceeds, which would have resulted in no money being paid to the bank, constituted a reasonable proposal on Auto Centre's part.

[10] Rents received by Auto Centre have been used to pay obligations of Auto Centre to other parties in regard to construction of improvements concerning building sites sold to purchasers. These expenditures were not expenditures included among the purposes of the bank's loan to Auto Centre.

[11] Mr. Crump argues that there was an agreement between the bank and Western, that as building sites were sold and the liability to Burnco was decreased so that the bank' s equity in the remaining sites increased, the Western securities held by the bank were to be decreased proportionately. This is denied by Mr. Duncan, solicitor for the bank. That is an issue to be resolved at trial. Meantime, for the purposes of this application, I think it proper to treat the obligations of Western as remaining unabated.

[12] The monthly rents received by Auto Centre from Mercedes pursuant to a net-net lease amount to $32,122.10. The three Western properties produce monthly gross rents

totalling $77,777.00. After deducting payments due to first mortgages and other prior encumbrances and for reasonable operating expenses and taxes, the balance available, that may be applied to the indebtedness to Citibank, is about $20,000.00. Thus what is in issue in this application, from the point of view of what the bank might ultimately receive, is about $52,000.00 a month.

[13] The Master did not deliver written reasons for granting the receivership order. Mr. Crump says that his oral reasons placed emphasis upon the fact that in their agreements with the bank, Auto Centre and Western had agreed that in the event of default the bank could commence an action for the appointment by the court of a receiver to collect rents. While I do not doubt that that is a factor to be taken into account in deciding what is just or convenient, I do not regard it as the controlling factor.

[14] I confirm the order made by the Master, subject to certain variations, for the following reasons.

[15] The application is made under the provisions of s. 13(2) of the **Judicature Act** and s. 45 of the **Law of Property Act**. Section 13(2) of the **Judicature Act** reads as follows:

> "13(2) 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."

[16] Section 45 of the **Law of Property Act** (including subparagraph 1.1, which was added by amendment in 1984) reads as follows:

> "45(1) Notwithstanding section 41, after the commencement of an action on
>
> (a) a mortgage of land other than farm land, or
>
> (b) an agreement for sale of land other than farm land,
>
> to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:
>
> (c) appoint, with or without security, a receiver to collect rents or profits arising from the land;

(d) empower the receiver to exercise the powers of a receiver and manager.

"(1.1) If

(a) a mortgage of land or an agreement for sale referred to in subsection (1) is in de fault, and

(b) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,

the Court shall, on application by the mortgagee or vendor, appoint a receiver where the court considers it just and equitable to do so."

[17] I shall deal first with s. 45 of the **Law of Property Act**. Subsection (1) is permissive; at the same time, it does not state any criteria upon which the court is to decide whether to appoint a receiver to collect rents.

The new subs. (1.1) is mandatory, but only "where the court considers it just and equitable" to appoint a receiver of rents. Mr. Duncan contends that subs. (1.1) was intended to remove any doubts that might previously have been entertained by the courts of Alberta as to the appointment of a receiver of rents where, for example, there is a substantial equity in favour of the mortgagee or the mortgagor debenture gives the lender the power to appoint a receiver privately. He adopted the view expressed in Price and Trussler, **Mortgage Actions in Alberta**, (1985), at pages 308-309, as follows (footnotes omitted):

"The use of the word 'may' in both s. 13(2) of the **Judicature Act**, and in s. 45 of the **Law of Property Act** as it existed before May 1984, resulted in the Court exercising its discretion and refusing to appoint a receiver if it felt that the appointment was inappropriate. Use of the word 'may' in a statute, however, does not absolve the Court from its duty to make the appropriate order if a case is made out for it. This interpretation was reinforced in May 1984, when the word 'may' in s. 45 was amended to 'shall'. However, addition of the words 'where the court considers it just and equitable to do so,' has confused the exact intention of the Legislature.

"Prior to the amendments, it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured. Where the property was in need of maintenance, or where the application was unopposed or consented to, the Court was more likely to appoint a receiver, notwithstanding the defendant's equity, but if the application were opposed, the Court preferred to exercise its discretion against such appointment and did not feel constrained to grant the mortgagee's application as of right.

"With the new s. 45(1.1), it would appear that the Legislature's intention is to increase the number of occasions in which a receiver will be appointed. The only preconditions stated by the section are (1) that the mortgage or agreement for sale be in default and (2) that the property be producing rent. Since these have always been obvious preconditions, there must have been some reason to recite them in s. 45(1.1). It is suggested that these two conditions are the primary factors to be considered by the Court, and unless there are some extraordinary or unusual circumstances, the Court should consider it 'just and equitable' to appoint a receiver if these two conditions are satisfied."

[18] With respect to the authors, I would not regard the two facts referred to as being the "primary" factors governing the appointment of a receiver of rents pursuant to s. 45(1). If that had been the intention of the legislature, there would have been no need to add the requirement that the court appoint a receiver if the court "considers it just and equitable to do so". In my view, that additional requirement dictates that the court must consider all circumstances that are relevant to doing justice and equity between the parties.

[19] The result is that, in my opinion, the position under s. 45(1) of the **Law of Property Act** is assimilated with that under s. 13(2) of the **Judicature Act**. I can see no real difference between searching for what is "just and equitable" and for what is "just or convenient". There may be circumstances (e.g., of emergency) in which it is "convenient" to appoint a receiver in an interlocutory order when it is not clear that to do so is just or equitable, but it is hard to think of any such circumstances when what is convenient would not also be what is just, especially if the intent is only to preserve the rents for ultimate allocation between the parties once their dispute is adjudicated upon.

[20] Conversely, it is difficult to imagine circumstances in which it would be just to order the appointment of a receiver unless it were also convenient to do so. A similar observation may be made as to the phrase "just and equitable". In each case it is appropriate to adapt the felicitous approach of Laskin, C.J.C., to the phrase "cruel and unusual" as found in s. 2(b) of the Canadian **Bill of Rights**: see **R. v. Miller and Cockriell** (1977), 11 N.R. 386; 31 C.C.C.(2d) 177 (S.C.C.), at 184. Adapting what he said there to the two combinations of nouns in s. 13(2) of the **Judicature Act** and s. 45(1.1) of **the Law of Property Act**, those combinations of words are not to be treated "as conjunctive in the sense of requiring a rigidly separate assessment of each word", but "rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm."

[21] I am further of the view that the following passage at page 309 of Price and Trussler's work is a correct approach to the matter:

> "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 contract, 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."

[22] Mr. Crump has cited **N.A. Properties Ltd. v. Ronald J. Young Professional Corporation and Gower** (1982), 20 Alta. L.R.(2d) 399, in which Master Quinn stated at page 400:

> "In my opinion, a receiver should not be appointed under s. 45 of the Law of Property Act unless it is shown that the equity of the debtor is such that there may be inadequate security afforded to the creditor."

With respect, I do not accept that as an accurate statement, if it was it was intended as a general statement of the law. I do not doubt that the existence of a substantial equity may, in some circumstances, assume a dominant position among the factors to be taken into account in deciding what is "just and equitable". The same would apply to a decision under s. 13(2) of the **Judicature Act**. But one cannot go further than that.

[23] Master Quinn further said that even if, as in that case, the defendant was in arrears and there were three mortgages against the title all of which required the defendant to make payments, those facts alone did not constitute "sufficient reason to grant an order for receivership in the absence of evidence that the vendor is in a tenuous position from a security point of view". If Master Quinn meant that a receiver should be appointed only when the vendor "is in a tenuous position from a security point of view", then, with respect, I disagree. That was a case of the appointment of a receiver being

sought by an unpaid vendor under an agreement for sale. The view apparently expressed by Master Quinn (if it is to be read as a general proposition) is, in my opinion, not correct either in the case of an unpaid vendor or that of a mortgagee.

[24] It is also true that Alberta courts have expressed reluctance to appoint a receiver when the lending instrument gives the lender a power of private appointment. For example, in **C.I.B.C. v. El Dorado Holdings Ltd.** unreported October 14, 1983, Alta. C.A. No. 15672 (cited in Price and Trussler's book at page 308n), Laycraft, C.J.A., in a Memorandum of Judgment delivered from the Bench, said:

> "We have on the other hand a debenture holder with a power of private appointment who has come to the Court to receive a Court appointment instead of proceeding on its own. That is something the Court is usually loath to do unless there are exceptional circumstances."

Despite the apparent generality of that statement, it will be noted that it is no more than a generalization. The facts of that case themselves were such as to persuade the Court of Appeal to appoint a receiver of rents, the rents to "be applied against the municipal taxes and levies, against the proper insurance of the property, and otherwise to prevent waste" and the "balance of the rents if any" to be held by the receiver. Among the other factors which the court balanced were those militating against the appointment (an allegation that a lease of the property to companies affiliated with the borrower authorized the lessees to cancel the lease if a receiver were appointed, and the fact that appointment of a receiver might damage the commercial credit of the borrower), and those militating in favour of the appointment (an allegation by the borrower that the debenture had been amended by a third party - not the borrower, lack of precision in another defence as pleaded, the failure of the borrower to make any of the payments due to the lender, and the facts that the land charged by the debenture was the sole asset of the borrower and that there had been no evidence as to where the rents had gone, why the taxes were not paid with the rent, or whether the rents were being paid at all).

[25] Another instance of reluctance to appoint a receiver is **Macotta Co. of Canada Ltd. v. Condor Metal Fabricators Ltd.** (1980), 40 A.R. 408; 35 C.B.R. (N.S.) 144 (Q.B.). Cavanagh, J., held that a receiver should not be appointed where there was no evidence

that the proposed receiver (already in possession of the property pursuant to a private appointment under debentures) could, if appointed by the court do something that he could not do or had not already done. The receiver had sought "no help from the court in carrying out its task". Therefore, Cavanagh, J., held that it had not been shown that it would be just or convenient to make the appointment. In those circumstances, it was not surprising that Cavanagh, J., observed:

> "One can speculate that the real purpose of such an application [to appoint the same receiver already appointed privately] is to clothe the appointed receiver with the authority of the court, which may tend to dissuade other creditors and dispossessed debtors from looking too deeply into the actions of debenture holders. If that is the aim of the applicants in such a situation, I think it ought to be discouraged."

[26] In the present case no mention has been made of the lending documents giving the lender a power to appoint a receiver privately, and in any event that has not been done.

[27] In the first of the two passages I have quoted earlier from Price and Trussler's book, two Alberta cases are cited in support of the proposition that before the 1984 amendment to the **Law of Property Act** "it was rare for a receiver to be appointed where there was equity in the property, and where the mortgagee applying for the order was well secured". For that proposition the authors cited two cases. One was **N.A. Properties Ltd. v. Ronald J. Young Professional Corp.**, a decision of Master Quinn which I have already discussed. The other was **Madison Development Corporation Ltd. v. Mehra** (1981), 40 C.B.R.(N.S.) 180, a decision of Master Funduk. Both were really cases in which the evidence fell far short of establishing facts which might support a conclusion that it would be just or convenient to appoint a receiver. In the **Madison** case, for example, there was no evidence of the value of the land and hence no support for the submission apparently made that the borrower had no equity in the land. That does not make the case authority for the proposition that a receiver will not be appointed where the mortgagee is well secured. Nor is the ratio decidendi of the **N.A. Properties** case authority for that proposition, although it is true that Master Quinn's judgment appears to support it. What I say, as I have said earlier, is that there is no such general rule.

[28] As I have said, Mr. Crump submits that a receiver should not be appointed because there is a fundamental dispute between the bank and Renaissance as to whether the event of default by Auto Centre occurred, being the nonpayment by Renaissance to the bank. He relies upon the following passage in **Kerr on Receivers** (7th Ed.), p. 7:

> "The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver the court will not prejudice the action, or say what view it will take at the trial. Indeed the court will not appoint a Receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim."

(The sentence underlined is emphasized by Mr. Crump.)

[29] In my view the sentence emphasized is not authority for the wide proposition advanced by Mr. Crump. As authority for the proposition stated in that sentence Kerr cites **Greville v. Fleming** (1845), 2 J. and L. 335, and **Marshall v. Charteris,** [1920] 1 Ch. 520. The facts of those cases must be examined in order to understand the precise meaning of Kerr's sentence. **Greville v. Fleming** was a decision of Sugden, L.C., of the High Court of Chancery of Ireland. He decided to appoint a receiver of tithe rent-charges upon the application of the son of one G., by then deceased. G. had asserted that he was the lay impropriator of a certain parish and therefore entitled to all tithes or rent-charges in lieu of tithes in respect of lands in the parish, that were payable to whoever was the lay impropriator of the parish for the time being. However, in his lifetime G.'s title to the rights of the lay impropriator was contested, and after his death those opposing the application for the appointment of a receiver continued to contest it. The court refused to appoint a receiver because the appointment of a receiver in a summary proceeding, not subject to appeal, would conclude the question of title for all practical purposes. In that case, therefore, the making of the order sought would have been to conclude the issue for all time. That is not so if the order I am asked to make is made, particularly if the funds collected are not placed at the disposal of the bank until the issues in the litigation are resolved by judgment or settlement.

[30] The other case cited by Kerr is **Marshall v. Charteris** a judgment by Eve, J. In an ejectment action in which the title to a house was in dispute, the defendant was in possession. In an interlocutory application the plaintiff sought an order appointing a receiver of the rents and profits of the house and ordering the defendant to give up possession to the receiver. In refusing to make the order, Eve, J., gave several reasons, one of which was that to deprive the defendant of possession would prejudice her right to plead her possession as a statutory defence and would thus in substance give the plaintiff judgment in the action. Moreover, there was no real concern about rents because the defendant, being in possession, was not receiving any. That case is distinguishable from the present case, for the making of the order I propose to make, in the form I intend (i.e. not placing the rents collected at the disposal of the bank), would in no way decide the issues in the litgation.

[31] I turn now to whether in the present case it is "just or convenient" or "just and equitable" to appoint a receiver of the rents. In my view both those tests are interchangeable, and are met in the circumstances. A useful summary of the circumstances that ought to be considered is found in **Bennett on Receiverships** at p. 91, as follows:

> "In determining whether it is 'just or convenient' that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property pending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others. In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court appointed receivership if the debtor is in default."

In the present case I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.

[32] In assessing the risk to the security holder I have regard to the extent to which Auto Centre and Western have equity in the mortgaged lands vis-a-vis the amount

claimed by the bank; if Burnco completes its foreclosure the equity of Auto Centre in its undeveloped lands (now $3.06 million) will be lost, leaving a maximum equity of $2.1 million in the Mercedes land and $2.7 million in western's properties, for a total of $4.8 million. This is not greatly in excess of the present claim of the bank. The risk to the security holder would moreover be increased if the order were not made because there can be no assurance that the defendants will use the rents to pay taxes or Burnco, or that they will not use the money for purposes unrelated to the obligation they incurred at least prima facie by executing the security instruments upon which the bank relies.

[33] There is here no question of waste.

[34] What I have said already addresses in part the issue of the preservation and protection of the property; in addition, the receiver will be able to use the rents, as provided in the Master's Order, to insure the property, pay taxes, pay utilities and necessary operating expenses and reasonable management fees to Auto Centre.

[35] The balance of convenience, in my view, is in favour of making the order.

[36] Finally, by making the order the court is ensuring that if the bank is successful in the litigation, the rent moneys (after making the deductions already mentioned) will be available as a means of enforcing the bank's rights under the security investments when those moneys might otherwise be used for other purposes and be exposed to the claims of other creditors of the borrower. The balance of the rent moneys so held in trust will be held on behalf of the parties to the action alone according to their rights: see **Halsbury's Laws of England** (4th Ed.), p. 408.

[37] The Master's Order is therefore confirmed except for the following:.

1 The bank by its solicitor will give an undertaking as to damages which will appear in the usual form in the preamble to the order.

2 Paragraph 2(c) of the Master's Order, which provides for payments of the balance to the bank, will be deleted. Instead the Order will provide that the balance be held by the receiver in trust for the parties to the actions according to their rights, to be paid out to whichever of the parties is held to be entitled to them at the conclusion of the actions by judgment.

[38] I have questioned counsel as to the Master's appointment of Auto Centre and Western as the receivers. This flies in the face of the principle that a receiver appointed by the court should be a disinterested party. Despite my concern, Mr. Crump has assured me that he is content that Auto Centre and Western should be the receivers of their respective properties, and I am prepared in that circumstance not to disturb the Master's Order in that respect.

[39] Costs may be spoken to.

Appeal dismissed.