COURT NO. / ESTATE NO.	2003 03284
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	COPPERLINE EXCAVATING LTD., 1496986 ALBERTA LTD., SPRUCE CREEK CONTRACTING LTD., JAMIE BLACK, and LORI BLACK
APPLICANT	ACCORD SMALL BUSINESS FINANCE CORP.
DOCUMENT	**BRIEF OF APPLICANT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP Barristers & Solicitors 1700 Enbridge Centre 10175 – 101 Street Edmonton, AB T5J 0H3 Attention: Bryan P. Maruyama Telephone: (780) 423-8698 Facsimile: (780) 423-2870 File Number: 76508-4/bpm

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
FEB 19 2020
Clerk of the Court of Queen's Bench

I. INTRODUCTION

1. Accord Small Business Finance Corp. ("**Accord**") applies for an Order declaring that the Accord Specific Collateral (as defined below) is not subject to the receivership proceedings sought by the Royal Bank of Canada ("**Royal Bank**") against Copperline Excavating Ltd. ("**Copperline**").

II. FACTS

2. Accord provided refinancing to Copperline to pay down certain specific equipment loans and the line of credit owing to the Royal Bank: Affidavit of James Jang of Accord, sworn February 18, 2020, paragraph 2 (the "**Affidavit of Accord**").

3. As part of the re-financing, the Royal Bank confirmed it had no interest in certain collateral under a series of waivers, as opposed to subordinations (the "**Royal Bank Waivers**"), and has no entitlement to the collateral listed in them – various motor vehicles, trailers and heavy equipment (the "**Accord Specific Collateral**"): paragraphs 3 and 4, Exhibit "A", Affidavit of Accord. Accord would not have proceeded with the refinancing without the Royal Bank Waivers: paragraph 5, Affidavit of Accord.

4. No other lenders (other than Accord and Royal Bank) have made specific registrations at the Alberta Personal Property Registry against the serial numbers of the Accord Specific Collateral (which are "serial number goods" held as "equipment" as defined under the *Personal Property Security Act*, RSA 2000 c P-7).

5. Accord is ready, willing and able to remove the Accord Specific Collateral forthwith: paragraph 12, Affidavit of Accord.

6. Royal Bank now brings the within application to appoint Ernst & Young as the Receiver and Manager of Copperline, including the Accord Specific Collateral that is subject to the Royal Bank Waivers. Accord takes the position that the Accord Specific Collateral ought to be carved out from and not subject to the within receivership proceedings.

III. ARGUMENT

7. The general starting position for an application to carve out particular assets from a receivership arises from *Edmonton (City) v. Alvarez & Marsal Canada Inc.,* 2019 ABCA 109 **[TAB 1]**.

   (a) In that case the Alberta Court of Appeal set out that generally speaking, "[t]he policy behind receiverships is that collective action is preferable to unilateral action": *Edmonton (City)* at para 23.

   (b) The Court noted the three circumstances where a receiver's charge would have priority (citing *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 59 DLR (3d) 492, as applied in *Royal Bank v Vulcan Machinery & Equipment Ltd.*, [1992] 6 WWR 307) at paragraph 14:

> "1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property,"

(c) The issue on appeal in *Edmonton (City)* was whether the Court erred in determining that the City of Edmonton's lien for unpaid tax arrears ought to rank ahead of the receiver's charge, while the other secured creditors remained subject to it. The Court determined that there was no distinction between the City of Edmonton's claim to avoid being subject to the receiver's charge.

(d) Notably in that case, unlike the case at hand, the appointing creditor held a security interest in the assets that were subject to the City of Edmonton's lien. Here, Royal Bank has no security interest in the Accord Specific Collateral, pursuant to the Royal Bank Waivers.

(e) Further, unlike the City of Edmonton (and other creditors), Accord is making the application at first instance to have its collateral removed from the receivership proceedings, and not after the receivership proceedings have started.

8. In *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation,* 2016 BCCA 231 at para 42 [**TAB 2**], the British Columbia Court of Appeal held that the receiver's charge did not apply for secured parties who held a purchase money security interest, and excluded trucks subject to those interests from the receivership proceedings.

(a) The Court ruled on the basis that the purchase money security interest ranked ahead of the security held by the creditor applying to appoint the receiver. The Court came to this conclusion on the basis that keeping those assets subject to the receivership proceedings would have the effect of circumventing the priority rules of the BC *Personal Property Security Act,* inappropriately causing the asset to be subject to the receiver's charge. In coming to this conclusion the Court noted the importance for parties to be able to rely on the priority rules of the BC *Personal Property Security Act*, which are specifically "designed to achieve commercial certainty and predictability": *Integris* at para 48.

(b) The Court did cite the same factors outlined in *Kowal* above: *Integris* at para 40.

(c) The Court clearly held that when the *Kowal* factors do not apply, it is not appropriate to circumvent the clear priority rules outlined in the *Personal Property Security Act*: *Integris* at para 50. Ultimately, the Court held that because the purchase money security interest took priority over the moving party's general security agreement that, as a matter of personal property security law, it was proper for the trucks to be released to the party holding the purchase money security interest and therefore carved out the trucks from the receivership proceedings: *Integris* at para 55.

9. In *Computershare Trust Company of Canada v. Meadows Development Ltd.*, 2019 BCSC 1945 [**TAB 3**], the Court declined to expand receivership proceedings to collateral that was not subject to a security interest by the moving party, following the reasoning in *Integris*. In that case the Court refused to include property where the moving party held a mortgage that ranked in second position to the respondent creditor, but held a mortgage in first priority over adjacent and related property over which the moving creditor held a mortgage that ranked first in priority.

10. In the case at hand, none of the three exceptions apply to permit Accord, as a higher ranking creditor than Royal Bank, to be subject to the requested receivership proceedings: (i) Accord has taken the position that the Accord Specific Collateral should not be subject to the requested receivership proceedings from the outset; (ii) the proposed receiver is aware of Accord's interest in the Accord Specific Collateral; and (iii) no charges or expenses have yet been or should be incurred for the preservation or improvement of the Accord Specific Collateral (given that they are motor vehicles, trailers and heavy equipment).

11. Furthermore, Royal Bank has no interest in the Accord Specific Collateral on the basis of Royal Bank Waivers. While Accord's security interest in the Collateral is not in the nature of a purchase money security interest, the same reasoning can be applied from *Integris*.

IV. CONCLUSION

12. Based on the foregoing, Accord submits that it is appropriate for the Accord Specific Collateral to be carved out from the requested receivership proceedings on the basis that Accord holds a security interest in the Accord Specific Collateral free from any interest of the Royal Bank, and that the three circumstances outlined in *Kowal* do not apply. Accordingly, the Accord Specific Collateral ought not to be subject to the requested receivership proceedings.

V. RELIEF REQUESTED

13. Accord seeks an Order declaring that the Accord Specific Collateral is not subject to the receivership proceedings sought by the Royal Bank against Copperline.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of February, 2020.

PARLEE McLAWS LLP

Bryan Maruyama

Bryan P. Maruyama, Counsel for Accord

TAB 1

In the Court of Appeal of Alberta

Citation: Edmonton (City) v Alvarez & Marsal Canada Inc, 2019 ABCA 109

Date: 20190325
Docket: 1803-0050-AC
Registry: Edmonton

Between:

City of Edmonton

Respondent
(Applicant)

- and -

Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp.

Appellants
(Defendants)

- and –

Royal Bank of Canada

Not a Party to the Appeal
(Plaintiff)

- and -

Reid-Built Homes Ltd and Emilie Reid

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice R.A. Graesser
Dated the 21st day of February, 2018
Filed the 11th day of April, 2018
(2018 ABQB 124, Docket: 1703 21274)

Memorandum of Judgment

The Court:

Introduction and Standard of Review

[1] The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 [*Decision*].

[2] The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 34, 58 Alta LR (6th) 209.

Background

[3] The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

[4] On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

[5] The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

Issues on appeal

[6] The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

[7] The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

[8] For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

Analysis

[9] Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

[10] The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

> Any expenditure or liability which shall properly be made or incurred by the Receiver … shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge")

[11] Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

Tax becomes debt to municipality

348 Taxes due to a municipality

(a) are an amount owing to the municipality,

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) *are a special lien*

(i) *on land and any improvements to the land, if the tax is a property tax*, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

[12] Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

[13] In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors—a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

[14] The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the

decision in *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 59 DLR (3d) 492, 9 OR (2d) 84 (CA) [*Kowal*], applied in *Royal Bank v Vulcan Machinery & Equipment Ltd*, [1992] 6 WWR 307, 13 CBR 69 (ABQB). *Kowal* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Kowal*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Kowal*:

1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or

3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

[15] These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

[16] In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

> [136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.
>
> [137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's

> fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

[17] In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in *CCM Master Qualified Fund v blutip PowerTechnologies*, 2012 ONSC 1750, where it was noted that in *CCAA* proceedings, "professional services are provided ... in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

> … comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA*…

[18] The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in *JP Morgan Chase Bank NA v UTTC United Tri-Tech Corp* (2006), 25 CBR (5th) 156 at para 45 (and cited in *Caisse v River*, 2013 ONSC 6809 at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

[19] Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

[20] The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

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[1] *First Leaside Wealth Management Inc (Re)*, 2012 ONSC 1299 at para 51.

[21] There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

[22] We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

[23] The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in *Royal Bank v Delta Logistics*, 2017 ONSC 368 at para 26:

> The whole point of a court-appointed receivership is that one person ... is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

[24] With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

[25] This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of

individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

[26] Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Appeal heard on February 7, 2019

Memorandum filed at Edmonton, Alberta
this 25th day of March, 2019

Authorized to sign for: Paperny J.A.

Greckol J.A.

Authorized to sign for: Khullar J.A.

Appearances:

H.A. Gorman, Q.C./A.M. Badami
for the Appellants

A. Turcza-Karhut/C.N. Androschuk
for the Respondent

TAB 2

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation,* 2016 BCCA 231

Date: 20160601
Docket: CA42954; CA42958

Docket: CA42954

Between:

Integris Credit Union

Respondent
(Plaintiff)

And

Mercedes-Benz Financial Services Canada Corporation

Appellant
(Defendant)

And

**KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd.,
BHL Capital, a division of Berner Holdings Ltd.**

Respondents
(Defendants)

- and -

Docket: CA42958

Between:

Integris Credit Union

Respondent
(Plaintiff)

And

BHL Capital, a division of Berner Holdings Ltd.

Appellant
(Defendant)

And

**KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd.
and Mercedes-Benz Financial Services Canada Corporation**

Respondents
(Defendants)

Before: The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated July 3, 2015 (*Integris Credit Union v. All-Wood Fibre Ltd.*, 2015 BCSC 1146, Vancouver Registry Docket S152310).

Counsel for the Appellant, Mercedes-Benz Financial Services Canada:	G.G. Plottel
Counsel for the Respondent, Integris Credit Union:	C.D. Brousson
Counsel for the Respondent, BHL Capital, a division of Berner Holdings Ltd.:	R.A. Finlay
Counsel for the Respondent, KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd.:	No Appearance
Place and Date of Hearing:	Vancouver, British Columbia May 9, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 1, 2016

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett

Table of Contents	Paragraph Range

Summary:

Respondent credit union held general security agreement with debtor. Appellants held priority over certain trucks in possession of debtor. On the respondent's application, the chambers judge granted a receivership order, based on the court's model order, appointing a receiver over the insolvent debtor's "property". The order granted receiver priority to all security interests. Appellants applied to have the trucks excluded from the order. Judge found that the trucks were included as "property" in the order. Held: Appeals allowed. It is not necessary to decide whether "property" under the order included the trucks. Even if "property" included the trucks, the judge erred in not considering whether the trucks should have still been excluded from the order due to the priority interests. Considering those priority interests, the application to exclude the trucks from the receivership order should have been allowed.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. <u>Introduction</u>

[1] With PD-47 − Model Orders, the Supreme Court has prescribed the use of model forms for certain types of orders. The purpose of the model orders is to encourage parties and the Court to focus on the issues in dispute in a particular proceeding. This appeal concerns an application made under a receivership order based on the Model Receivership Order made pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], and/or s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

[2] The Appellant Mercedes-Benz Financial Services Canada Corporation ("MBFS") is a company which finances the acquisition of equipment, including vehicles. The Appellant BHL Capital, a division of Berner Holdings Ltd. ("BHL"), is an equipment lessor. All-Wood Fibre Ltd.'s ("All-Wood") principal line of business was fibre supply for the forestry industry. It financed trucks from MBFS and BHL. All-Wood ceased operations March 9, 2015. Integris Credit Union ("Integris") is a lender with a General Security Agreement with All-Wood. Integris sought and obtained a receivership order. KPMG Inc. ("KPMG") is the receiver. The indebtedness of All-Wood to all of its creditors is now estimated to exceed $8 million.

[3] As a result of the size of an unanticipated CRA liability Integris stands to pay for a significant part of KPMG's fees. The Appellants say that their security over the trucks ranks ahead of the General Security Agreement. They say the receivership order should not cover their trucks and, in any event, their trucks should have been excluded upon application in the court below.

[4] For the reasons that follow, I would allow these appeals.

II. Background

[5] MBFS and BHL supplied four trucks to All-Wood (the "Trucks"):

(a) MBFS provided a 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated December 4, 2012. MBFS registered a financing statement for this truck in the British Columbia Personal Property Registry ("PPR") on December 10, 2012.

(b) MBFS provided another 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated January 14, 2013. MBFS registered a financing statement for this truck in the PPR on January 16, 2013.

(c) MBFS provided a 2014 Freightliner 122SD to All-Wood under a Lease Agreement dated December 22, 2014. MBFS registered a financing statement for this truck in the PPR on December 29, 2014.

(d) BHL provided a 2015 Freightliner 122SD 48 to All-Wood under a Lease Agreement dated May 23, 2014 (All-Wood was one of several lessees). BHL registered a financing statement for this truck in the PPR on May 23, 2014.

[6] By March 9, 2015, All-Wood had ceased operations. On March 17, 2015, Integris obtained an *ex parte* order appointing KPMG as an interim receiver of All-Wood's "assets, undertakings and properties", pursuant to s. 47(1) of the *BIA* and s. 39 of the *LEA*.

[7] On March 25, 2015, Ehrcke J. appointed KPMG as the receiver (the "Receiver") in respect of "all of the assets, undertakings and properties of [All-Wood], including all proceeds thereof", pursuant to s. 243(1) of the *BIA* and s. 39 of the *LEA*

(the “Receivership Order”). The Receivership Order was based on the court’s Model Receivership Order, and includes the following terms:

- Paragraph 2(a) authorizes the Receiver 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”.
- Paragraph 2(j) authorizes the Receiver to “market any or all of the Property … as the Receiver in its discretion may deem appropriate”.
- Paragraph 16 provides for a receiver’s charge (the “Receiver’s Charge”), which “shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, … but subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*”.
- Paragraph 19 provides for a charge not to exceed $100,000 (the “Receiver’s Borrowings Charge”) as security for funds borrowed by the Receiver, “in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, … but subordinate in priority to the Receiver’s Charge and the charges set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*”.
- Paragraph 29 provides that “[a]ny interested party may apply to this Court to vary or amend this Order …, specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein”.

[8] I pause to note here that the Receivership Order at issue here differs from the Model Receivership Order by the addition of the phrase, handwritten in the original, “*specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein”*.

[9] Notably, the business of All-Wood had ceased. The form of receivership order sought did not empower the Receiver to carry on the business of All-Wood.

[10] On May 13, 2015, BHL filed a notice of application seeking the following relief:

> 1. An order that KPMG Inc., receiver of the assets and undertaking of All-Wood Fibre Ltd. pursuant to an order in these proceedings dated March 25, 2015, forthwith deliver up to BHL the following property:
>
> 2015 Freightliner 122SD 48 in. Midroof Tri-Drive Tractor …

[11] On May 25, 2015, MBFS filed a similar notice of application seeking:

> 1. An order that the Equipment [the three trucks], in the possession or control of the Receiver, be delivered by the Receiver to Mercedes-Benz Financial Services Canada Corporation, or its authorized agent.
> 2. A declaration that the Equipment is not subject to the Receivership Order made March 25, 2015, herein.

[12] By order dated June 8, 2015, the Chambers Judge (the "Judge") approved the Receiver's proposed sale of All-Wood's assets by auction but reserved judgment on the issue of whether the Trucks fell "within the scope of the Receivership Order".

[13] By order dated July 3, 2015, the Judge dismissed MBFS and BHL's applications. In addition, he declared that:

> 1. The truck which is subject to the BHL … Lease Agreement dated May 23, 2014, …constitutes "property" within the scope of, and is subject to, the Interim Receivership Order granted March 17, 2015 and the Receivership Order granted March 25, 2015 herein (together the "Receivership Order").
> 2. The three trucks which are subject to the Mercedes-Benz Financial Services Canada Corporation Conditional Sale Contract and Security Agreement dated December 4, 2012, Conditional Sale Contract and Security Agreement dated January 14, 2013 and Lease Agreement dated December 14, 2014, respectively, … constitute "property" within the scope of, and are subject to, the Receivership Order.

[14] There is some dispute concerning the effect of these orders. The Appellants say that the effect of these orders is that the Trucks are subject to a priority charge in favour of the Receiver's costs by paragraphs 16 and 19 of the order. Integris says that there needs to be a further hearing at which the court will make an allocation of the Receiver's costs. Conceivably, no allocation or a minor allocation of those costs could result. The Receiver, who filed a factum, but did not appear, made no submission on this issue.

[15] By virtue of the nature of the Appellants' interests and the timing of the registrations, it is not disputed that the Appellants had duly registered purchase money security interests (PMSI) in the Trucks and serial-number registrations, which establish the Appellants as the highest ranking secured creditors in respect of the Trucks. Integris holds a General Security Agreement in favour of All-Wood, which security is subordinate to that of the PMSI's. Accordingly, Integris is in a subordinate position to the Appellants in respect of the Trucks.

III. Reasons Below

[16] The Judge first considered the meaning of "property" in the Receivership Order. He interpreted this term broadly, with reference to s. 243(1) and the definition of "property" in s. 2 of the *BIA.*

[17] Next, the Judge considered whether the impugned agreements were "financing leases" or "true leases" (apparently in an effort to address the Appellants' submission that All-Wood did not obtain an interest in the title to the Trucks, and therefore the Trucks did not qualify as "property" under the impugned contracts).

[18] At para. 30, he summarized the Receiver's submissions on this issue as follows:

> [30] The position of the Receiver … is that the agreements relating to the subject trucks are "financing leases" as opposed to "true leases". As such, the trucks constitute Property and are subject to the Receivership Order. The Receiver submits that if the agreements are "true leases" then the trucks do not form part of the assets of All-Wood and would not be subject to the Receivership Order.

[19] After reviewing the "test" for a financing lease (i.e., security lease) in *DaimlerChrysler Services Canada Inc. v. Cameron*, 2007 BCCA 144, the Judge concluded that the impugned agreements met this test and were therefore not true leases (paras. 38-39).

[20] At para. 40, he summarized his findings as follows:

> [40] Given my interpretation of the term Property, the trucks fall within the scope of the Receivership Order. Further, the agreements between All-Wood and BHL and MBFS are financing leases; as a result the trucks fall within the scope of the Receivership Order.

IV. Statutory Provisions

[21] Section 243(1) of the *BIA* authorizes a court, upon the application of a secured creditor, to appoint a receiver over an insolvent or bankrupt person's property where it is "just or convenient to do so":

> ***Court may appoint receiver***
>
> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it 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.

[22] Section 243(6) of the *BIA* also authorizes a court to "make any order respecting the payment of fees and disbursements of the receiver that it considers proper", and order that the receiver's charge has priority ahead of "any or all… secured creditors" although "other secured creditors who would be materially affected by the order" must receive notice and have the opportunity to make representations:

> ***Orders respecting fees and disbursements***
>
> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, <u>but the court may not make the order unless it is satisfied that</u>

> the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.
>
> [Emphasis added.]

V. Standard of Review

[23] Generally on appeal, questions of law are reviewable on a standard of correctness. Findings of fact may be reversed on a palpable and overriding error. For true questions of mixed fact and law, where a legal principle is not readily extricable, the matter should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8-12, 36. Failure to give sufficient weight to relevant considerations may justify appellate review: *Bell v. Bell*, 2001 BCCA 148 at para. 11.

VI. Interpretation of the Order

[24] The arguments here and below focused on the interpretation of the Receivership Order, and in particular the meaning of "property".

[25] The principles concerning the interpretation of orders are well settled. In *Yu v. Jordan,* 2012 BCCA 367, this Court said:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>
> [Emphasis added.]

[26] In *Sutherland v. Reeves*, 2014 BCCA 222, it was argued that the interpretation of an order turned on the meaning of the Model Receivership Order. This Court rejected that approach saying:

> [30] But I do not accept Mr. Sutherland's underlying premise. This appeal does not turn on an interpretation of the Model Order. It turns on the

> interpretation of the specific Order made by Mr. Justice Willcock. This is so for two reasons.
>
> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
>> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>>
>> [Emphasis added in original.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.
>
> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.
>
> [Emphasis added.]

[27] Those principles were recently applied to the interpretation of a Receivership Order by Fitzpatrick J. in *Great Basin Gold Ltd. (Re)*, 2015 BCSC 1199. She found that all of the aspects of the receivership order, based on the factors set out in *Yu*, were interrelated and supported an interpretation of the stay provisions at issue there.

[28] As this Court noted in *Sutherland*, the order to be interpreted is a specific order of the court. It is an error to focus on the Model Order rather than the specific order at issue. It is the pleadings, relevant circumstances and specific wording of the order that governs the interpretation of the Receivership Order.

[29] The pleadings reveal the nature of the receivership was to liquidate the assets over which Integris held priority for their security. Integris' notice of civil claim sought an order, *inter alia*, giving Integris conduct of sale over All-Wood's assets, or alternatively empowering the Receiver to sell the assets. MBFS's response to civil claim expressly opposed this relief. Further, Integris' notice of application and accompanying affidavit established that All-Wood ceased to carry on business. The draft form of receivership order sought by Integris did not empower the Receiver to carry on the business of All-Wood.

[30] Accordingly, realization of Integris' interests, and not operation of All-Wood, was the Receiver's focus. Integris required the Receiver's assistance to realize on the security. Conversely, the Appellants did not want or need the assistance of the Receiver. The pleadings reveal that the Receiver, as Integris' appointee, was intended to be the agency by which Integris would realize on the security it held.

[31] The Receivership Order did not incorporate by reference the statutory definition of "property". The reference to "property" provided in the Order was less expansive:

> 1. Pursuant to Section 243(1) of the BIA and Section 39 of the LEA KPMG Inc. is hereby appointed Receiver, without security, <u>of all of the assets, undertakings and properties of the Debtor, including all proceeds thereof (the "Property").</u>
>
> [Emphasis added.]

[32] In *Sutherland*, the receivership order's definition of "property" differed from that of the Model Order. Bauman C.J.B.C. found the definition used to be "significantly broader" than that of the Model Order:

> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.

> [33] When the word "Property" is replaced with its definition in the first portion of clause 10 of the Order, that portion provides:
>
> > 10. No Proceeding against or in respect of Tangerine or the [affairs, business, undertaking and assets of Tangerine] shall be commenced or continued except with the written consent of the Receiver or with leave of this Court …

[33] Integris describes the factual circumstances at the time the Receivership Order was made as chaotic. It says All-Wood's equipment was scattered among various locations, some remote; the landlord had distrained; the company's records had been removed; the employees were laid off; the company's management had walked away; the creditors were seizing assets; and CRA had a lien.

[34] Integris submits the definition of "property" should include the Trucks because the Receiver could not have practically considered priorities before needing to step in and take control for the benefit of all creditors. I agree that certain circumstances may justify finding a higher-ranking creditor liable to a receiver appointed by a general creditor. However, such scenarios are an exception to the general rule that a receiver cannot subject secured creditors to liability for disbursements or fees.

[35] Although I have reviewed the circumstances of the Receivership Order and the parties' arguments, I do not think the issue before the court properly turns on the interpretation of "property" in the Receivership Order. Here, the applications before the court were to deliver up to MBFS and BHL the Trucks and exclude them from the receivership. That was something expressly contemplated by paragraph 29 of the Receivership Order and is determinative of these appeals.

VII. Application Before the Court

[36] The Judge did not find, nor did the Receiver or Integris establish in evidence, that the Receiver expended money necessary for the preservation of the Trucks. The Judge ultimately ordered that the Trucks be excluded from the package of assets auctioned by the Receiver because the Appellants "had the ability and resources to market the trucks on their own".

[37] The Appellants could sell the Trucks, with the consent of the Receiver, on the condition that the proceeds be held in trust. The real issue before the court was the Receiver's right to indemnity for the costs of the receivership, and whether the Trucks should be removed from the receivership or be subject to such charges.

[38] It is apparent that there are significant differences between a court-appointed receiver and a trustee in bankruptcy. A receiver does not obtain the debtor's proprietary interest in the collateral: *1231640 Ontario Inc. (Re)*, 2007 ONCA 810 at para. 22, 27-28. On the other hand, a trustee becomes vested with the property of the bankrupt debtor, which may allow the trustee to assert a claim that the bankrupt cannot: *BIA*, s. 71; *Re Giffen* [1998], 1 S.C.R. 91.

[39] A receiver's right to indemnity may exceptionally extend to the security of secured creditors as was discussed in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 59 D.L.R. (3d) 492 at 496 (Ont. C.A.):

> [13] Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. <u>As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him</u>. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:
>
> > When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. <u>No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership</u>. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior

> mortgagees or lienholders without the sanction of such mortgagees or lienholders.
>
> [Emphasis added.]

[40] *Kowal* was approved and applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). In *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017, aff'd 2006 BCCA 458, Stromberg-Stein J., as she then was, summarized the exceptions to the general rule provided in *Kowal*:

> [30] Although a secured creditor in a priority position may not be bound by a court order granting priority to another party, as held in *Kowal*, a creditor in a superior priority position may nevertheless forgo that priority position by some other means. For example, three exceptions to the general rule that a receiver has no priority for his expenses over a prior secured creditor were recognized by the Ontario Court of Appeal in *Kowal*, and by the British Columbia Court of Appeal in *Lochson*. The three exceptions as provided in *Kowal* at 496, 497, and 499, respectively, are:
>
> > 1. If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders;
> >
> > 2. If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and
> >
> > 3. If the receiver has expended money for the necessary preservation or improvement of the property he may be given priority for such expenditure over secured creditors.

[41] In my view the exceptions provided for in *Kowal* are not engaged here. From the outset of the application, the Appellants took the position that they wanted no part in the receivership. Prior to the court application, BHL engaged in correspondence with KPMG in an attempt to have the Receiver give up the property without a court application. The Receiver also had early notice of MBFS's interest in the Trucks.

[42] The most telling circumstance weighing in favour of excluding the Trucks from the receivership is that the Appellants have priority over Integris with respect to the Trucks pursuant to their PMSI's. To allow the Trucks to remain under the

receivership would grant the Receiver, and indirectly Integris who must indemnify the Receiver's losses, priority over the Appellants.

[43] By virtue of the lease or conditional sale agreements, All-Wood had only possessory interests in the Trucks. The Appellants retained the proprietary rights. All-Wood had only the right to possess and use the Trucks, on certain terms and conditions as set out in the agreements. The Receiver could not acquire a greater interest than All-Wood held.

[44] The court below focused on a "true lease / financing lease" analysis. The true lease / financing lease dichotomy arises in the context of the *Personal Property and Security Act*, R.S.B.C. 1996, c. 359 [*PPSA*]. Section 55 of the *PPSA* exempts Part 5 from transactions referred to in s. 3, which includes a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e., a true lease). However, Part 5 is irrelevant to the application before the court. *DaimlerChrysler*, cited by the Judge, did not involve a receivership but determined whether Part 5 of the *PPSA* applied to a particular lease.

[45] The true lease / financing lease analysis is also relevant in a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 proceeding in that creditors with a true lease are entitled to continuing payments under s. 11.01(a) while those with a financing lease are not: *Smith Brothers Contracting Ltd. (Re)(Trustee of)* (1998), 53 B.C.L.R. (3d) 264 (S.C.).

[46] In my view the true lease / financing lease dichotomy is not helpful in the analysis here. Section 243(6) of the *BIA* allows a court to direct that a receiver's charges rank ahead of security interests but requires notice to secured creditors. The Appellants applied for orders directing the Receiver to release the Trucks and exclude the property from the Receivership Order (the Receiver's fees and borrowing charges). This type of application was expressly contemplated in paragraph 29 of the Receivership Order, which included these handwritten changes to the Model Receivership Order:

> 29. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business 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, *specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein.*
>
> [Italics denote the handwritten addition to the order.]

[47] The Judge concluded the Trucks fell within the scope of the Receivership Order because the Trucks were "property" and the agreements between All-Wood and the Appellants were financing leases. However, the Judge did not consider whether, pursuant to paragraph 29 of the Order, the Trucks should be excluded from the priorities set out in paragraphs 16 and 19 despite being "property". Effectively that is what the applications sought.

[48] In my opinion, even if the Trucks fell within the definition of "property" in the Receivership Order, the question of whether the Appellants had superior entitlement under the priority rules of the *PPSA* was critical to the applications before the court. The priority rules of the *PPSA* are designed to achieve commercial certainty and predictability. To keep the Trucks within the Receivership, and thus subject to the charges of the Receiver, would circumvent the priority rules of the *PPSA*.

[49] Groberman J.A. summarized the goal of the *PPSA* and its application to third parties in *KBA Canada, Inc. v. Supreme Graphics Limited,* 2014 BCCA 117:

> [20] It is well-established that the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing. The statute includes clear rules for registration of financing statements in respect of security interests and for priorities among secured creditors. Courts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity. The general approach to the statute is well-described in the first chapter of Ronald C.C. Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, 2d ed. (Toronto: Irwin Law, 2012) at 51:
>
>> The PPSA is founded on certain legislative policies that generally inform its interpretation. The most prominent of these is the advancement of commercial certainty and predictability. This is a primary value in commercial law generally. Its principal application in the PPSA context takes the form of an appropriate reluctance to

> countenance judicial glosses on the statutory rules, especially those dealing with priority.
>
> …
>
> [27] It is difficult to conceive of a situation in which principles of common law, equity, or the law merchant will be applicable to a priorities dispute, because the *PPSA* deals with priorities comprehensively. In discussing similar Saskatchewan legislation in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, the Supreme Court of Canada said this of the priorities scheme:
>
>> [22] The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3) [ss. 20(b) and (c) of the B.C. Act]. Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.
>
> [Emphasis added.]

[50] The clear rules of the *PPSA* should not be circumvented by the appointment of a receiver, when the exceptions outlined in *Kowal* are not met.

[51] Integris submits that in the appropriate circumstances a court may appoint a receiver and grant it priority over other pre-existing charges, such as occurred in *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809.

[52] *Caisse* was an application for the appointment of a receiver over the assets of a debtor. Certain mortgagees argued that the real property over which they hold security by way of first and second mortgages respectively should be carved out of any receivership order because "a receiver would do no more than add a layer of expense and procedure to the handling of the real property, resulting in increased expense but adding nothing of convenience" (para. 17). The mortgagees ranked in

priority to Caisse, the general creditor who sought the appointment. The judge rejected the mortgagees' argument and found that it was just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors.

[53] In my view, *Caisse* does not assist Integris. There the judge applied the analytical framework of *Kowal* and found an exception was made out. The particular circumstances of that case justified the order, most notably that (1) the mortgagees would receive a full return on their interests and (2) the realization of the mortgagees' security would not be subjected to the costs arising from the other interests:

> [22] I see no injustice or prejudice to the mortgagees under such an arrangement: there is no evidence before me that the real property is worth any less than the $13.5 million put forth by Hubert Belanger. I cannot conceive of any scenario wherein the receivers' costs or disbursements would compromise a full return on the mortgagees' interest. The proposed order contains a limit on the right of the receiver to borrow in order to fund the receivership (see paragraph 24 of Appendix "A"). To the extent that the receiver conducts itself in a manner similar to a mortgagee in possession, one must assume that some of its costs in that regard would simply be incurred in the stead of the costs that a mortgagee in possession would incur or charge. This assurance can be enhanced by a clause in the order which would serve to ensure that the priority of a receiver's charge or borrowing charge should rank ahead of the three conventional mortgages only to the extent that those charges relate exclusively to the preservation, maintenance, upkeep or condition of the real property. The proposed order put forward by the Caisse contains such a clause at paragraph 28. In my view, it is just and convenient that the costs of the receiver as they pertain to the real property be allocated amongst all creditors. Moreover, this arrangement ensures that the realization of the mortgagees' security will not be subjected to the operation of the business, matters which are of no concern to them as mortgagees. On the other hand, it is only reasonable and fair that the receiver be given priority for expenditures incurred for the necessary preservation and improvement of the property. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no good reason why the mortgagee should not have to pay its proportionate share of the receivership costs [see: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp* (2006), 25 C.B.R. (5^{th}) 156 (ONSC) at para. 45.
>
> [Emphasis added.]

[54] In the present case, we are advised that there are insufficient funds from the Receivership to pay the secured creditors and the Receiver's costs and disbursements. The situation described in *Caisse* does not arise.

[55] Nor is it appropriate, as Integris argues, to reserve the issues here to a future allocation hearing. As the Appellant's PMSIs take priority over Integris' GSA, and the Appellants wanted no part of the receivership, in the circumstances here the Trucks should have been released to the secured creditors at the earliest opportunity.

VIII. Conclusion

[56] In my opinion the Trucks should have been excluded from the Receivership in response to the Appellants' applications. The Trucks should not be subject to the Receiver's charges. It follows that I would allow the appeals.

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Bennett"

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Computershare Trust Company of Canada v. Meadows Development Ltd.,* 2019 BCSC 1945

Date: 20190913
Docket: S54612
Registry: Vernon

Between:

Computershare Trust Company of Canada

Petitioner

And

Meadows Development Ltd., David John Borden also known as Jack Borden, Elaine Borden, Interior Equities Corp., and David W. Regehr Holdings Ltd.

Respondents

Before: The Honourable Mr. Justice Grauer

Oral Reasons for Judgment
In Chambers

Counsel for Petitioner:	M.L. Teetaert
Counsel for Respondents Meadows Development Ltd., David John Borden, and Elaine Borden:	K. Burnham
Counsel for Respondent Interior Equities Corp.:	S.D. Dvorak
Place and Date of Trial/Hearing:	Vancouver, B.C. September 13, 2019
Place and Date of Judgment:	Vancouver, B.C. September 13, 2019

[1] **THE COURT:** The petitioner, Computershare, holds a first mortgage and a General Security Agreement as security for the indebtedness of the respondent Meadows Development presently in the amount of approximately $2,700,000.

[2] Computershare's security under the mortgage consists of lands and a building that I will call the Lodge. The building contains 57 assisted-living rental units.

[3] Since the security was given in 2006, Meadows developed additional buildings and facilities on adjacent lands that, together with the Lodge, now comprise a retirement community consisting of various cottages, terraces and other residences. The respondent Interior Equities is the first mortgagee for this additional development and holds a second mortgage over the Lodge, securing a total of approximately $17 million.

[4] Meadows has defaulted on its debt obligations to Computershare. Computershare obtained an order nisi of foreclosure on March 13, 2018, which application had been adjourned on terms from February 6, 2018. Those terms included an agreement to make a payment of three months' arrears, and ongoing monthly payments. Meadows has failed to abide by those terms.

[5] The redemption period expired on August 6, 2018, and on August 29, 2018, Master Wilson (as he then was) pronounced an order granting Computershare exclusive conduct of the sale of the Lodge together with solicitor-and-client costs both before and after pronouncement of the order nisi.

[6] Computershare has been unsuccessful in securing a sale of the Lodge for reasons I will shortly discuss. It now seeks an order appointing a receiver of "all of the assets, undertakings and property of the debtor, including all proceeds which are the subject matter of this proceeding including the lands and premises of the debtor [comprising the Lodge]." Computershare seeks, in other words, the appointment of a receiver not only over the Lodge, but of other parts of the retirement community not secured by its mortgage and over which Interior Equities has priority.

[7] Why does Computershare seek such an order? The Lodge is not a separate business. The retirement community of which it is a physical part is managed as a whole, and services are provided out of the Lodge throughout the community. There is no separate accounting for the Lodge, or at least none that has been made available to Computershare. This has made it very difficult to ascertain what expenses of the business are properly attributable to the Lodge and what net income is properly attributable to the Lodge. Without accurate information of this kind, prospective purchasers quickly lose interest because they cannot ascertain the potential profitability and, hence, the value of the property.

[8] Moreover, there are a number of concerning circumstances that, from Computershare's perspective, require explanation. The vacancy rate at the Lodge has increased rather dramatically over the past two years. Until recently, payments of net income from the business have been made to Interior Equities with no share going to Computershare. It now appears that no such payments of net income are made to anyone, and Computershare has no idea why. It has been unable to obtain the information it required to answer these questions.

[9] In the meantime, Meadows has been trying to effect a sale of the community as a whole. It seems self-evident that such a sale would be in the best interests of all. Nothing I have seen suggests that selling piecemeal will result in a greater return. The opposite is more likely.

[10] Indeed, when this matter first came before me on July 30, 2019, in Kelowna, I adjourned the hearing and seized myself of the matter because a conditional contract for the sale of the business as a whole had been negotiated with the subjects to be removed shortly. As it turned out, they were not removed, and the closing was extended. That extension passed without completion and has not been renewed. In the result, all efforts to sell the community as a whole have failed, as have all efforts to sell the Lodge individually.

[11] Computershare has been frustrated in its attempts to obtain from the respondent Borden the information it needs to be able to provide to potential

purchasers of the Lodge. Mr. Borden has not, for instance, ever provided more than a "guesstimate" concerning the breakdown of income and expenses between the Lodge and the balance of the business. Computershare has requested the information Mr. Borden has provided to potential purchasers of the business as a whole, and has not received it.

[12] Computershare maintains that its only viable option at this point is to install a receiver with expertise in the field of running a retirement community business. This is necessary, Computershare says, in order to make sense of what expenses are properly attributable to the Lodge, how much income is properly attributable to the Lodge, what has happened to the net income that ought to have been coming in every month, to determine why there are so many units vacant and what must be done to fill them, and to look at the services provided throughout the community and the salaries paid in order to assess the proper attribution of costs. Without such information, Computershare submits its prospects of selling the Lodge for anything close to its appraised value of $2,700,000 are non-existent. Indeed, the length of time the property has been exposed to the market suggests that the appraisal is optimistic.

[13] A receiver, Computershare asserts, will ensure that the property is maintained and occupied to maximize its value and will develop the financial information necessary to support a sale at market value.

[14] Interior Equities opposes the application. It maintains that the remedy Computershare seeks is excessive and unnecessary. Computershare seeks to appoint a receiver of all the assets, undertakings and properties of Meadows, not just the Lodge. This has the effect of displacing Interior Equities' priority over the property subject to its first mortgage to the extent of the receiver's charges in circumstances where Interior Equities does not agree to the appointment of the receiver, sees no benefit to it, and where it is not necessary to accomplish Computershare's goals. In Interior Equities' submission, those goals can be accomplished by an appropriately crafted order for the disclosure of financial

information. In the meantime, Interior Equities would rather that Mr. Meadows continue to operate the business than a receiver.

[15] Interior Equities concedes that the court has jurisdiction to appoint a receiver as requested by Computershare, but that its discretion in that regard is limited to three situations as discussed in *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation*, 2016 BCCA 231 at para. 40 as adopted in *Terra Nova Management v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017 at para. 30, from *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 59 D.L.R. (3d) 492 at 496 (ONCA). These exceptions are, first, where a receiver has been appointed at the request, or with the consent or approval, of the holders of the security; second, where a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; and third, whether receiver has expended money for the necessary preservation or improvement of the property.

[16] Interior Equities submits that none of these exceptions applies in this case. To impose a receiver in circumstances where the debt owed to Interior Equities is six times that owed to Computershare means that it is largely Interior Equities' security that becomes further impaired by the costs of the receiver, not Computershare's.

[17] Computershare maintains that the second exception applies. In doing so, it effectively expands the basis upon which it sought the appointment of the receiver from obtaining the information necessary to effect the sale of the Lodge to undertaking the management of sale of the whole property. This aspect was always within the power sought, but not specifically relied upon before. Computershare relies upon the decision of Mr. Justice Graesser of the Alberta Court of Queens Bench in *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124, affirmed 2019 ABCA 109.

[18] In the submission of Meadows, the only real way out of this difficulty is to sell the business and property as a whole, which has so far proved difficult to accomplish. The prospects will certainly not be enhanced by the appointment of a receiver. The resistance to providing information before was, they say, due to

pending negotiations and no longer exists. In other words, Meadows and its principals maintain that they are now willing to provide whatever disclosure Computershare requires. They should, of course, have done so long ago.

[19] The parties do not disagree about the general test applicable to the appointment of receivers as set out in cases such as *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527: see para. 25; *Textron Financial Canada Limited. v. Chetwynd Motels Ltd.*, 2010 BCSC 477; and *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348. There is a different line of authority championed by Mr. Justice Burnyeat: see *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, but this is neither the time nor the place to resolve the difference between the two lines. In the unusual circumstances of this case, I am satisfied, and the parties do not dispute, that the proper approach is that taken by Madam Justice Fitzpatrick in the *Bank of Montreal* case at para. 23: to review the matter holistically and decide whether, on the whole of the circumstances, it is in fact just and convenient to appoint a receiver.

[20] The question then becomes whether, in the circumstances we have here, such a review is further restricted by the principles enunciated in the *Integris Credit Union* case to the parameters of the three exceptions there discussed.

[21] It seems to me that if the exceptions mentioned in *Integris Credit Union* do not apply, then that must weigh in balancing whether it is just and convenient to appoint a receiver. If an exception is applicable, the holistic approach should still be followed. In doing so I conclude that the appointment of a receiver, at least at this stage, is not just and convenient.

[22] In my view, a review of the factors set out in *Maple Trade Finance* leads to this result. Although Computershare has the right to appoint a receiver, the changes to the property since the security was granted, and the effect of the appointment of a receiver upon the parties, the prospects of sale and the security of Interior Equities, all weigh against the appointment of a receiver, particularly when viewed in the context of the risks to Computershare in relation to the value of its security. While I

understand Computershare's real frustration, I consider that much of its concern can be addressed, as was the case in *Maple Trade Finance*, by an order for disclosure with which Meadows has undertaken to comply. At this stage the appointment of a receiver with all of the expense that would follow would be well beyond what the circumstances justify. This is quite different from the sort of situation considered in the *Reid-Built Homes* litigation, where a receiver was appointed by consent between the Royal Bank of Canada and the debtor in relation to a home construction business.

[23] Accordingly, the application for the appointment of a receiver is dismissed. I order the respondents David John Borden, Elaine Borden and Meadows Development to provide all documents reasonably requested by the petitioner or on behalf of the petitioner, including but not limited to:

1. bank statements;
2. accounts receivable ledgers;
3. accounts payable ledgers;
4. expense listings;
5. historical financial statements over the last two years;
6. income tax returns;
7. listings of residents and terms and details of residents;
8. employee records and details;
9. contracts with residents;
10. any regulatory documentation regarding licensing and operations.

[24] As I understand it, the respondents are content with this list, and in particular the respondents Meadows and the Bordens consent to it. These documents are to cover, as I understand it, the last two years.

[25] Time for production. 21 days?

[26] MR. BURNHAM: That should do it, thank you.

[27] THE COURT: Are you content with that?

[28] MS. TEETAERT: Sure. Thank you, My Lord.

[29] THE COURT: These documents are to be produced within 21 days. If after reviewing the documents Computershare concludes that they give rise to grounds for the appointment of a receiver, it may renew its application. It may also do so in the event that the documents are not produced as and when ordered.

[30] Now, is there any reason not to award Computershare its solicitor-client costs?

[SUBMISSIONS RE COSTS]

[31] THE COURT: The petitioner is entitled to its solicitor-client costs pursuant to the order of Master Bishop as against the respondents other than Interior Equities subject to such priority hearing as may be relevant. Interior Equities may have its costs of today as ordinary costs, not including any previous attendances and adjournments. I am grateful to counsel for your very helpful submissions.

[32] MR. BURNHAM: Thank you, My Lord.

[33] MS. TEETAERT: Thank you, My Lord.

"GRAUER, J."