Clerk's Stamp:

COURT FILE NUMBER	2303 17033
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**BANK OF MONTREAL**
DEFENDANTS	**2396610 ALBERTA INC., ALI ABSHIR DINI and ADEN SHIRE ALI**
DOCUMENT	**BENCH BRIEF OF BANK OF MONTREAL IN SUPPORT OF AN APPLICATION FOR A RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10220 103 Avenue NW Edmonton, Alberta T5J 0K4 Ph. (780) 423-7284 Fx. (780) 423-7276 File No.: 126233-2265 Attention: Dean A. Hitesman

TABLE OF CONTENTS

Page

I. Introduction 1

II. Issues 1

(a) Should a Receiver be appointed by this Honourable Court in the present circumstances? 1

(b) If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver? 1

III. Factual Background 1

IV. Law and Argument 3

A. Should a Receiver be appointed by this Honourable Court in the present circumstances? 3

B. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver? 8

V. Conclusion 9

I. INTRODUCTION

1. The Defendant, 2396610 Alberta Inc.("**2396**"), is indebted to Bank of Montreal ("**BMO**") pursuant to loans or other credit extended by RBC to 2396 in the amount of $967,753.54 as at September 19, 2023. The indebtedness is secured by a multi-unit residential building in Edmonton, Alberta.

2. 2396 has granted to BMO security over all of 2396's present and after-acquired personal property, and all proceeds thereof, and has granted mortgage security over the Lands, as defined herein. This security allows for and provides for the appointment of a receiver or receiver and manager in the event of default with respect to 2396's obligations to BMO.

3. 2396 is in default of its obligations to BMO. On or about August 18, 2023, BMO demanded payment of all amounts owing from 2396 and did serve on 2396 a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "**BIA**"). 2396 has not provided BMO with any proposal as to how it intends to repay their indebtedness owing to BMO.

4. The Lands, as defined herein, consist of a multi-unit residential building that will require ongoing, active management throughout the enforcement of BMO's security, and a court-appointed Receiver would be best suited and empowered to oversee that enforcement while considering the interest of both creditors and tenants.

5. BMO respectfully submits that, having regard to the circumstances, it is just and convenient to appoint a Receiver of the assets, undertaking, and property of 2396 that BDO Canada Limited ("**BDO**") ought to be appointed as Receiver immediately, given the nature of the property and the reasons set out herein.

II. ISSUES

6. BMO respectfully submits that the issues before this Honourable Court are:

   (a) Should a Receiver be appointed by this Honourable Court in the present circumstances?

   (b) If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver?

III. FACTUAL BACKGROUND

7. 2396 borrowed money from BMO which it agreed to pay to BMO with interest. As at September 19, 2023, 2396 remained directly indebted to BMO in the amount of $967,753.54, plus accruing interest, plus legal costs on a solicitor and his own client basis (the "**2396 Indebtedness**"), which amounts are fully due and payable.

Affidavit of Wade Plawucki sworn November 6, 2023 ("**Affidavit of Wade Plawucki**") at paragraphs 8-9 and Exhibits "B" and "C"

8. Pursuant to a Collateral Mortgage dated March 7, 2022 (the "**Mortgage**") and registered at the Land Titles Office as instrument number 222 141 227, 2396, 2396 granted to BMO a mortgage as security for the Indebtedness in the principal amount of $937,500.00, plus interest at the rate of

5.00% per annum above the prime rate of interest maintained by BMO from time to time ("**Prime**"), plus costs on a solicitor and his own client basis, over real property legally described as:

PLAN B4
BLOCK 8
LOT 192
EXCEPTING THEREOUT ALL MINES AND MINERALS

and municipally described as 10734 108 St NW, Edmonton, Alberta (the "**Lands**").

Affidavit of Wade Plawucki at paragraphs 14-15 and Exhibits "F" and "G"

9. 2396 also granted to BMO an Assignment of Rents (the "**Assignment of Rents**") dated March 7, 2022, assigning to BMO all leases and rents derived from the Lands as security for the 2396 Indebtedness.

Affidavit of Wade Plawucki at paragraph 16 and Exhibit "H"

10. 2396 further granted to BMO a General Security Agreement dated March 7, 2022 (the "**2396 GSA**") securing to BMO all of its present and after acquired personal property, and the proceeds thereof. The 2396 GSA secures all of the 2396 Indebtedness.

Affidavit of Wade Plawucki at paragraph 17 and Exhibit "I"

11. BMO has perfected its security interests created by the 2396 GSA by way of registration at the Personal Property Registry of Alberta.

Affidavit of Wade Plawucki at paragraph 18 and Exhibit "J"

12. By a Caveat dated August 17, 2023 and registered in the Alberta Land Titles Office as instrument number 232 287 281, BMO registered the floating charge granted in the 2396 GSA against the Lands, securing payment of the 2396 Indebtedness in the amount of $100,000.00 (the "**Equitable Mortgage**"). The Equitable Mortgage secures all of 2396 Indebtedness.

Affidavit of Wade Plawucki at paragraph 18 and Exhibit "K"

13. Pursuant to the 2396 GSA and Mortgage, 2396 agreed that upon any event of default of 2396's obligations to BMO, BMO would be entitled to, among other things, apply for the appointment of a receiver or a receiver and manager of 2396.

Affidavit of Wade Plawucki at Exhibits "G" and "I"

Issues and Concerns regarding BMO's Security

14. 2396 has defaulted in its obligations to BMO by, among other things, failing to pay amounts due and owing to BMO. On or about August 18, 2023, BMO demanded payment of the 2396 Indebtedness, but 2396 has failed or neglected and continues to fail or neglect to repay the 2396 Indebtedness. Concurrent with the issuance of the demand for payment, BMO did serve on 2396 a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*.

Affidavit of Wade Plawucki at paragraphs 21-22 and Exhibit "L"

15. BMO requested that Stewart Belland & Associates Inc. conduct an occupancy check on the Lands and provide a report on the status of the Lands. On or about September 13, 2023, Lyle Stewart of Stewart Belland & Associates Inc. ("**Mr. Stewart**") sent an email to Tamya Chowdhury of Dentons Canada LLP advising that:

    (a) there are 12 units located in the Lands, however, Mr. Stewart advised that the occupancy status of the units could not be confirmed;

    (b) the Lands were locked and access could not be gained; and

    (c) there are no signs of a property management company at the Lands.

    Affidavit of Wade Plawucki at paragraph 27 and Exhibit "O"

16. BMO has material concerns regarding the status, stability, and preservation of its security. In particular:

    a) There are unpaid property taxes owing to the City of Edmonton regarding the unpaid lands, which continue to accrue and erode BMO's security;

    Affidavit of Wade Plawucki at paragraph 28

    b) BMO has lost confidence in the ability and management of 2396 to continue to operate the business;

    Affidavit of Wade Plawucki at paragraph 30

    c) 2396 owes a significant amount to BMO, exceeding $967,753.54, and is not capable of repaying this indebtedness in the near future or at all;

    Affidavit of Wade Plawucki at paragraph 31

    d) 2396 is not capable of obtaining refinancing whatsoever, or of selling sufficient assets in the near future sufficient to pay the 2396 Indebtedness in full; and

    Affidavit of Wade Plawucki at paragraph 32

    e) the Lands contain a multi-unit, residential building with numerous tenants, the details of which have not been provided to BMO despite its inquiries.

    Affidavit of Wade Plawucki at paragraph 33

17. BMO's patience has now been exhausted, and BMO has concerns about the erosion of BMO's security and the preservation of the collateral subject to BMO's security interests.

    Affidavit of Wade Plawucki at paragraph 37

IV. LAW AND ARGUMENT

A. Should a Receiver be appointed by this Honourable Court in the present circumstances?

18. Each of section 243 of the *BIA*; section 65 of the *Personal Property Security Act*, RSA 2000, c P-7, as amended; section 49 of the *Law of Property Act*, RSA 2000, c L-2; and section 13(2) of the *Judicature Act*, RSA 2000 c J-2 vest in this Honourable Court authority to appoint a Receiver where it is just and convenient to do so.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243 **[TAB 1]**

Personal Property Security Act, RSA 2000, c P-7, s 65 **[TAB 2]**

Law of Property Act, RSA 2000, c L-7, s 49 **[TAB 3**]

Judicature Act, RSA 2000, c J-2, s 13(2) **[TAB 4]**

19. In BMO's respectful submission, this Honourable Court should exercise its discretion to appoint a Receiver, as it is just, convenient, and generally appropriate that a Receiver of the undertaking, property and assets of 2396 be appointed at this time.

20. BMO respectfully submits that the oft-cited factors set out in *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("***Paragon***"), weigh in favour of the appointment of a Receiver, which factors are as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co., 2002 ABQB 430 at para 27 **[TAB 5**]

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 at para. 32 aff'd by 2010 ABCA 191 [**TAB 6**] and *Schendel Management Ltd., Re*, 2019 ABQB 545 at para 44 [**TAB 7**].

21. Having regard to the above factors listed by Justice Romaine, and to the contents of the Affidavit of Wade Plawucki, BMO notes that:

a) the security documents granted by 2396 authorize the appointment of a receiver, and therefore it is not essential for BMO to establish irreparable harm if a receiver is not appointed;

b) the risk to BMO is significant, with the 2396 Indebtedness exceeding $967,753.54, and the value of the Lands is unknown;

c) the collateral is primarily composed of a multi-unit, residential building. The appointment of a Receiver would greatly facilitate the administration of 2396' estate and communications with the numerous potentially interested stakeholders, including residential tenants;

d) there are concerns of waste of the collateral, as 2396 has not communicated with BMO, and BMO has concerns about whether the Lands are being properly managed or if the assets are deteriorating. The appointment of a receiver during the sale of the Lands would ensure the property is properly preserved and protected;

e) the property which comprises BMO's security requires the oversight of an independent party to ensure it is being adequately preserved;

f) the balance of convenience weighs in favour of BMO. 2396 is insolvent and not capable of repaying the 2396 Indebtedness by way of regular business operations;

g) as noted above, BMO has the right under the 2396 GSA and Mortgage to appoint a Receiver. While the appointment of a Receiver is extraordinary relief and should be granted cautiously and sparingly, Justice Romaine notes at paragraph 28 of *Paragon* that this factor is less essential to the inquiry where the security documentation provides for the appointment of a Receiver;

Paragon, *supra*, at para 28 **[TAB 5**]

h) the enforcement of rights under the Mortgage and 2396 GSA would likely be difficult without the involvement of a receiver;

i) as noted above, while the appointment of a receiver is extraordinary relief, this factor is less essential to the inquiry where the security documentation provides for the appointment of a Receiver;

j) it is submitted that a court appointment of a receiver is necessary as it will confer upon the receiver the powers most effectively and efficiently carry out its duties;

k) the effect that a receivership order will have on the parties is justified when taking into consideration all of the circumstances;

l) the conduct of the parties is supportive of the granting of a Receiver, as 2396 has failed or refused to effectively communicate with BMO or instill any confidence in BMO that the indebtedness owed to it will be repaid in the reasonably near future;

m) the Receiver may need to be in place for a significant period of time, as it may take a considerable period of time to market and sell the Lands;

n) while there is cost of appointing a Receiver, it is BMO's position that the appointment of a Receiver will result in a timely and economical resolution of BMO's concerns regarding its security and recovery of the indebtedness owed;

o) it is likely the value of 2396's assets will be maximized by appointing a Receiver that can manage and preserve the Lands and building located on the Lands which comprise BMO's security, and collect rents until the Lands are ultimately sold; and

p) a Court-appointed Receiver will be endowed with significant powers to properly administer the collateral and 2396's estate.

22. In the decision of *MTM Commercial Trust v. Statesman and Riverside Quays Ltd*., 2010 ABQB 647 ("***MTM***"), the applicant sought a receivership order pursuant to section 13(2) of the *Judicature Act*. In the reasons, Justice Romaine states:

> As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?
>
> *MTM,* at para 11 [**TAB 8**].

23. It is relevant to note that in the *MTM* decision, the application was being brought pursuant to the *Judicature Act* alone, and there was no indication that the applicant held security over the respondent's property.

24. Such was also the case in *BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127 ("***BG International***"), where the applicant did not have authority to appoint a receiver pursuant to security documents. The Alberta Court of Appeal discussed the test to appoint a receiver under the *Judicature Act*, and held:

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

BG International, supra at para 17 [**TAB 9**].

25. In addition to the considerations under the *Judicature Act*, it is of considerable note that 2396 has granted security to BMO, including the express contractual agreement that upon an event of default by 2396, that a Receiver may be appointed.

26. An application to appoint a Receiver was made before the Alberta Court of Queen's Bench in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*., 2013 ABQB 63 ("***Kasten***"), wherein the creditor had authority to appoint a Receiver under a general security agreement. This Honourable Court applied a modified and less onerous version of the interlocutory test and held:

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

> consider the effect of granting the receivership order, and if possible use a remedy short of receivership.
>
> 21 The security documentation in the present case authorizes the appointment of a Receiver (2396 GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27.

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd., 2013 ABQB 63 at paras 20 and 21 **[TAB 10**]

27. Similar to the *Paragon* and *Kasten* decisions, 2396 has granted security authorizing the appointment of a receiver, and therefore the modified and less onerous version of the interlocutory test applies.

28. BMO respectfully submits that there are no other remedies short of the appointment of a Receiver available to BMO that will adequately protect its interest. The balance of the interests of the parties favours BMO and the appointment of a Receiver.

B. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver?

29. In an application for the appointment of a Receiver, the Court is faced with the task of deciding the appropriate person or firm to be appointed.

30. Notwithstanding that the discretion to select the Receiver is that of this Honourable Court, BMO respectfully submits that consideration ought to be given to the firm put forward by BMO, in this case, BDO.

31. The proposition that significant consideration ought to be given to the applicant creditor's proposed appointment is supported by *Confederation Trust Co. v. Dentbram Developments Ltd.,* 9 C.P.C. (3d) 399, Ontario Court of Justice (General Division) Commercial List, wherein Justice Borins held:

> 2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking the receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

Confederation Trust Co. v. Dentbram Developments Ltd., 9 CPC (3d) 399, (Ont Gen Div [Commercial List]) at para 2 **[TAB 11]**

32. BDO is a well-recognized and respected insolvency firm. BDO is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner.

33. Additionally, BDO has consented to act as Receiver if so appointed by this Honourable Court.

34. BMO respectfully submits that it would be reasonable for this Honourable Court to exercise its discretion to appoint BDO as the Receiver of 2396.

V. CONCLUSION

35. BMO respectfully submits that, having regard to the circumstances, it is just and convenient to appoint BDO Canada Limited as Receiver of the assets, undertakings and properties of 2396610 Alberta Inc.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of NOVEMBER, 2023.

DENTONS CANADA LLP

Per: _____

DEAN A. HITESMAN / TAMYA N. CHOWDHURY
SOLICITORS FOR BANK OF MONTREAL

INDEX

TAB

1. *Bankruptcy and Insolvency Act,* RSC 1985, c B-3

2. *Personal Property Security Act*, RSA 2000, c P-7

3. *Law of Property Act*, RSA 2000, c L-7

4. *Judicature Act,* RSA 2000, c J-2

5. *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co*., 2002 ABQB 430

6. *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242

7. *Schendel Management Ltd., Re*, 2019 ABQB 545

8. *MTM Commercial Trust v. Statesman and Riverside Quays Ltd*., 2010 ABQB 647

9. *BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127

10. *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*., 2013 ABQB 63

11. *Confederation Trust Co. v. Dentbram Developments Ltd.,* 9 C.P.C. (3d) 399, (Ont. Gen. Div. [Commercial List])

TAB 1

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

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.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
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.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Judicial Consideration (8)

Currency
Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

TAB 2

R.S.A. 2000, c. P-7, s. 65

s 65. Receiver

Currency

65.Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

65(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act*, and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

65(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

65(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

65(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

65(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

65(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

65(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

65(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

TAB 3

R.S.A. 2000, c. L-7, s. 49

s 49. Appointment of receiver

Currency

49.Appointment of receiver

49(1) Notwithstanding section 40, 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.

49(2) If

(a) a mortgage of land or an agreement for sale referred to in subsection (1) is in default, 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.

49(3) Notwithstanding subsections (1) and (2), an application to appoint a receiver may be made ex parte if

(a) in the case of a mortgage, the land is transferred or sold

(i) while the mortgage is in default, or

(ii) within 4 months before the mortgage goes into default,

or

(b) in the case of an agreement for sale, the purchaser's interest in the land is assigned or sold

(i) while the agreement for sale is in default, or

(ii) within 4 months before the agreement for sale goes into default.

49(4) The proceeds of rents or profits collected by the receiver, less any fee or disbursements, which may be allowed by the Court to the receiver by way of remuneration, shall be applied

(a) in payment of taxes accruing due or owing on the land in receivership, and

(b) in reduction of the claims of the mortgagee or vendor against the land in receivership.

49(5) A receiver appointed pursuant to this section may distrain for rent in arrears in the same manner and with the same right of recovery as a landlord.

49(6) On default of the mortgagor or purchaser of the land other than farm land that is in receivership to pay the rents or profits from it, the Court may order possession of the land to be delivered up to the receiver and leased by the receiver, on any terms and conditions that the Court considers fit.

49(7) The Court may, on application by the receiver, give the receiver further directions from time to time as the circumstances require.

49(8) An order appointing a receiver may be discharged by the Court at any time, but the order shall only be discharged on application after notice.

49(9) When and so often as the circumstances require, the Court may, without discharging the order appointing the receiver, substitute another person for the person originally appointed by the order appointing a receiver, and the substituted receiver shall perform all the duties and has all the powers given by the order or this section to the person originally appointed.

49(10) When an order appointing a receiver is made under this section, then, unless the Court otherwise directs in that order or in a subsequent order, proceedings in the action on the mortgage or on the agreement for sale shall be stayed until the time that the order appointing a receiver is discharged.

49(11) Subsection (10) does not apply when the mortgagor or purchaser is a corporation.

49(12) In this section, **"farm land"** means farm land as defined in section 47(4).

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

TAB 4

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

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.

Judicial Consideration (1)

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

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TAB 5

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence

to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390 68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

TAB 6

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495,
[2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but

undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies and A Inc. were complicit in fraud perpetrated by B — S Corp. was placed into receivership — Investors brought application to have same receiver appointed over assets and undertakings of A Inc. and companies owned by B and S — Application granted — Although S was not involved directly in proceedings before commission, his companies and A Inc. were subject of investigation in view of flow of monies — B's companies, S's companies and A Inc. were involved in receipt and transfer of tens of millions of dollars which flowed freely between B's companies and S's companies — There was no evidence put forward by S to lend any credence to position that he was conducting legitimate business at arm's length with B — There was evidence which suggested contrary — S and his companies received over $50 million directly or indirectly from B and his companies and there was no accounting for any of these monies — B was directing mind of A Inc. and A Inc. shared address and director with S Corp. — There was real risk of irreparable harm in wasting of proposed receivership companies' assets if no order was made — Appointment of receiver would allow assets to be preserved which was essential given nature of claim — Balance of convenience favoured placement of receiver — Receiver would be able to preserve assets and further investigate whereabouts of any other assets — There was no evidence of any harm to companies by placement of receiver.

Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies were complicit in fraud perpetrated by B — Investors brought application for attachment order against S — Application granted — In order to obtain attachment order, investors had to show that there was reasonable likelihood of success at trial — S and his companies received between $50 and 80 million in investor funds — There had been no accounting with respect to these funds — S had to do more than simply say he never had contact with investors and that he did not solicit funds from them directly — Looking at conclusions of commission, there was little doubt that S and his companies were key element in raising and dissipation of funds — S appeared to have been key element in fraud perpetrated by B.

APPLICATION by investors for receivership and attachment orders.

***G.C. Hawco J.*:**

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

4 Mr. Quilling is granted an Attachment Order against Mr. Sorenson.

Background

5 By way of brief background, in May and June of 2006, a hearing took place before the Alberta Securities Commission ("ASC") against Milowe Allen Brost, one of two Respondents, and others, with respect to allegations of misrepresentations and fraud, relating to Strategic and investors in Strategic. On February 16, 2007, the ASC found that Strategic and a number of their representatives, specifically Edna Forrest, Carol Weeks, Bradley Regier and Mr. Brost, were responsible for false or misleading statements in an Offering Memoranda and that all of those parties engaged in a course of conduct that amounted to

a fraud on the shareholders of Strategic. Mr. Sorenson was not a named party to the ASC hearing and did not appear, but was featured prominently in the deliberations and findings of the ASC.

6 What appears to be fairly clear from the ASC hearings is that Mr. Brost and Strategic were involved in a massive fraudulent scheme whereby the Applicants and other investors were induced to trust Mr. Brost and his associates with large amounts of money to be invested on their behalf. The information which was provided to the investors has been determined to be false. The total amount of money received by Mr. Brost and his associates was upward of $500 million. None has been recovered.

7 The decision of the ASC was appealed to our Alberta Court of Appeal. On October 3, 2008, the Court dismissed the appeals by Mr. Brost, Strategic and others. *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (Alta. C.A.).

8 In paragraph 20 and 21 of the Court of Appeal's decision, it stated:

> 20. The Commission summarized the fraudulent scheme, and the roles of each of the Appellants played in that scheme as follows (at para. 13 of the *Sanctions Decision):*
>
> > ... Brost was at the centre of the activities of Strategic and alternatives and ... when he developed Strategic and his business plan, he had in mind the involvement of Gary Sorenson ("Sorenson") and Art (Arthur) Wigmore ("Wigmore") [neither of whom were involved in the proceedings before the Commission] and the funding of mining ventures of either or both of them (as indeed incurred in respect of ventures within the Merendon orbit).... [The] plan was to lure public investor (with promises of high returns and safety along with tantalizing references to gold) into putting money into securities of Strategic - essentially a shell of a company whose main (but undisclosed) function was to finance Sorenson's mining ventures. ...
>
> 21. The Commission described the materials that Alternatives put out to market Strategic shares as "highly promotional", "factually weak" and "clearly designed to entice investors." It noted blatant untruths and misrepresentations in those materials. For example, it noted that Strategic's shares were touted as being secured by precious metals when that clearly was not the case. The Commission was convinced that Strategic investors would not see the returns they expected to realize on their investments and was doubtful that they would recover much of the money they paid.

9 In paragraph 42, the Court concluded that it was reasonable for the ASC to conclude that each of the Appellants engaged in conduct that amounted to regulatory fraud. It went on to say, at para. 47:

> We are of the view that there was evidence upon which the Commission could reasonably conclude, on a balance of probabilities, that Brost was responsible for making false and misleading statements to, and participating in a fraud on, investors.

The Court went on to dismiss the Appeals.

10 Pursuant to a Notice of Hearing dated May 17, 2009, the ASC has commenced proceedings against Arbour, Brost, IFFL, Sorenson, MMCL and a number of additional parties. The Notice of Hearing alleges, among other things, that the Respondents engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors. That hearing is on-going.

Receivership

11 As mentioned, Strategic has been placed into receivership. Mr. Quilling has delivered two reports. The Applicants and others are, or were, investors who allege that the Respondents conspired and acted jointly together to defraud them of funds through the use of an investment scheme that operated in the same way as the investment scheme alleged and referred to in the ASC hearing in 2006 and in the Strategic action.

12 The hearing before the ASC and the matters heard by this Court and our Court of Appeal concerned Strategic and Mr. Brost. Mr. Sorenson and his companies (collectively referred to as the Merendon Companies) were not parties to those proceedings. Neither was Arbour a party.

13 The Applicants allege that Mr. Sorenson, the Merendon companies and Arbour are complicit in the fraud perpetrated by Mr. Brost. They seek to have Mr. Quilling appointed as Receiver of the Respondent companies and seek to have an injunction or attachment order against Mr. Sorenson.

14 Mr. Sorenson states that he was not a party to the original ASC hearings and denies even having anything to do with Mr. Brost's investment schemes. He admits to having been involved in "arm's length business dealings with Mr. Brost and certain of his corporate entities" but denies having been in business with Mr. Brost. I must assume he means that he has not conducted any nefarious business with Mr. Brost.

15 Mr. Sorenson objects to the evidence of Mr. Quilling being received because Mr. Quilling relies upon certain findings of the ASC. He argues that the ASC was not bound by the rules of evidence. Contrary to those rules, the ASC received and relied upon hearsay evidence. As neither Mr. Sorenson nor his companies were parties to that proceeding, the evidence ought not be relied upon. Nor should any of the ASC reasoning or findings be relied upon.

16 The argument of the Applicants is that their case is not founded upon any hearsay evidence which may be found in Mr. Quilling's affidavit, but rather upon the evidence of the financial documents which had been placed before the ASC and which have been examined by Mr. Quilling, as well as the affidavit of Mr. Sorenson and his cross-examination upon that affidavit.

17 What must be born in mind is that the Court of Appeal of this province has considered the decisions of the ASC in some detail and has upheld those decisions with respect to its findings relating to false and misleading statements and misrepresentations of Mr. Brost and others involved with Strategic and the related corporate vehicles. The ASC found that the Offering Memoranda "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money". The ASC further found that fraud had been perpetrated on the investors, who include the Applicants.

18 The Court considered the grounds of appeal of Mr. Brost and the others and, in its analysis referred to the arguments of the Appellants which included the objection to the admission of the hearsay evidence. In paragraph 34, the Court stated:"The Commission acknowledged that transcripts of investigative interviews are not the same as live testimony in that hearsay evidence can be problematic. It treated the impugned hearsay evidence with caution when assessing its value and reliability." In paragraph 36, the Court concluded that the Appellant's arguments (including its arguments to exclude the hearsay evidence) were without merit.

19 Clearly, Mr. Sorenson was not involved directly, as a party, in the previous proceedings before the ASC. Just as clearly, however, his Merendon companies and Arbour were the subject of investigation in view of the flow of monies that went through Mr. Brost, Strategic and his related companies including IFFL and Capital Alternatives. Mr. Brost was the principle of Strategic, Capital Alternatives, IFFL and Merendon Mining (Colorado). These companies and Mr. Sorenson's Merendon companies, and Arbour were involved in the receipt and transfer of tens of millions of dollars which flowed freely between Mr. Brost's companies and Mr. Sorenson's companies.

20 MMCL received over $26 million from Mr. Brost's company - IFFL. MMCL purchased a mine in Tulameen, British Columbia for $1 million and sold it shortly after to Strategic for $9.6 million. That mine was held out by Strategic to be a prime property. It was information and belief of Sgt. Fuller that it was a sham. That appears to be confirmed from Mr. Quilling's investigation.

21 Arbour went from an insolvent company to one loaning $39 million in investors funds in a matter of months to MMCL. Mr. Sorenson claims that MMCL extinguished its obligation to Arbour by selling back to Arbour 25% interest in Tar Sand Recovery Limited. Nothing has been presented by Mr. Sorenson to justify Tar Sand's worth.

22 SGD was another Brost/Sorenson company which received money from Strategic and then directed huge sums of money (over $50 million) to MMCL. Again, no accounting is offered by Mr. Sorenson. Mr. Sorenson simply says that these were monies lent to MMCL and that the debt was retired. The documentation as to how it was retired and the documentation with respect to the value of any assets transferred is sadly lacking. There is simply no evidence put forward by Mr. Sorenson to lend any credence to his position that he was conducting a legitimate business at arm's length with Mr. Brost. There is evidence which suggests the contrary.

23 Mr. Quilling's report of August 26, 2008 states that as a result of information he has received, the Merendon Mining operation in Honduras is a sham as well. I have already determined that the Tulameen mine is basically a sham.

24 Both Mr. Brost and Mr. Sorenson were shareholders of SGD which provided funds to MMCL. Mr. Sorenson was aware that funds were being provided to MMCL through SGD and that they were being sourced from IFFL.

25 SGD existed for the sole purpose of channelling tens of millions of dollars of IFFL members' money to MMCL in exchange for no discernable value.

26 Mr. Sorenson argues he is being tarred by Mr. Brost's brush yet says that he does not have to disprove what is alleged. He continues to argue that he had no involvement in Strategic. Yet, it was Mr. Brost's evidence that Mr. Sorenson initially agreed to, and did become, a director of Strategic.

27 Mr. Sorenson continues to assert that the Honduran mine is continuing to produce gold while the evidence of Mr. Quilling, as fully set out in his report, is that the mine is a sham.

28 Serious allegations have been made against Mr. Sorenson and his companies in these proceedings. Mr. Sorenson has filed an affidavit and has been cross-examined on it. However, he has failed to produce any documentation which would speak to the value of any companies owned by him or that would answer in any manner the allegations of either fraud or dissipation of assets within the companies. Indeed, neither Mr. Sorenson nor MMCL have put forth any independent or reliable evidence of legitimate operations or value in MMCL or any of its subsidiaries or to account for any of the tens of millions of dollars of investors funds that Mr. Sorenson admits that his companies received. His position is that "only" $26 million went to his companies through Mr. Brost and that these were arm's length transactions which were legitimately retired.

29 I am satisfied that Mr. Sorenson and his companies have indeed received over $50 million directly or indirectly from Mr. Brost and his companies. There is no accounting for any of these monies. Mr. Sorenson's explanation of repaying the $26 million loan lacks credibility.

30 With respect to Arbour, Mr. Brost was its directing mind. Arbour and Strategic shared an address and had at least one common director. Arbour received $820,000.00 from Strategic and has accounted for none of it. Arbour was used as a flow-through to send investment funds to Mr. Sorenson's company, MMCL. Arbour appears to be insolvent at this time. It is not carrying on business presently. It has been the recipient of at least $28 million from the Applicants and other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

32 In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

38 Mr. Sorenson appears to have gone to great lengths to make himself judgment-proof. He claims that he has not dissipated assets yet refuses to answer specific questions on his cross-examination with respect to asset dissipation or the presence of any bank accounts he may have.

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements of Mr. Brost, Mr. Sorenson must do more than simply say that he never had any contact with these Applicants and that he did not solicit funds from them directly. When I looked at the conclusions of the ASC there is little doubt but that Mr. Sorenson and his companies were a key element in the raising and dissipation of those funds. He appears to have been a key element in the fraud perpetrated by Mr. Brost.

40 In the end result, I am satisfied that an Attachment Order is appropriate and such Order will issue together with the Receivership Order as indicated.

Application granted.

Footnotes

* Affirmed at *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.).

End of Document

2010 ABCA 191
Alberta Court of Appeal

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 1049, 2010 ABCA 191, [2010] A.W.L.D. 2980, [2010] A.W.L.D. 3006, [2010] A.W.L.D. 3051, [2010] A.W.L.D. 3052, 189 A.C.W.S. (3d) 694, 27 Alta. L.R. (5th) 241, 487 A.R. 262, 495 W.A.C. 262, 69 C.B.R. (5th) 42

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Respondent / Plaintiffs) and Michael J. Quilling (Respondent / Applicant) and Merendon Mining Corporation Ltd. and Gary Sorenson (Appellant / Defendant) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon De Honduras S.A. De C.V., Merendon Mining Inc. Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon De Venezuela C.A., Merendon De Peru S.A., Merendon De Equador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Not a Party to the Appeal)

Marina Paperny, Peter Martin JJ.A., Adele Kent J. (ad hoc)

Heard: June 4, 2010
Judgment: June 11, 2010
Docket: Calgary Appeal 1001-0088-AC

Proceedings: affirmed *Lindsey Estate v. Strategic Metals Corp.* ((2010)), 2010 CarswellAlta 641, 2010 ABQB 242 ((Alta. Q.B.))

Counsel: K.J. Warren, Q.C., T.A. Frizzell for Appellants
F.R. Dearlove, M.D. Mysak for Respondents

Subject: Corporate and Commercial; Securities; Evidence; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Evidence
V Documentary evidence
V.2 Public documents
V.2.a Court documents
Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.e Miscellaneous
Securities
VI Offences
VI.6 Fraud
Headnote
Securities --- Offences — Fraud

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Evidence — Documentary evidence — Public documents — Court documents — Judgments

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Bankruptcy and insolvency — Receivers — Appointment

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Remedies — Injunctions — Rules governing injunctions — Interlocutory, interim and permanent injunctions — Miscellaneous Receivership — Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to

hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

APPEAL from decision granting pre-judgment relief to receiver in form of attachment order and receivership order against defendants.

***Per Curiam*:**

Background

1 This appeal is from an order granting pre-judgment relief to Michael Quilling, Receiver of Strategic Metals Inc. (Strategic) in the form of an attachment order against the appellant Sorenson and a receivership order for the appellant Merendon Mining Corporation Ltd (Merendon), both of whom are defendants in the underlying proceedings.

2 Those proceedings were begun by two statements of claim, the first in Action No. 0801-08351 (*Lindsey Estate v. Strategic Metals Corp.*) filed July 14, 2008, and the second in Action No. 0801-14107 (*Vollmer v Merendon*, Sorenson) filed November 12, 2008. The plaintiffs in both actions were investors in the defendant corporations. The personal defendants were or are principals of those corporations. The plaintiffs claim that the defendants were operating a "ponzi scheme" that fraudulently deprived them of tens of millions of dollars. The two actions were consolidated by order dated November 17, 2009.

3 The Alberta Securities Commission (ASC) is in the process of investigating the defendants for violations of securities legislation related to the alleged ponzi scheme. Its hearings into the actions of some of those defendants, including the appellants Sorenson and Merendon, is ongoing.

4 The ASC has already held hearings with regard to some of the other defendants in this action, including Strategic. Its decisions are reported as *Re Capital Alternatives Inc* 2007 ABASC 79 and [*Capital Alternatives Inc., Re*] 2007 ABASC 482 (Alta. Securities Comm.). Although neither Merendon nor Sorenson was a party to those hearing, they figured prominently in the reasons of the ASC. In essence, the ASC found that Strategic was merely a funnel for money to flow to Merendon, and thereafter to Sorenson personally. An appeal of the ASC's decisions to this court was dismissed: *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326, 440 A.R. 7 (Alta. C.A.).

5 After the ASC decision, the plaintiffs sought a receivership order for Strategic. Michael Quilling, a Texas attorney with experience in ponzi scheme litigation, was appointed receiver of Strategic on September 25, 2008: 2008 ABQB 602 (Alta. Q.B.). Shortly thereafter, the action in No. 14107 against Sorenson, Merendon and others was filed.

6 On October 27, 2009, Quilling, as receiver for Strategic, applied for an attachment order against Sorenson, and to have himself appointed receiver of Merendon. The chambers judge heard the applications on December 14, 2009 and granted both on April 9, 2010: 2010 ABQB 242 (Alta. Q.B.). In the interim, in November 2009, the two underlying actions had been consolidated.

Grounds of Appeal

7 The appellants argue that the chambers judge erred in granting Quilling's applications. In particular, they argue that the chambers judge erred:

a) in permitting Quilling to bring the applications;

b) in relying on the reasons of the ASC in *Re Capital Alternatives*, and on the reasons of this court in *Alberta (Securities Commission) v. Brost*;

c) in making the orders where there was no evidence that either Merendon or Sorenson were dissipating assets;

d) in granting a receivership order that was essentially a wind-up order;

e) in granting the orders after undue delay by the applicant; and

f) in not requiring security for the orders or an undertaking of damages for the receivership order.

Analysis

8 The appellants challenge the standing of Quilling, as receiver of Strategic, to bring the applications. With respect to the receivership application, they argue that Quilling had no standing to bring it against Merendon because such an application contemplates that there be a *lis* between the parties: *Canada Mortgage & Housing Corp. v. York Condominium Corp. No. 46* (1981), 31 O.R. (2d) 514 (Ont. Co. Ct.).

9 We cannot accept that this requirement presents any difficulty in this case. "*Lis*" has been defined as "a piece of litigation; a controversy or dispute": Bryan A. Garner, ed. *Black's Law Dictionary*, 9th ed. (St. Paul MN: Thomson Reuters, 2009). As the appellants point out, receivers are appointed to preserve property until the rights of persons alleging an interest therein have been determined: *Canada Mortgage & Housing Corp. v. York Condominium Corp. No. 46* at para. 7, citing Williston and Rolls, *The Law of Civil Procedure* (1970), vol. 2, 618. On the basis of the evidence before the court, it is apparent to us, as it must have been to the chambers judge, that Strategic will have to pursue Merendon in order to recover assets claimed by the plaintiffs in the underlying litigation. As receiver of Strategic, Quilling was entitled to bring the receivership application against Merendon in an attempt to preserve those assets for the benefit of the plaintiffs and the class members. In fact, the relief originally sought in the statement of claim and subsequently granted was the appointment of an interim receiver to maximize recovery to those individuals.

10 The appellants also argue that Quilling had no standing to apply for the attachment order against Sorenson. The attachment order was granted pursuant to section 17 of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15. The *Act* requires that the applicant for an attachment order be a "claimant", defined in section 16 as a "person asserting a claim". "Claim" is defined, as "a claim that may result in a money judgment being granted if the claim is established". Given the nature of the *lis* here and the role the receiver was expected and authorized by the court to play, we are satisfied the requirement has been met.

11 The appellants argue that the reasons of the ASC and of this court were not admissible as evidence against them. They claim that they cannot be bound by findings of fact in other proceedings to which they were not parties: see *Edwards v. Law Society of Upper Canada* (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.); *Moyes v. Fortune Financial Corp.* (2002), 22 C.P.C. (5th) 154 (Ont. S.C.J.). To the extent that the chambers judge appeared to rely on the findings in that case and specifically those against Merendon and Sorenson, we agree.

12 That, however, does not end the matter. The test for an interlocutory order appointing a receiver is whether the court finds that it is "just or convenient" that the order should be made: section 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2. As the respondents note, there was an abundance of evidence before the chambers judge to justify granting the receivership order. In particular, the chambers judge relied extensively on the affidavit evidence filed by the respondent. This affidavit, while mentioning the ASC as background to the application, does not rely on the reasons of the ASC for its substantive content. Instead, Quilling's affidavit refers to and relies on the Notice of Hearing issued by the ASC against Sorenson and Merendon,

news stories about Sorenson's arrest and the charges against him, the interim reports that Quilling prepared as Inspector for Strategic prior to his appointment as receiver, the report of an Ecuadorian attorney retained by Quilling to investigate Merendon's property in Ecuador, letters and documents received from investors, an affidavit sworn by Scott Fuller, an RCMP officer from the Integrated Market Enforcement Team, and Merendon's website. These sources indicate that Merendon's mining and refining operations are a sham, that Sorenson is the principal of Merendon, and that Merendon and Sorenson were the recipients of investor funds funnelled through the other corporate defendants.

13 Given the strength of this evidence, and the failure of the appellants to challenge it in any substantive way, it was "just or convenient" to order the appointment of a receiver for Merendon.

14 Concern was raised by the breadth of the order, and in particular the stay of proceedings. The chambers judge was not asked to consider lifting the stay of proceedings on these actions. Counsel for the respondent has agreed that the stay should be lifted insofar as the specific litigation concern, and we so direct. There was also concern that by Quilling's own admission as receiver of Merendon his goal will be essentially to wind-up the company rather than continue operations. Since this receivership has been appointed pre-trial, we agree that caution must be exercised until the trial. However, the receiver is under the supervision of the court, and the court will be able to monitor his activities to ensure that he acts appropriately.

15 The remainder of the issues raised by the appellants are either questions of mixed fact and law, or challenges to the chambers judge's exercise of his discretion. The findings of the chambers judge on these issues are entitled to deference, and the appellants have failed to establish any error in principle that calls for appellate intervention.

Appeal dismissed.

End of Document

TAB 7

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Pursuant to s. 50(12) of BIA, proposal would not likely be accepted by creditors, and was deemed refused — ATB had true veto, it intended to vote no, and proposal would necessarily fail — ATB would vote no because it regarded proposal as unsatisfactory — Focus was on existing proposal — None of identified ATB steps showed absence of good faith or showed commercial unreasonableness — ATB was not attempting to pursue improper purpose, and was pursuing its interests and asserting its rights within bounds of and for purposes squarely within Canadian insolvency system — Given its secured position, BIA provisions governing secured creditors and approval of proposals, and proposal itself, and ATB was entitled to oppose proposal and seek deemed refused ruling — ATB believed, on reasonable or defensible or arguable grounds, that it would fare better by receivership than under proposal — ATB was not acting perversely or vindictively or otherwise than in its own economic interests, and it was

not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50(12).

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

APPLICATION by secured creditor for orders deeming refused joint proposal made by three related corporations, lifting proposal stay of proceedings, and appointing receiver and manager.

***M.J. Lema J.*:**

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the Bankruptcy and Insolvency Act (BIA) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) BIA, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

- Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

- after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

- the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

- Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

- however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

• on March 22, 2019 and in response, Schendel filed a notice of intention to file a proposal under s. 50.4(1) BIA, triggering a stay (under s. 69.1 *BIA*) of enforcement action by ATB and other creditors;

• on April 18, 2019, Mah J. granted a 45-day extension and dismissed an application by ATB to lift the stay and appoint a receiver or interim receiver;

• on June 3, 2019, Little J. granted an interim extension to allow time for a further extension application;

• on June 11, 2019, Yamauchi J. granted a further extension, to July 11, 2019;

• on July 10, 2019, Schendel filed a proposal to ATB and its other creditors;

• the proposal treats ATB's claim (approximately $22 million) in two segments: it gauges the secured portion of ATB's claim at $11.2 million and the unsecured portion at $11 million. ATB's secured claim is the sole occupant of Secured Class; its unsecured portion joins other unsecured creditors in steerage. (Various other secured creditors are excluded from the proposal);

• by virtue of the solo nature of its secured claim, ATB has a veto over the proposal i.e. if it votes no to the proposal, it will fail, per para 62(2)(b) *BIA*. (ATB does not contest that aspect);

• for whatever difference it makes, ATB may also have a veto in the unsecured class, at least for Mechanical;

• ATB contends that, with no order consolidating the affairs of the three Schendel companies for proposal purposes, Schendel was not authorized to file a joint proposal;

• assuming that a joint proposal is authorized, the creditors' meeting to vote on it is set for July 31, 2019;

• on July 12, 2019, ATB applied for the deemed-refusal and stay-lifting orders described at the outset and heard at the application on July 16, 2019;

• ATB intends to vote no at the meeting, based on having lost confidence in Schendel's management, on Schendel's ongoing losses, on concerns about preferential payments having been made to certain pre-NOI creditors, on losing access (under the proposal) to personal guarantees, and on its perception that it will fare better in a bankruptcy or receivership than under the proposal (among other grounds);

• it argues that, in light of that position, which it maintains is fixed, the failure of the proposal on July 31, 2019 is a foregone conclusion and that, accordingly, the proposal should be "deemed refused" under ss. 50(12) or the s. 69.1 stay should be lifted (or both), followed the appointment of PwC as receiver-manager; and

• as noted, Schendel is opposed, citing the possibility of an amended (and enhanced) proposal between July 16 and 31 and, more fundamentally, based on what is perceives as the commercial unreasonableness of and inequitable and improper conduct by ATB. It believes the proposal process should continue until July 31 at which time the proposal (existing or amended) can be voted on by all of its creditors.

C. Issues

4 The issues are:

1. whether the proposal should be deemed refused under ss. 50(12), which has three separate triggers (any one of which is sufficient):

• the debtor has not acted, or is not acting, in good faith and with due diligence;

- the proposal will not likely be accepted by the creditors; or
- the creditors as a whole would be materially prejudiced if the application under this subsection is rejected;

2. in any case, whether the s. 69.1 stay should be lifted under s. 69.4, which has two separate triggers (either of which is sufficient):

- the creditor is likely to be materially prejudiced by the continued operation of s. 69.1; or
- it is inequitable on other grounds to make such a declaration; and

3. if ss. 50(12) is satisfied (in which case Schendel will be deemed bankrupt and ATB, as a secured creditor, will be free to enforce its security) or if the stay is lifted (permitting the same thing), ATB intends to enforce its security, and the issue becomes whether PwC should be appointed receiver and manager of Schendel.

D. Analysis

5 I start by examining the second branch of ss. 50(12), namely, whether the proposal will not likely be accepted by the creditors. (I see ss 50(12) as the more fundamental provision: if it applies, the proposal proceeding is eclipsed. The "stay lift" application contemplates an ongoing proposal.)

6 The answer is yes: the proposal will not likely to be accepted — in fact, it is almost *guaranteed* not to be accepted.

7 My reasoning is outlined below.

ATB veto

8 ATB has a true veto, which Schendel acknowledges: if ATB votes no, the proposal will necessarily fail. (ATB is the only creditor in the "Affected Secured Creditors" class, and the proposal require a yes vote by ATB for the proposal to succeed: Article 9.1.)

9 ATB intends to vote no. Its evidence is that that position will not change i.e. it would necessarily vote no at the July 31 meeting (if it occurs).

10 It would vote no because it regards the proposal as unsatisfactory, for reasons including:

- it is effectively being asked to take a 50 per cent discount on its claim;
- the "secured" portion of its claim will be replaced by two unsecured promissory notes, the payment of one of which depends on the (uncertain) outcome of certain events;
- the unsecured portion of its claim may be effectively blocked by the proposal mechanics;
- ATB already has first-position security on the assets out of which Schendel proposes to pay it under the proposal;
- it undercuts ATB's recourse against five guarantees provided by individuals associated with the Schendel; and
- overall, ATB believes it will fare better under a bankruptcy.

Uncertainty over possible amendments

11 While Schendel's evidence includes the details of a potential deal with a third party, which it described as "possibly" leading to a sweetened amended proposal, the evidence does not disclose the (even estimated) timing of the deal, its potential terms, the likelihood of consummation, or by how much the proposal's terms might be enhanced as a result.

12 Pointing to almost 40 possible deals or other lifelines disclosed by the Schendel's evidence, none of which came to fruition and the vague details of the latest potential deal, ATB sees next-to-no chance of an enhanced proposal coming forward at this stage.

Focus of ss 50(12) BIA on proposal "as is"

13 In any case, the focus is on the existing proposal. Subsection 50(12) refers to "the proposal" being deemed refused if the court is satisfied that "the proposal" will not likely be accepted i.e. nothing in the provision contemplates an amendment or how it might be received by the creditors.

14 Where a creditor seeks to have the proposal deemed refused, it is effectively saying that:

- it does not support the proposal; *and*
- it sees no prospect of an acceptable amended proposal.

15 Otherwise, the creditor would presumably be prepared to wait, through to the vote meeting, to see if worthwhile amendments might be proposed.

16 Subsection 50(12) allows a veto creditor in such circumstances (opposed to proposal; no prospect of acceptable amendments) to fast-forward to the inevitable result i.e. the proposal's termination.

17 The proposal proponent's reaction, as here, may be to say "wait, there may be a better proposal soon." The answer to that is:

- this is the proposal it made;
- the focus of the ss 50(12) exercise is the proposal *as filed*;
- the proposal cannot be withdrawn (ss 50(4) BIA);
- the applicant creditor had the option of waiting, until the vote meeting, for proposal "sweetening";
- if the applicant perceived the likelihood or even a real possibility of worthwhile amendments, it would not have brought the "deemed refused" application;
- even if it had seen such likelihood or possibility, it is entitled to balance the potential upside of waiting against the downside e.g. the costs associated with waiting;
- if the debtor had needed more time (i.e. to put forward a different, and better, proposal), it had the option (as here) of seeking another extension of the notice-of-intention period (six-month maximum had not been reached);
- having not done so (instead, filing the proposal now under review), the debtor must live with that proposal. For the ss. 50(12) exercise, *that* proposal is the only slide under the microscope. The possibility of a different, and better, slide is *not* a factor;
- in other words, by laying down a proposal, the proponent takes the risk that a creditor (or group of creditors) will say "this is not good enough" and move for termination under ss 50(12). The section weighs who is supporting and who is not and whether the outcome at the voting stage is "likely" refusal; and
- here, with ATB having an effective veto, its "opposed" stance is determinative: *this* proposal will fail. The possibility of a different proposal down the road does not enter into the equation.

Subsection 50(12) exists for a reason

18 If Parliament had intended an "unabridgeable" period between the proposal filing and the vote meeting (whether to ensure "full consideration" by the creditors, an opportunity for the debtor to propose amendments, or otherwise), it would not have included the "deemed refused" element in ss 50(4).

Case law recognizes impact of veto in "deemed refused" scenarios

19 In materially identical circumstances to those here, LaVigne J. held in *Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.* [1]:

> *Sport Maska* [the veto-position creditor] asserts that the Proposal will not succeed, as there is no chance [it] will accept this Proposal, or any Proposal made by RBI. It therefore submits that it is not necessary or indeed practical, that a meeting of creditors be held, since it is already known that [it] will vote to defeat the Proposal.
>
> *It is obvious that no plan of arrangement can succeed without [its] approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance it cannot succeed.*
>
> *It is apparent that Sport Maska is overwhelmingly opposed to the plan. No persuasive argument was put forward as to why the vote should proceed in those circumstances.*
>
> *I am of the view that it is fruitless to proceed to a further stage with this Proposal.*
>
> RBI argues that while it may be appropriate for the Court to use its discretion when the Proposal has not yet been tabled, the Court should not use its discretion in the present case since RBI has made its Proposal and a meeting date has been set. I find that *it is easier for the Court to make a finding as to what the creditors are likely to do when the terms of the Proposal are known, and the meeting of the creditors is set to occur in the very near future such as in situations contemplated in subsection 50(12)*, then when the terms of the Proposal are unknown and the date of the meeting of creditors is to happen sometime later.
>
> RBI also argued that it may obtain sufficient financing to pay off completely the debt actually owed to Sport Maska. In my view, that is highly unlikely considering the evidence presently before this Court.
>
> *A creditor does not have to show beyond certainty that a Proposal would be rejected in order to be successful on a Motion under subsection 50(12). A creditor simply has to show that the Proposal would not likely be accepted by the creditors.*
>
> Therefore, on a balance of probabilities, based on the evidence before this Court, I am satisfied that the Proposal that was filed by RBI will not likely be accepted by the creditors. [emphasis added]

20 *Sport Maska* is anchored on a body of case law (reviewed in the decision) taking the same approach: where the writing is on the wall (with a veto-position creditor steadfastly opposed), the proposal may be, and has been, deemed refused or the proceedings otherwise terminated.

Same approach taken under CCAA

21 The same approach has been taken under the *Companies' Creditors Arrangement Act*: see, for example, the analysis of Butler J. in *Marine Drive Properties Ltd., Re* [2]:

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

Good faith

22 Schendel argues that ATB has not acted in good faith or in a commercially reasonable way during their dealings relating to the fall-out of the halting, in September 2018, of work on the Grande Prairie Hospital project, through to mid-March 2019, when ATB demanded repayment. In particular it says that "ATB's conduct . . . was not consistent with it proposing to take immediate steps to enforce its security" (Schendel brief, p 4). On that aspect, it points to:

- its ATB account manager advising over the course of fall 2018 to spring 2019 that ATB would work cooperatively with Schendel to restructure its loan commitments;

- Schendel believing, in late February 2019, that its account with ATB was still in the hands of the account manager i.e. not under the effective control of ATB's special-credit group i.e. ATB did not make plain to it that the special-credit group was involved;

- an early March 2019 meeting where ATB advised that it was patient, was working through the issues, and was considering parking Schendel's debt;

- at a Schendel-ATB meeting on March 13, 2019, ATB outlining restructuring steps for Schendel with a three- to six-month horizon, starting later in March, once Schendel had provided certain information to ATB;

- at the same meeting, ATB advising Schendel that "this [was] not the end", instead, was part of the process and restructuring;

- at that meeting, and although ATB did disclose an intention to seek a receivership if certain conditions of the three- to - six month restructuring period were not achieved, it making no mention then of an intention to issue payment demands;

- ATB obtaining payables information requested at that meeting (understood by Schendel to assist in working through the restructuring period) and using it as evidence of Schendel's inability to carry on business; and

- later on March 13, 2019, ATB issuing demand letters and s. 244 *BIA* (intention to enforce security) notices.

23 Schendel maintains that, if it had known earlier that ATB had shifted to viewing the Schendel loans as seriously troubled, it would have taken more, and earlier, restructuring steps.

24 It also points to ATB demanding "commercially unreasonable" terms in proposed forbearance agreements (before the NOI was filed) that ultimately led nowhere.

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.* [3] and *Toronto-Dominion Bank v. Rismani* [4], as well as *Good Faith as an Organizing Principle*

in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

26 I note as well that academic commentary on the subject of creditors acting in good faith in insolvency proceedings has not suggested good-faith testing of creditors voting on proposals or arrangements i.e. outside of the "improper purpose" (i.e. abuse of system) contexts discussed below. In "*What Does "Good Faith" Mean in Insolvency Proceedings*?" [5], the authors suggest that imposing an explicit "vote in good faith" duty on creditors may "ultimately have a paralyzing effect on negotiations, add greater litigation costs, impair efficiency, and alter the carefully calibrated balance between the rights of creditors and their insolvent debtors."

27 See also Professor Janis P. Sarra's article "*Requiring Nothing Less than Good Faith in Insolvency Proceedings*" [6], where she proposes a good-faith duty for creditors, but not to the extent of weighing voting decisions beyond "improper purpose" contexts.

28 In any case, I find that none of the identified ATB steps, alone or collectively, show an absence of good faith or show commercial unreasonableness. ATB had no duty to advise Schendel who at ATB was running or reviewing its account at any particular time. ATB was indeed working with, and funding, Schendel through a financial crunch for many months before and even after the hospital-work halt. [7] It was entitled to intensify its scrutiny of Schendel's loans and overall business condition as it did, to obtain more information via that scrutiny, and to demand payment (in light of commitment-letter defaults and, in any case, the demand character of the loans here) when it did, and to notify Schendel of its intention to enforce security per the *BIA*-prescribed notice period. ATB had no duty to forbear from enforcing its rights.

29 As for whether Schendel might have been able to pursue restructuring earlier and more effectively, and assuming that to be so, Schendel knew its own financial condition throughout. It was not incumbent on ATB to guide Schendel's rescue efforts. In any case, Schendel pointed to no material difference that earlier restructuring efforts might have made.

30 In any case, Schendel ended up filing a proposal, regardless of any perceived difficulties with ATB's conduct. That filing triggered a right for ATB (in fact, any Schendel creditor) to apply under ss. 50(12) for "deemed refusal." The narrow test (as noted) is whether the proposal is unlikely to be accepted.

31 As Schendel acknowledges, ATB is the sole occupant of the secured class, and the support of that class is necessary for proposal approval. Those are just "givens" in the circumstance here i.e. reflect ATB's position as Schendel's principal lender, its security, and the *BIA*'s treatment of secured creditors in proposals i.e. are not a function of ATB's conduct in its dealings with Schendel.

32 As for how ATB is using its veto position derived from those circumstances (i.e. to seek a "proposal deemed refused" ruling), Schendel argues that that decision is commercially unreasonable and inequitable. In support it cites cases such as *West Coast Logistics Ltd. (Re)* [8] and *Laserworks Computer Services Inc., Re* [9]

33 The Alberta Court of Appeal endorsed the *Laserworks* approach to "improper purpose" in *Promax Energy Inc. v. Lorne H. Reed & Associates Ltd.* [10]:

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc.*** [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He

> also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

34 Those cases are distinguishable. They deal with creditors attempting to use the insolvency system for an improper purpose e.g. attempting to drive a competitor out of business or escaping from a royalty regime.

35 No evidence here showed that ATB was attempting to pursue an improper purpose, whether within the meaning of those cases or otherwise. Instead, ATB was pursuing its interests and asserting its rights *within the bounds of, and for purposes squaring with, the Canadian insolvency system* i.e. recovering its loans.

36 In *Hypnotic Clubs Inc., Re* [11], Cumming J. held:

> The intent and policy underlying the BIA is that *creditors* should consider and *vote* upon a *proposal* advanced pursuant to a NOI as they see fit in their own *self interest*. . . .
>
> . . .
>
> . . . the underlying policy of the BIA [includes] letting creditors *vote* as they choose in respect of accepting or rejecting a *proposal* .... [emphasis added]

37 Given its secured position, the *BIA* provisions governing secured creditors and the approval of proposals, and the proposal itself, ATB is entitled to oppose the proposal and, on the basis of that opposition, seek a "deemed refused" ruling.

38 By ATB's calculations it foresees materially greater recoveries in a bankruptcy or receiver than via the proposal. The proposal trustee is currently reviewing the "bankruptcy versus proposal" outcomes and is due to report shortly on that. Schendel does not agree with ATB; it filed the proposal on the basis it would produce a more favourable outcome for all the creditors, including ATB, than bankruptcy. It points to recovery estimates showing that ATB may fare better under the proposal than its low-end estimate of receivership recovery and may even recovery (slightly) more than its high-end estimate.

39 I make no ruling on the respective anticipated recoveries i.e. what is the likely better avenue recovery-wise. I simply note that ATB believes, on reasonable, or at least defensible, or at least arguable, grounds, that it will fare better by a receivership than under the proposal i.e. ATB is not acting perversely or vindictively or otherwise than in its own economic interests i.e. it is not pursuing any ulterior purposes.

40 To summarize here, I find that ATB has been acting in good faith and in a commercially reasonable way, including in deciding to oppose the proposal and seek a "deemed refused" ruling.

Enirgi Group Corp. v. Andover Mining Corp. ***also distinguishable***

41 Schendel also cited this decision. [12] It too is distinguishable, concerning a clash between a request for more time to file a proposal and a creditor seeking to terminate the proposal proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down "sight unseen."

42 In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on "proposal deemed refused" application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the Judicature Act. Schendel opposes.

Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*[13], Romaine J held:

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
  - the Proposal is not viable;
  - the Debtors operate at a loss;
  - the Proposal will not be approved by [ATB]; and
  - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";

- per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";

- ATB has not provided evidence to support its receiver-related arguments; and

- more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

- Schendel is a large enterprise with complex construction projects underway;

- coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

- recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

- ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

- Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

- ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

- as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

54 I note that, under section 33 of the draft order, "any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver . . . "

G. Closing note

55 I thank all counsel for their very helpful briefs and submissions.

56 On a final house-keeping note, I grant the order sought by Ms. Fisher in her July 17, 2019 email (concerning the sealing of a certain affidavit).

Application granted.

Footnotes

1 2005 NBQB 394 (N.B. Q.B.) at paras 36-43

2 2009 BCSC 145 (B.C. S.C.) at paras 31 and 32

3 2018 ONSC 4669 (Ont. S.C.J.) at paras 13-15

4 2015 BCSC 596 (B.C. S.C.) at paras 31-37

5 Rogers, LA, Sieradzki D, and Kanter M, Journal of Insolvency in Canada, Vol 4 [2015] 55 at 77

6 2014 Annual Review of Insolvency Law (ed Janis P Sarra)

7 Affidavit of Alex Corbett filed April 4, 2019, paras 31-41

8 2017 BCSC 1970 (B.C. S.C.)

9 1998 NSCA 42 (N.S. C.A.)

10 2002 ABCA 239 (Alta. C.A.)

11 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) at paras 33 and 36

12 2013 BCSC 1833 (B.C. S.C.)

13 2002 ABQB 430 (Alta. Q.B.) at paras 26-32

14 2013 ABQB 335 (Alta. Q.B.) at para 71

TAB 8

2010 ABQB 647
Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.a General principles
Business associations
II Creation and organization of business associations
II.2 Partnerships
II.2.b Relationship between partners
II.2.b.ii Membership
II.2.b.ii.A Introduction and expulsion
Contracts
VII Construction and interpretation
VII.11 Miscellaneous
Contracts
XIV Remedies for breach
XIV.6 Injunction
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote
Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles
Debtors and creditors --- Receivers — Appointment — General principles
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not

to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.

Contracts --- Remedies for breach — Injunction

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.

Contracts --- Construction and interpretation — Miscellaneous

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.

Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion

M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to

fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

***B.E. Romaine J.*:**

Introduction

1 By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");
>
> (c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;
>
> (d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

2 By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

> (a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and
>
> (b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

3 The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

4 By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

5 After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

7 Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

8 Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

9 Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

10 While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

12 The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.), as follows:

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

(i) Strength of the Applicant's Case

Breach of Agreements

13 Matco and Statesman set up a structure and entered into a series of agreements in order to develop the Project, which is to be a residential project in the Inglewood area of Calgary. In total, the Project is to include 615 apartments and 71 townhouses in six phases. Matco owned the land and Statesman was to provide the development services.

14 The Partnership was created, the units of which are held by a trust. Other investors invested in the trust, but Matco and Statesman hold the largest interests through corporate, individual, family and employee investments. The General Partner is SRQL, a corporation that Matco and Statesman own equally.

15 The USA provides that Matco and Statesman have equal representation on the board of directors of the General Partner and that all major decisions require unanimous directors' approval. Such decisions include approving related party transactions, executing any contract more than $100,000 and requiring capital contributions. The USA also provides that, to the extent development financing is available on reasonable market terms, it would be obtained rather than utilizing shareholders' equity. Matco submits that the result is that, while Statesman has day-to-day control of the General Partner's operations, Matco retains the ability to restrain the pace of development, to fund it through borrowing rather than equity and to oversee Statesman's management of the Project.

16 Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development, any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

17 Under the Limited Partnership Agreement, SRQL as General Partner agrees to discharge its duties honestly, in good faith, and in the best interests of the Partnership. If the General Partner breaches its obligations in such a way as would have a materially adverse effect on the business, assets or financial condition of the Partnership, the Limited Partner (being the trust) is entitled to remove and replace the General Partner by resolution.

18 While there is some confusion over terminology, it is clear that development of the Project was planned in phases. Subject to conditions for each phase, bank financing was obtained for land acquisition and infrastructure, and for construction of the first two phases of residential units (the Bank of Montreal Credit Agreement dated April 21, 2008).

19 Land acquisition and infrastructure (including a parkade for Phases 1 and 2) were funded by the Bank and are complete. Phase 1 of the residential unit construction was also funded and is essentially complete. Phase 1 is comprised of 124 residential condominium units and an amenities centre.

20 Phase 2 is to consist of a second building of 122 residential condominium units, plus two townhouses.

21 Only nine units in Phase 1 remained unsold as of July 20, 2010, although 14 sales were pending. As of that date, 57 units in Phase 2 had been pre-sold. The Credit Agreement was revised on June 9, 2010 to provide that, as a condition precedent to the Bank providing financing for Phase 2, there must be satisfactory evidence of not less than 166 eligible purchase agreements under Phase 1 and Phase 2. Statesman submits that sales agreements for 169 units have been submitted to the Bank for review.

22 Matco submits that Statesman has begun to disregard its obligations under the agreements. It asserts breaches of various agreements, some of which it submits amount to misappropriation and misapplication of funds. It alleges that, without seeking the necessary directors' or Management Committee approval, Statesman or one of its affiliates executed more than $12.5 million worth of construction contracts in excess of $100,000 each, and commenced Phase 2 of the development. Matco also alleges that Statesman instructed trades to carry out more than $2 million of Phase 2 construction work without first having met the Bank's funding requirements.

23 Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

24 Initially, Statesman submitted that the construction that was the subject of Matco's complaints was part of Phase 1 and that there had been no improper commencement of Phase 2 construction. It was now clear, from evidence from the architects, the City, the banking documents, the Statesman Project Manager, tradespeople, the Statesman Chief Financial Officer and even cross-examination of the President of Statesman, that Phase 2 construction has commenced and that more than $12.5 million of contracts that relate to Phase 2 have been executed by Statesman.

25 Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2 budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

26 Statesman does not deny that it did this. It submits, however, that, since the construction of Phase 2 of the Project is not an event outside the ordinary business of the General Partner or the Partnership, consent of all the directors of SRQL to the commencement of construction on Phase 2 is not required under the USA.

27 Statesman argues that under the USA, the development of the Project as a whole has been approved and that there is therefore no need to obtain approval of each phase. These submissions do not deal with the alleged breaches of specific terms of the DMA and the USA.

28 Statesman submits that, at any rate, Matco's failure to give consent is not commercially reasonable. That is not within the province of this court to decide: Matco is not under any contractual obligation to act in a commercially reasonable manner in giving or withholding its consent, and Matco's motives or judgments in respect of its decision are not properly at issue before me, except to the extent that they may relate to considerations of irreparable harm or balance of convenience.

29 Statesman submits that, pursuant to the by-laws of SRQL's board of directors, the President of Statesman, Garth Mann, has a casting vote as Chairman of the board, and therefore effectively a determining vote with respect to construction matters.

30 However, Section 3.5 of the USA provides that each shareholder shall use its best efforts to cause its nominees to the SRQL board to act in such a way to ensure that the provisions of the USA shall govern the affairs of the corporation, and provides that if there is any conflict between the provisions of the USA and the articles or by-laws of SRQL, the articles or by-laws will be amended. The nature of a USA does not allow its provisions to be trumped by a procedural by-law, and the provisions of the USA that require approval by all directors of certain major decisions cannot in effect be vitiated by such a by-law.

31 Statesman also submits that Matco has no entitlement to halt construction until shareholders' loans are repaid (which it submits is the reason for Matco's reluctance to agree to the next stage of construction), citing section 8.1(d) of the USA which provides for equity injections by shareholders in certain circumstances. Matco rightly points out that additional capital contributions to the Partnership require the unanimous consent of the directors of SRQL.

32 Statesman submits that Matco was aware that construction had commenced on Phase 2. It appears from the evidence that Matco had begun to suspect that construction on Phase 2 had commenced in May of 2010, although there may have been general discussion of Phase 2 requirements in the months leading up to May. It also appears that Matco became aware of what it asserts are other breaches and misconduct of Statesman at about the same time. The Originating Notice was filed on July 8, 2010. Matco therefore acted with reasonable dispatch once it became suspicious that breaches had occurred.

33 Matco also submits that Statesman has beached the DMA in other ways. By the terms of the DMA, the Manager is a fiduciary to the Partnership, and the DMA "shall terminate upon any of" certain events. One such event is said to occur when the "Manager misappropriates any amounts or defrauds the Partnership in any manner whatsoever".

34 The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

35 Matco submits that, in breach of the express terms of Clause 5.06 of the DMA, SMBI misapplied Partnership funds to pay unauthorized sales commissions, salaries and fees to its staff. The amounts improperly taken appear to total about $51,328 not including an additional $6,000 of what Matco asserts are improper referral fees.

36 Statesman does not deny that SMBI paid such amounts to its sales staff, nor does it assert that it had Matco's approval or consent, but it claims that its actions represented good and necessary business decisions. Statesman also submits that the amounts paid are reasonable out-of-pocket costs and expenses under Clause 5.09 of the DMA and thus do not require Matco's consent.

37 Statesman says that these payments have been disclosed to Matco or its representatives in the Construction Superintendent Reports, and that, in any event, these issues should be dealt with by arbitration. Statesman submits that if the amounts paid are not permitted under the DMA, it will reimburse the Partnership.

38 The June 9, 2010 Management Committee Meeting minutes state the following with respect to this issue:

> Mr. Mathison queried commission payments apparently made contrary to the agreed formula and in excess of budget. Mr. Mann acknowledged that higher commission payments had been made to Statesman salespeople. He stated that MLS Resale Listing fees were forgiven to stimulate sales where a purchaser had a product to sell, therefore, offset the higher commission payments with a zero net result. Mr. Mathison repeated that this decision was again made unilaterally without notice or the approval of Matco.

39 It therefore appears that Matco did not agree to this alleged breach, by silence or otherwise.

40 Matco also submits that Statesman breached the provision of the USA that requires approval by the SRQL directors of the execution of any contract involving more that $100,000.

41 Statesman submits that the DMA gives the Manager the responsibility of awarding construction contracts. That responsibility, however, is subject to the specific terms of the DMA agreement, which includes the provision that the Manager shall submit construction contracts to the Management Committee for approval, provided that in any disagreement Statesman has the determining vote. There is no evidence that these contracts were submitted to the Management Committee for approval. Statesman points out, however, that Phase 1 construction contracts were not all submitted to the Management Committee.

42 There is a certain amount of ambiguity in the agreements with respect to the concept of a Management Committee. The DMA does not define the structure of the Management Committee, but merely states it shall be "as constituted and subject to the Partnership Agreement" (Section 1.03). The Limited Partnership Agreement does not reference a Management Committee. The recitals to the DMA provide that the Partnership wishes to engage the Manager and Matco as to certain strategic management decisions and Section 1.15 of the DMA engages Matco as a "strategic manager" for the Project. However, the DMA clearly requires Management Committee oversight and approval of numerous matters, and the parties have operated with a Management Committee with equal representation from Matco and Statesman. Whether the Management Committee is a committee of the directors of SRQL or of SRQL as Manager and Matco as "strategic manager" is not entirely clear.

43 While this ambiguity exists, the issue is less the conduct of Statesman in entering into individual contracts, and more the complaint that it commenced construction on Phase 2 without Management Committee approval.

44 Section 4.4(f) of the USA provides that all directors of SRQL must approve "related party transactions and major decisions with regard to those transactions".

45 There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

46 Matco also submits that Statesman is guilty of misconduct that amounts to fraud and dishonesty, apart from alleged breaches that simply relate to breach of contractual provisions.

47 Matco submits that Mr. Mann committed the Partnership to a US $732,600 promissory note to pay an unrelated debt of an American affiliate of Statesman. It also submits that Statesman signed up a number of tradespeople to agreements to purchase residential units on the understanding that they would not be required to close such purchases.

48 There is conflicting affidavit and cross-examination on affidavit evidence with respect to these serious allegations. With respect to the allegation that Mr. Mann on behalf of Statesman used SRQL to guarantee a settlement obligation of a Statesman affiliate that had nothing to do with the Project, Matco alleges Statesman did not just commit SRQL as a co-promissary on a promissory note that had nothing to do with the Project, but attempted to block the Applicants from obtaining information about this.

49 Statesman asserts that this was an innocent and inadvertent clerical error that was remedied within a few days, but at any rate by June 16, 2010. There are serious issues of credibility that arise from the documentation and the evidence of Mr. Mann and others on this issue. Given the serious nature of the allegation and the conflicting evidence, this issue requires *viva voce* evidence before a determination can be made.

50 With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called "investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

51 Matco complains of a number of other breaches and irregularities in the management of the Project. Given the conclusion I have reached on the alleged breaches described, it is not necessary to review all of these allegations.

52 While the first factor of the test set out in *RJR-MacDonald* only requires a serious issue to be tried, the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial. I am satisfied that in this case Matco has established a strong *prima facie* case of breach of contract with respect to the question of whether Statesman proceeded with the construction of Phase 2 of the Project without the necessary approvals of Matco as required under the various agreements.

53 I am also satisfied that these breaches amount to a breach of a negative obligation, which is in substance the obligation not to proceed to the next phase of construction without obtaining Management Committee approval or the approval of all of directors of SRQL under the USA.

54 The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

55 The contractual interpretations that Statesman submits would lead to the conclusion that approval of construction of Phase 2 of the Project is not necessary or that Mr. Mann has a casting vote that would allow Statesman to make the decision to proceed in the face of Matco's opposition do not address the structure of the development agreements as a whole, and ignore or fail to give effect to specific provisions to the contrary.

(ii) Irreparable Harm

56 While there are authorities that suggest that it is unnecessary to establish irreparable harm or that less emphasis will be placed on this factor in the context of an injunction application involving a negative context (see John D. McCamus, *The Law of Contracts*, Irwin Law Inc., 2005 at page 995, note 197), I have considered the application with reference to this factor. To show that it would suffer irreparable harm, Matco must establish either that failure to enjoin Statesman's continued breach of contract would give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured.

57 Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk. If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

58 In the usual case of an application for injunctive relief, the moving party would provide an undertaking in damages in the event it is not ultimately successful. Given the manner in which this application has proceeded, Matco has not had an opportunity to address this requirement. If Matco is unwilling to supply the usual undertaking as to damages, it has leave to apply to be relieved from such an obligation. Such an undertaking should be supplied or an application to relieve from the undertaking should be made within two weeks, and Statesman will of course be allowed an opportunity to respond to the application.

(iii) Balance of Convenience

59 This factor requires the Court to consider which of the parties would suffer the greater harm from the granting or refusal of an interlocutory injunction.

60 It is clear that failure to enjoin Statesman from continuing to breach the agreements by continuing construction on Phase 2 of the Project would nullify Matco's right to a say in whether construction on the Project should continue at this time. As noted by Matco, Statesman has indicated no commitment to discontinue the alleged breaches: rather, by its response to the application, it asserts its right to proceed without consultation or approval and applies to be relieved of its voluntary undertaking to stop construction and for confirmation of what it says is its right to proceed.

61 The enforcement of the negative obligation not to continue construction on Phase 2 without Matco's consent would not required Court supervision and has in fact already been effected through the voluntary shut-down of the Project. It is possible to readily define what Statesman should be enjoined from doing. There is no issue that permanent injunctive relief may not have been an available remedy to Matco after trial, given the nature of the obligation as a negative obligation.

62 Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

63 It is noteworthy that Matco does not propose that the Project be abandoned or that development cease on a permanent basis: what is involved is a difference of opinion between two experienced partners to a development with respect to the timing of development, the structure and availability of financing and the use of funds. Whether Matco or Statesman is correct with respect to these matters is not a question to be decided by this Court. What the Bank may do in the face of a failure to recommence construction on Phase 2, what various tradespeople or purchasers who have entered into pre-sale agreements may do is only speculative at this point, and does not tip the balance of convenience in favour of one party or the other.

64 It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

65 I find that the balance of convenience favours Matco in this case, as failure to grant the injunction would nullify its contractual right to be part of the decision to proceed. If the remedy was withheld, that right would be so impaired by the time the issues could be ultimately determined on their merits by unilateral action by Statesman that it would be too late to afford Matco complete relief.

C. Should There Be an Order Confirming the Termination of SMBI as Manager of the Project?

66 As previously indicated, the DMA provides that it shall terminate if the Manger "misappropriates any monies or defrauds the Partnership in any manner whatsoever." Matco submits that misappropriation does not require fraud or even dishonesty and that it is sufficient if there is a failure by a fiduciary to meet an obligation, even where the fiduciary believes the reasons for his failure to be valid, citing *Kitnikone, Re* (1999), 13 C.B.R. (4th) 76 (B.C. S.C.) at 77 -78 and *Janco (Huppe) v. Vereecken* (1982), 44 C.B.R. (N.S.) 211 (B.C. C.A.) at 213 -214.

67 Matco submits that the alleged misappropriation by SMBI of partnership funds to pay unauthorized sales commissions to its staff is a misappropriation that has terminated the DMA. Statesman's response to this submission has been set out previously in these reasons. While Matco has established a strong *prima facie* case of contractual breach, the issue of whether this alleged breach is a misappropriation is not entirely without doubt.

68 It will also not be clear until the issue of whether SRQL remains the General Partner of the Partnership who has authority to act for the Partnership in order to instigate termination of the DMA.

69 For these reasons, and since the issue of the removal and replacement of the General Partner remains to be determined on its merits for the reasons set out later in this decision, I make no final determination of this issue at this time.

D. Should There Be an Order Confirming the Removal of SRQL as General Partner?

70 By the terms of the Limited Partnership Agreement, SRQL was appointed as initial General Partner. Statesman has had day to day authority over the operation of SRQL, but the USA provides that all "Major Decisions", including the approval of

related party transactions and the execution of any contract involving more than $100,000, require the approval of all directors. SRQL itself specifically committed to act exclusively as General Partner of the Partnership and to comply with these approval requirements. By the Limited Partnership Agreement, SRQL covenanted to discharge its duties honestly, in good faith and in the best interests of the Partnership.

71 The Limited Partnership Agreement provides that "the Limited Partners may remove the General Partner and appoint a successor by Extraordinary Resolution" where the "General Partner has breached its obligations under this Agreement in such a manner as would have a material adverse effect on the Business, assets or financial condition of the Limited Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010, the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

72 Matco submits that SRQL's actions in commencing over $2 million of Phase 2 construction and committing the Partnership to over $12.5 million of Phase 2 construction contracts without the approval of the directors of SRQL as required by the USA and without meeting the Bank's requirements for funding of the Phase 2 credit facility, SRQL's involvement in the alleged "dummy trades" scheme and the use of SRQL as a co-signatory on a promissory note unrelated to the Project all justify the removal of SRQL as General Partner of the Partnership.

73 While the Limited Partner of the Partnership, being MTM Commercial Trust, may remove the General Partner and appoint a successor by Extraordinary Resolution, Section 15.1(b) provides that if a breach is capable of being cured, the General Partner can only be removed if such breach continues unremedied for a period of twenty business days after the General Partner has received written notice of such breach from any Limited Partner, which in this case means MTM Commercial Trust.

74 The alleged breaches with respect to the "dummy trades" and the promissory note problem have been addressed by the General Partner, although it may be an issue whether a fiduciary may cure a breach of trust of this kind. As indicated previously, these allegations, however, raise issues of credibility that cannot be determined in an application of this kind. The alleged breach of proceeding with construction of Phase 2 without required approval is less subject to credibility issues, and the question is whether it is appropriate to made a final determination of the issues of whether Statesman has breached the agreements in this respect, whether such breaches have had a material adverse effect on the business or financial condition of the Partnership, whether such breaches are capable of being cured and it so, whether proper notice has been given and thus whether the Limited Partner was justified in removing the General Partner as part of this summary application.

75 The interlocutory injunction granted in this application achieves the purpose of enjoining further alleged breaches while preserving Statesman's rights to fully present evidence and argument on these issues of contractual authority. While Matco has established a strong *prima facie* case, there are ambiguities in the agreements and submissions made with respect to contractual interpretation that do not make the matter entirely without doubt. I therefore decline to confirm the removal of SRQL as General Partner of the Partnership at this stage of the proceedings. It follows that confirmation of the appointment and confirmation of 1358846 Alberta Ltd. as new General Partner is premature.

76 For the same reasons that I decline to make a final order with respect to SRQL as General Partner and SMBI as Manager of the Project on the motion by the Applicants, I decline to confirm SRQL as General Partner and SMBI as Manager of the Project in accordance with Statesman's counter motions.

E. Should the SMBI Issue Be Stayed and an Arbitrator Appointed Pursuant to the Terms of the DMA?

77 I agree that the parties have gone too far down the litigation trail for some of the inter-related issues to be now referred to arbitration.

78 While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA. It would be undesirable to have a multiplicity of proceedings where there is clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New*

Era Nutrition Inc. v. Balance Bar Co., 2004 ABCA 280 (Alta. C.A.) at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Alta. Q.B.) at paras. 6-9.

Conclusion

79 Statesman is enjoined from continuing construction on the Project until the issues of alleged breach of contract and other misconduct can be resolved on their merits or until the parties agree otherwise. I will remain seized of the matter as case management judge to hear applications to have the matters in issue proceed to a full hearing on an expedited basis and to hear any other related motions.

80 If the parties are unable to agree on costs of these applications, they may be addressed.

Application granted in part; cross-application dismissed.

TAB 9

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Headnote
Debtors and creditors --- Receivers — Appointment — General principles
Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.
Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement
Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that

M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

APPEAL by operator of oil well of decision appointing interim receiver.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of

Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was

primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

TAB 10

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Natural resources
III Oil and gas
III.5 Oil and gas leases
III.5.h Transfer of title
Headnote
Debtors and creditors --- Receivers — Appointment — General principles
Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.
Natural resources --- Oil and gas — Oil and gas leases — Transfer of title
Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.

APPLICATION seeking order for appointment of receiver and manager of company's assets and undertaking.

***Donald Lee J.*:**

Introduction

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

Facts

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

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

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

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

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

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

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

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

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

Issue

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

Law

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

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

Parties' Positions and Analysis

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

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

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

Kasten's Submissions

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

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

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

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

Shamrock's Submissions

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

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

Should a Receiver be Appointed in this Case?

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

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

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

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

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

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

26 After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

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

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

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

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

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

> [28] ... [A] fishing licence ... bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds ...
>
> [29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) ... The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.
>
> [30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on The Law of Real Property (4th ed. 1975), at p. 779:
>
> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree.
>
> And at p. 822:
>
> A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.
>
> [31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in ***Harper v. Minister for Sea Fisheries*** (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:
>
> A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]
>
> . . .
>
> [33] In my view these observations are helpful ... there are important points of analogy between the fishing licences issued to the appellant ***Saulnier*** and the form of common law property called a *profit à prendre* ...
>
> [34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.
>
> (emphasis added)

31 In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in *Saulnier*. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: *Saulnier* at para 29. The right

to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": *Saulnier* at para 34.

32 In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: *Saulnier* at para 34; *Stout & Co. LLP v. Chez Outdoors Ltd.*, 2009 ABQB 444 (Alta. Q.B.) at para 39, (2009), 9 Alta. L.R. (5th) 366 (Alta. Q.B.) [*Chez Outdoors*]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": *Chez Outdoors* at para 15. That right is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

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

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

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

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

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

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

Application granted.

TAB 11

1992 CarswellOnt 474
Ontario Court of Justice (General Division), Commercial List

Confederation Trust Co. v. Dentbram Developments Ltd.

1992 CarswellOnt 474, [1992] O.J. No. 3870, 9 C.P.C. (3d) 399

CONFEDERATION TRUST COMPANY v. DENTBRAM DEVELOPMENTS LTD., AMNON ALTSCHULER GORDON COBB, OAKBRUM INVESTMENTS LIMITED and THE TORONTO-DOMINION BANK

Borins J.

Judgment: April 24, 1992
Docket: Doc. 92-CQ-8560CM

Counsel: *Michael McGowan* and *Kevin J. Zych*, for plaintiff.
Harvey M. Mandel, for defendants Dentbram Developments Ltd. and Amnon Altschuler.
Theodore Nemetz, for defendant Gordon Cobb.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor
Headnote
Receivers --- Appointment — Application for appointment — General
Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor
Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.
Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.
Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.
Held:
The motion was granted.
Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

Borins J.:

1 I appreciate that the appointment of a receiver is a discretionary remedy and that the court ought not lightly to exercise it discretion to appoint a receiver. However, on the evidence before me, I am satisfied that it is just and equitable that a receiver be appointed. The plaintiff has demonstrated that its right under the mortgage to take steps to preserve the property and to obtain the benefits of the property in the realization of its debt have proved to be ineffective. As well, in consideration what is fair and equitable, I have taken into consideration that the mortgage contract contains an express covenant in which the mortgagee agrees to the appointment of a receiver in the event of default, and default has, of course, occurred. I my view, the appointment of a receiver is required, inter alia, for the reasons contained in para. 20 of the plaintiff's original factum.

2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

3 In he result, a order is to issue pursuant to the order as amended contained in Sched. "A" to the notice of motion which I have placed my fiat.

Motion granted.