Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.

Respondents

BRIEF OF AUTHORITIES OF THE MOVING PARTY

(Motion returnable January 25, 2017)

January 19, 2017

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INDEX

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I N D E X

TAB NO.	DOCUMENT
1	*DBDC Spadina Ltd. v. Walton*, 2013 ONSC 6833 (Ont. S.C.J. – Commercial List); aff'd 2014 ONCA 428
2	*Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. S.C.J. – Commercial List)
3	*Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.)
4	*Business Development Bank of Canada v. Aventura II Properties Inc.*, 2016 ONSC 1545 (Ont. S.C.J. – Commercial List); aff'd 2016 ONCA 300

TAB 1

2013 ONSC 6833
Ontario Superior Court of Justice [Commercial List]

DBDC Spadina Ltd. v. Walton

2013 CarswellOnt 15226, 2013 ONSC 6833, 22 B.L.R. (5th) 79, 233 A.C.W.S. (3d) 841

DBDC Spadina Ltd. and Those Corporations Listed on Schedule a Hereto, Applicants and Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc, Respondents and Those Corporations Listed on Schedule B Hereto, To be Bound by the Result

Newbould J.

Heard: November 1, 2013
Judgment: November 5, 2013*
Docket: CV-13-10280-00CL

Proceedings: affirmed *DBDC Spadina Ltd. v. Walton* (2014), 2014 ONCA 428, 2014 CarswellOnt 6908 (Ont. C.A.)

Counsel: Peter H. Griffin, Shara N. Roy, for Applicants
John A. Campion, Emmeline Morse, Guillermo Schible, for Respondents
Fred Myers, Mark S. Dunn, for Inspector

Subject: Corporate and Commercial

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

Business associations

III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.5 Miscellaneous

Business associations

III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.1 Order appointing receiver

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order appointing receiver

B and respondent W agreed to invest jointly in 31 commercial real estate projects, as equal shareholders in companies set up for each project — B advanced some $105 million into projects while W contributed some $6 million — Mortgages of $6 million were placed on properties without B's knowledge, and proceeds were deposited into account of W's company R Ltd. and at least $2.1 million was diverted by W away from projects — On motion by B and his companies, inspector was appointed — B and companies brought motion for appointment of inspector as permanent receiver/manager over project companies — Motion granted — W took steps to hinder inspector's investigation, including frenzied attempt to update ledgers and manufacture invoices — Contrary to agreements for projects, there was extensive co-mingling of bank accounts set up for each project and funds were routinely transferred to R Ltd. — Contemporaneous books and records were not kept that would permit B or inspector to fully understand what occurred to money from each property — R Ltd. appeared to have charged project companies almost $35 million in fees for services, without documentation to establish provision of services — Appointment was sought on basis of evidence largely uncontested by W, and that record established oppressive conduct by W regarding each property — Permanent receiver/manager could bring stability to situation as required to protect interests of B — B had huge financial interest in portfolio of properties and wanted properties dealt with in sound commercial way — There was no reason why experienced receiver/manager with capable property managers could not continue with success of ventures.

Table of Authorities

Cases considered by *Newbould J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
s. 248 — considered

s. 248(2) — considered

s. 248(3)(b) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

MOTION by B and his companies for appointment of receiver/manager over companies set up with W for commercial real estate projects.

***Newbould J.*:**

1 On October 4, 2013, Schonfeld Inc. was appointed as inspector of all of the companies in schedule B. On October 24, 2013 a motion by the applicants to have Schonfeld Inc. appointed as a manager of those corporations and related corporation was adjourned to November 1, 2013 and interim relief was granted, including giving the applicants access to and joint control over all bank accounts.

2 The applicants now move for the appointment of the Inspector as receiver/manager over the schedule B corporations and certain other properties that are mortgaged to Dr. Bernstein under mortgages which have expired. It is resisted by the respondents who maintain that the appointment would be an interim appointment pending a trial of the issues that should be ordered and that the applicants have sufficient protection from the order of October 24, 2013 that the respondents will not attack.

3 For the reasons that follow, Schonfeld Inc. is appointed as receiver/manager of the 31 schedule B corporations.

Background

4 Dr. Bernstein is the founder of very successful diet and health clinics. Norma Walton is a lawyer and co-founder with her husband Ronauld Walton of Rose & Thistle. She is a principal of Walton Advocates, an in-house law firm providing legal services to the Rose & Thistle group of companies. Ronauld Walton is also a lawyer and co-founder of Rose & Thistle and a principal of Walton Advocates

5 Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Waltons either through Rose & Thistle or through other corporations of which they are the beneficial owners.

6 Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in 31 various commercial real estate projects. Each is a 50% shareholder of each corporation set up to hold each property.

7 The known facts and concerns of the applicants giving rise to the appointment of the Inspector are set out in my endorsement of October 7, 2013 and were contained in affidavits of James Reitan, director of accounting and finance at Dr. Bernstein Diet and Health Clinics. Since then, there has been further affidavit material from both sides and the Inspector has delivered two interim reports and a supplement to the first. The most recent affidavit from the applicants' side is an affidavit of Mr. Reitan sworn October 24, 2013. The most recent from the respondents' side is an affidavit of Norma Walton sworn October 31, 2013 on the day before this motion was heard. There has been no cross-examination on any affidavits. The first interim report of the Inspector is dated October 21, 2013, the supplement to it is dated October 24, 2013 and the second interim report is dated October 31, 2013. I have not permitted any cross-examination of the Inspector but the respondents have been free to make reasonable requests for information from the Inspector and they have availed themselves of that opportunity.

8 To date, Dr. Bernstein through his corporations has advanced approximately $105 million into the 31 projects (net of

mortgages previously repaid), structured as equity of $2.57 million, debt of $78.5 million and mortgages of $23.34 million.

9 According to the ledgers provided to the Inspector, the Waltons have contributed approximately $6 million. $352,900 is recorded as equity, which I assume is cash, $1.78 million is recorded as debt and $3.9 million is recorded in the intercompany accounts said to be owing to Rose & Thistle and is net of (i) amounts invoiced by Rose & Thistle but not yet paid; (ii) amounts paid by Rose & Thistle on behalf of the companies such as down-payments; and (iii) less amounts paid by DBDC directly to Rose & Thistle on behalf of the companies and (iv) other accounting adjustments.

Concerns of the applicants

(i) $6 million mortgage

10 This was a matter raised at the outset and was one of the basis for my finding of oppression leading to the appointment of the Inspector. Mr. Reitan learned as a result of a title search on all properties obtained by him that mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013. Dr. Bernstein had no knowledge of them and did not approve them as required by the agreements for those properties. At a meeting on September 27, 2013, Ms. Walton informed Mr. Reitan and Mr. Schonfeld that the Waltons were in control of the $6 million of mortgage proceeds (rather than the money being in the control of the owner companies), but refused to provide evidence of the existence of the $6 million. Ms. Walton stated that she would only provide further information regarding the two mortgages in a without prejudice mediation process. That statement alone indicates that Ms. Walton knew there was something untoward about these mortgages.

11 In his first interim report, Mr. Schonfeld reported that the proceeds of the Don Mills mortgages were deposited into the Rose & Thistle account. Rose & Thistle transferred $3,330,000 to 28 of the 31 companies. The balance of the proceeds of the Don Mills mortgages totalling $2,161,172, were used for other purposes including the following:

1. $98,900 was paid to the Receiver General in respect of payroll tax;

2. $460,000 was deposited into Ms. Walton's personal account;

3. $353,000 was apparently used to repay a loan owed by Rose & Thistle in relation to Richmond Row Holdings Ltd.; and,

4. $154,600 was transferred electronically to an entity named Plexor Plastics Corp. and $181,950 transferred electronically to Rose and Thistle Properties Ltd. Ms. Walton advised the Inspector that she owns these entities with her husband.

12 In her affidavit of October 31, 2013, Ms. Walton admits that $2.1 million was "diverted" and used outside the 31 projects. She admits it should not have been done without Dr. Bernstein's consent. She offers excuses that do not justify what she did. What happened here, not to put too fine a point on it, was theft. It is little wonder that when first confronted with this situation, Ms. Walton said she would only talk about it in a without prejudice mediation.

13 In her affidavit of October 4, 2013, Ms. Walton said she had made arrangements to discharge the $3 million mortgage on 1500 Don Mills Rd on October 21, 2013 and to wire money obtained from the mortgage on 1450 Don Mills Road into the Global Mills account (one of the 31 companies) by the same date. Why the money would not be put into the 1450 Don Mills account was not explained. In any event, no repayment of any of the diverted funds has occurred.

(ii) Tisdale Mews

14 Tisdale Mews is a rezoning for 35 townhomes near Victoria Park Avenue and Eglinton Avenue East. Mr. Reitan states in his affidavit that Dr. Bernstein made his equity contribution to Tisdale Mews December 2011 in the amount of $1,480,000. The bank statements for December 2011 for Tisdale Mews have not been made available. The forwarded balance on the bank

statements available for Tisdale Mews from January 2012 is $96,989.91, indicating that most if not all of Dr. Bernstein's money went elsewhere. Ms. Walton states in her affidavit that the project "was purchased by Dr. Bernstein on January 11, 2012" and he invested $1.7 million in equity. How it was that Dr. Bernstein purchased the property is not explained and seems contrary to the affidavit of Mr. Reitan. The bank account statements for the property show no deposits of any consequence in January 2012 or later.

15 In any event, Mr. Reitan was able to review bank records and other documents. Invoices and cheques written from Tisdale Mews' bank account show that a total of $268,104.57 from Tisdale Mews has been used for work done at 44 Park Lane Circle, the personal residence of the Waltons in the Bridle Path area of Toronto.

16 Ms. Walton in her affidavit acknowledges that the money was used to pay renovation costs on her residence. She says, however, that Rose & Thistle funded 100% of the $268,104.57 purchases before any cheques were sent out of the Tisdale Mews account. How this was funded was not disclosed, although she did say that overall, Rose & Thistle has a positive net transfer to the Tisdale Mews account of $2,208,964 "as per Exhibit G to the Inspector's first interim report". Exhibit G to that report has nothing to do with Tisdale Mews. Exhibit D to that report, being the property profile report of the Inspector for the 31 properties, contains no information for Tisdale Mews because information had not yet been provided to the Inspector. The Inspector's updated profile prepared after information was obtained from Rose & Thistle shows $1,274,487 owing from Tisdale Mews to Rose & Thistle, but whether this is legitimate cannot be determined until back-up documents sought by the Inspector are provided. It is no indication that cash was put into Tisdale Mews by Rose & Thistle.

17 The statement of Ms. Walton that Rose & Thistle funded 100% of the $268,104.57 purchases on her residence before any cheques were sent out of the Tisdale Mews account makes little sense. There would be no reason for Rose & Thistle to transfer funds into the Tisdale Mews account to pay personal expenses of Ms. Walton for her residence. Again, it has all the appearances of another case of theft.

(iii) Steps to impede a proper inspection

18 It is quite evident that from the moment the order was made appointing the Inspector, Ms. Walton took various steps to hinder the Inspector. That order was made on October 4, a Friday, and permitted the Inspector to go to the offices of Rose & Thistle during normal business hours and on that evening and throughout the week-end. Mr. Reitan swears in his affidavit that when he arrived at the Rose & Thistle offices at 3:33 p.m. on the direction of the Inspector, which was shortly after the order was made, he saw Ms. Walton locking the door to the premises and she waved to him as she walked away from the doors. He was informed by Angela Romanova that Ms. Walton had told all employees to leave the premises once the order was granted at approximately 3 pm. He observed one employee who left with a server and one or more computers. After a discussion with the employee and Steven Williams, VP of operations at Rose & Thistle, these were taken back into the building. I received an e-mail from Mr. Griffin early in the evening alerting me to the problem and I was asked to be available if necessary. Mr. Reitan states that after several hours, and following Mr. Walton's arrival, Mr. Schonfeld, Mr. Merryweather and he were allowed into the premises.

19 Ms. Walton in her affidavit states that a laptop "that was about to be removed" from the Rose & Thistle offices was 13 years old and they were disposing of it. One of her occasional workers asked if he could have it and they agreed. She states that the timing was unfortunate. She states that there are eight server towers permanently affixed to the premises. What she does not answer is Mr. Reitan's statement that she locked the doors and told her employees to leave, that whatever was taken from the premises was returned after discussions with the employee and Mr. Williams, the VP of operations, and that it took several hours before the Inspector and Mr. Reitan were permitted on the premises. The order appointing the Inspector required Ms. Walton to fully co-operate with the Inspector.

20 The order also permitted the Inspector to appoint persons as considered necessary, including Mr. Reitan. Ms. Walton however took the position that Mr. Reitan should not be on the premises, which was contrary to the order, and that the Inspector should not discuss with the applicants or their lawyers any information he obtained before making his first report to the court. Mr. Reitan was the accounting person for Dr. Bernstein most familiar with the investments and not having him available to the Inspector, either on the Rose & Thistle premises or not, would not be helpful to the Inspector. On October 9, 2013 I made a further order, which should not have been necessary, permitting Mr. Reitan to be on the premises when Mr. Schonfeld or his staff were present. I also ordered that Mr. Schonfeld was entitled, but not required, to discuss his

investigation with the parties or their representatives.

21 Ms. Walton informed the Inspector that the books and record of the companies were last brought current in 2011. Since August or September, 2013, after Mr. Reitan became involved in seeking information, Rose & Thistle employees have been inputting expense information into ledgers relating to the period January 2012 and August 2013. They have also issued a number of invoices for services rendered or expenses incurred by Rose & Thistle during the period January 2012 to August 2013. On October 17, 2013, Mr. Schonfeld convened a meeting with the parties and their counsel to orally present his findings. Prior to that meeting, Ms. Walton would only provide the Inspector with access to general ledgers for individual companies once she and Rose & Thistle had completed their exercise of updating the ledgers and issuing invoices from Rose & Thistle to each company. At the meeting, Ms. Walton agreed to provide the Inspector with access to ledgers for the remaining companies in their current state. These were eventually provided.

22 Ms. Walton instituted a procedure under which no information could be provided by Rose & Thistle employees to the Inspector only after Ms. Walton had vetted it, which was causing considerable difficulties for the Inspector. On October 18, counsel for the Inspector wrote to counsel to the respondents and asked that the respondents provide immediate unfettered access to the books and records and end the insistence that all information be provided through Ms. Walton. During the week of October 21, Ms. Walton said she could not meet because she was involved in preparing responding material in the litigation and that her staff was unavailable. By October 24, 2013 no substantive response to the Inspector's request was made, and on that date I made an order requiring Ms. Walton not to interfere with Rose & Thistle employees providing information to the Inspector. This should not have been necessary in light of the terms of the original order of October 4, 2013 appointing the Inspector.

(iv) Improper use of bank accounts

23 The agreements for each project require that each project has a separate bank account. The Inspector reports, however, that there has been extensive co-mingling of bank accounts and that funds were routinely transferred between the company accounts and the Rose & Thistle account. From the date of each agreement to September 30, 2013, approximately $77 million was transferred from the companies' accounts to Rose & Thistle and Rose & Thistle transferred approximately $53 million to the various company accounts meaning that Rose & Thistle had retained approximately $24 million transferred to it from the various companies.

24 Ms. Walton confirmed to the Inspector that equity contributions to, and income received by, the companies were centralized and co-mingled in the Rose & Thistle account, which she described as a "clearing house". This practice continued in September 2013 and the Inspector reported it was difficult to trace how transfers from the companies were used because the funds were also co-mingled with funds transferred to the Rose & Thistle account by other Walton companies not making up the 31 companies in which Dr. Bernstein has his 50% interest. It is clear that the Waltons did not treat each company separately as was required in the agreements for each company.

25 To alleviate the problem of the co-mingling of funds and the payments out to Rose & Thistle, the order of October 25 provided for the payment of deposits to be made to the bank accounts of the 31 companies and that no payment out could be made without the written consent of the applicants or someone they may nominate.

(v) Receivables of Rose & Thistle from the 31 companies

26 The agreements for the 31 properties state that Dr. Bernstein and the Waltons are to provide 50% of the equity required. They do not provide that the Walton's equity is to be provided in services. They state that each of Dr. Bernstein and the Waltons will put in amounts of money. In her lengthy affidavit of October 31, 2013, Ms. Walton went to the trouble of describing each of the 31 projects, including stating how much equity Dr. Bernstein had put into each property. Tellingly, however, she made no statement at all of how much equity she or her husband had put into any of the properties, and gave no explanation for not doing so. This may be an indication that Ms. Walton is not able to say what equity has been put into each property, hardly surprising as the books and records were two years out of date at the time the Inspector was appointed.

27 In his first interim report, Mr. Schonfeld reported that based on invoices and general ledger entries provided to October

18, 2013, Rose & Thistle appeared to have charged the companies approximately $27 million for various fees and HST on the fees. On October 17, the date of his meeting with the parties, he had circulated a version of his chart regarding this which identified $2.68 million that had been transferred to Rose & Thistle that could not be reconciled to any invoice issued by Rose & Thistle. On the following day on October 18, Rose & Thistle provided additional invoices to the companies for $5.6 million so that the total amount invoiced exceeded the amounts transferred by Rose & Thistle to the companies by $2.9 million. In his supplement to his first report, Mr. Schonfeld reported that the respondents had produced further invoices from Rose & Thistle dated between January 2012 and September 2013 to the companies for a total of $34.6 million, being $10.6 million more than it had received from the companies. Mr. Schonfeld identified approximately $3.9 million recorded on the ledgers of Rose & Thistle as owing from the companies to Rose & Thistle. This amount is part of the $6 million recorded in the books as being the contribution by the Waltons to the companies.

(vi) Documentation to support Rose & Thistle invoices

28 The Inspector has sought unsuccessfully so far to obtain documentation underlying Rose & Thistle's invoices of some $34.6 million to the companies, including construction budgets for the various projects. This is of considerable importance in understanding the claim for equity put into the properties by the Waltons, because by far the largest amount of equity now claimed to have been put in by the Waltons are the fees for services said to have been provided by the Waltons to the various companies.

29 The information that has been obtained regarding the invoices issued to some of the companies by Rose & Thistle is troubling and gives little confidence in what Ms. Walton and Rose & Thistle have done.

30 Riverdale Mansion Inc. is one of the 31 projects. It is the owner of a historic mansion on Pape Avenue. Riverdale transferred $1,759,800 to Rose & Thistle and received from Rose & Thistle $785,250. Thus Rose & Thistle retained $974,550 transferred to it by Riverdale.

31 Rose & Thistle provided the Inspector with invoices addressed to Riverdale for construction management fees totaling $1,183,981 plus HST and maintenance fees of $60,000, including $275,000 for "deposits for materials", $103,863 for "project management services", $295,000 for "site plan deposits and application" and $67,890 for "steel bar ordered and installed". At the October 17 meeting, the Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton said that Rose & Thistle did not have third party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself (it has a construction company) and that some of the expenses had not yet been incurred. In response, the Inspector requested documents such as material invoices and payroll records to validate the cost of work done by Rose & Thistle and invoiced to Riverdale. None were provided.

32 On the following day, October 18, the Inspector received a credit note from Rose & Thistle which showed that the invoice form Rose & Thistle to Riverdale had been reversed except for $257,065.62 for work performed in 2011. The credit note is dated December 31, 2011.

33 In her affidavit of October 31, 2013, Ms. Walton gave an explanation for the Riverdale reversal, an explanation that has problems. She said that considerable work was done to prepare the site for construction of townhouses and condominiums. As the work was proceeding, the project changed and the mansion will be rebuilt and become used for a woman's shelter. Rose & Thistle was owed "certain monies" for its work and the invoice for $1,291,025 inclusive of HST was rendered by Rose & Thistle to Riverdale. She states that "the Inspector thought the amount claimed was too high" and so she issued a credit note and submitted a lower invoice for $257,065.62 "that reflected the value of the work done by Rose & Thistle". She says she merely forgot to re-do the invoice after the plans changed.

34 The applicants have had no chance to cross-examine Ms. Walton on her affidavit. I have considerable doubts that the Inspector told Ms. Walton that the invoice was too high, as he has had no back-up documentation to consider the validity of the invoice and was asking for it to be produced. However, even assuming that the Inspector told her the invoice was too high, which is not what the Inspector reported, one may ask why, if the new invoice of some $257,000 reflected the work that was done, an earlier invoice had been sent for some $1.2 million. That earlier invoice appears to have been highly improper.

35 Dupont Developments Ltd. is one of the 31 projects. It is a contaminated industrial building and the plan according to

Ms. Walton is to "gut renovate" the building and remediate the contaminated site. The Inspector requested the construction budget for it and it was provided by Mr. Goldberg, who said he was responsible for the construction project. Mr. Goldberg told Mr. Schonfeld that the budget documents were out of date. They indicate that Dupont spent $385,000 on construction and $20,000 on environmental renovation. The Inspector had previously been provided with an invoice issued by Rose & Thistle to Dupont for $565, 339.34 which includes an entry for construction management services of $175,300.30, said in the invoice to be "10% of hard costs", implying that Rose & Thistle had supervised construction that cost approximately $1.75 million. The updated general ledger for Dupont received by the Inspector on October 24 showed capitalized expenses of approximately $248,000, construction in progress of $36,000 and various consulting fees of approximately $563,000. All of these documents show different construction expenditures, none nowhere near the implied cost of $1.75 million.

36 This Dupont budget was the only budget for any of the projects provided to the Inspector by the time of his last report dated October 31, 2013, one day before this motion was heard. The Inspector concludes that it appears that Rose & Thistle is not maintaining project budgets on an ongoing basis to track expenses and measure construction costs against the pro forma statement prepared when the property was purchased.

37 Fraser Properties owns property at 30 Fraser Avenue and Fraser Lands owns abutting property purchased in October 2012. Dr. Bernstein made an equity contribution of approximately $16 million. Fraser Properties transferred $10,281,050 to Rose & Thistle and received back $1,215,100. Thus Rose & Thistle retained $9,065,950. In his first report, Mr. Schonfeld said he had inspected the property and saw no construction work or evidence of recent construction work. In his supplement to his first report, after he had received the general ledger and invoices from Rose & Thistle to Fraser Properties, he reported that the invoices to Fraser Properties were approximately $1.6 million. Assuming the invoices can be supported, that would mean that Rose & Thistle has received approximately $7.4 million more from Fraser Properties than it invoiced to Fraser Properties. It is to be noted that at the time of the Inspector's first report, the books and records showed an intercompany receivable due to Rose & Thistle from the companies of approximately $9.9 million. By the time of the first supplement to the Inspector's report three days later, after the invoices and general ledger had been received and reviewed, this amount was reduced to approximately $3.9 million, due to a new debit showing as being owed by Rose & Thistle to Fraser Properties of approximately $6.45 million.

38 On October 31, 2013 Mr. Campion on behalf of the respondents wrote to counsel to the applicants and to the Inspector and referred to the Inspector asking which filing cabinet he could review to obtain the documents requested, such as third party invoices, contracts, payroll records or other contemporaneous documents. Mr. Campion said that the information sought can only be obtained through discussion with the staff as all documentation is on computer and not in a filing cabinet. This is troubling to the Inspector. It would mean that there is no paper of any kind in existence for $35 million of costs said to have been incurred, or that it has all been scanned and thrown out. It would be unusual to scan it and throw it out, and questionable that it was all scanned when Rose & Thistle was two years late in their bookkeeping and according to Ms. Walton had an outdated software system.

39 Since the Inspector was appointed, Rose & Thistle has been preparing invoices for work done going back to January 2012, and one may question where the information is coming from to do that. Mr. Campion was undoubtedly passing on what he was told by Ms. Walton, but what he was told raises concerns.

(vii) Other equity investors

40 The agreements provided that the only shares to be issued were to Dr. Bernstein's corporations or to the Walton's corporations and neither could transfer shares to another party without the consent of the other party. However, in his prior affidavit, Mr. Reitan provided documentary evidence that disclosed that the Waltons have taken on new equity investors in at least one project, without the agreement of Dr. Bernstein. This issue was not answered by Ms. Walton in her affidavit of October 31, 2013, the failure of which is compounded in that Ms. Walton did not disclose, as previously discussed, what equity contributions have been made by the Waltons for any of the properties.

Legal principles and analysis

41 Section 101 of the *Courts of Justice Act* provides for the appointment of a receiver/manager where it appears to a judge

to be just and convenient to do so. In *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.), Epstein J. (as she then was) discussed what should be considered in deciding whether to make such an order. She stated:

> The jurisdiction to order a receiver is found in s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

42 Section 248 of the OBCA also provides for the appointment of a receiver manager if there has been oppression as contained in section 248(2). Under section 248(2) a court may make an order to rectify the matters complained of and section 248(3) provides:

> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> [...]
>
> (b) an order appointing a receiver or receiver-manager;

43 Various cases other than the *Chongsim Investments Ltd.* case have discussed the principles to be taken into account. See *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) and *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J.) and the authorities referred to in those cases.

44 In my view this is not a case in which the applicants are seeking an interim order appointing a receiver/manager. They do not seek an interim order. They seek the appointment on the basis of evidence that is largely uncontested by Ms. Walton. I would agree with the respondents that if the evidence relied on by the applicants for the order sought was largely contested, the relief should be considered on the basis that it is interim relief. However, that is not the case. In any event, even if the *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994 CarswellQue 120 (S.C.C.)] tri-part test were applicable, that would not be materially different in this case from the test articulated by Epstein J. in *Chongsim Investments Ltd.* that requires a consideration of the effect of the order sought on the parties and their conduct.

45 In my reasons when the Inspector was appointed on October 4, 2013, I found oppression had occurred as follows:

> [27] In my view, on the record before me Dr. Bernstein has met the test required for an investigation to be ordered. To put on two mortgages for $6 million without the required agreement of Dr. Bernstein and then refuse to disclose what happened to the money except in a without prejudice mediation meets the higher test of oppression, let alone the lesser test of unfairly disregarding the interests of Dr. Bernstein. The other examples of the evidence I have referred, as well as the failure to provide monthly reports on the projects to Dr. Bernstein, are clearly instances of the Waltons unfairly being prejudicial to and unfairly disregarding the interests of Dr. Bernstein, a 50% shareholder of each of the owner corporations.

46 I do not see the picture as now being less clear. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:

> 1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would

only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.

2. $268,104.57 was improperly paid from the Tisdale Mews account to pay for renovations to the Waltons' residence. No reasonable explanation has been provided.

3. The co-mingling of accounts and the cash sweep into the Rose & Thistle accounts was a breach of agreement and unfairly prejudicial to Dr. Bernstein and a disregard of his interests. This is particularly the case in light of the lack of current books and records that should have been prepared and available rather than requiring an Inspector to try to get to the bottom of what has occurred. A lack of records is in itself unfairly disregarding the interests of Dr. Bernstein, particularly taken the size of his investment. Blaming it on outdated computer software is hardly an answer. That should have been taken care of long ago.

4. The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records. Dr. Bernstein should never have had to face this prejudicial situation.

5. The Waltons have not provided equal payments of money into any of the 31 properties. The claim that their equity was provided by way of set-off for fees and work, even if that were permissible under the agreements, is unsupported by any available documents to the Inspector. What little has been provided raises serious issues, as discussed above. As well, taking in new equity partners is not at all what Dr. Bernstein signed up for, and indicative of a lack of ability of the Waltons to fund their equity in accordance with the agreements.

6. Dr. Bernstein was entitled to monthly reports. It is now quite evident why that has not occurred.

47 Mr. Campion contended that a receiver/manager could not be ordered over any particular property without a finding of oppressive conduct regarding that property. I am not at all sure that such a proposition in this case is correct, but in any event there has been oppressive conduct regarding each property. The co-mingling of funds and the sweep of cash from each property's account into Rose & Thistle was oppressive in these circumstances in which there were no contemporaneous books and records kept that would permit Dr. Bernstein, or now the Inspector, to fully understand what occurred to the money from each property. The setting up of alleged fees owing to Rose & Thistle for the properties to substantiate the Waltons' equity contributions, even if permissible, without readily available documentation to substantiate the validity of the fees, was oppressive. The lack of records and reports for each property was oppressive.

48 It is contended on behalf of the respondents that they have the contractual right to manage the projects and thus no receiver/manager should be appointed. The difficulty with this argument is that the contracts have been breached and the Waltons have certainly not shown themselves to be capable managers. A basic lack of record keeping, compounded by co-mingling of funds and transferring them to Rose & Thistle, belies any notion of proper professional management. Ms. Walton acknowledges that accounting and other issues "have plainly caused him [Dr. Bernstein] to lose confidence in my management". That is a fundamental change to the relationship.

49 It is contended that the business will be harmed if a receiver/manager is appointed. Ms. Walton states in her affidavit that she believes that the dynamic nature of this portfolio will suffer and in the end suffer unnecessary losses. What is meant by the dynamic nature is not clear. I recognize that a receiver/manager can in certain circumstances have negative implications in the marketplace, particularly if it means that unsold properties will have to be put up for sale at less than market prices or be sold quickly. There is no indication that is the plan here at all and there is no court ordered sale being requested.

50 It is also to be recognized that a receiver/manager can bring stability to a situation, which in this case appears to be a requirement to protect the interests of Dr. Bernstein.

51 Dr. Bernstein with his $100 million plus investment has a huge financial interest in this portfolio of properties. It is hardly in his interest to have the properties dealt with in less than a sound commercial way. He suffers the same risk as the Waltons, and depending on what real equity the Waltons have put in, perhaps far more. The Waltons contend that they have

huge financial risk in that they have guaranteed mortgages to the tune of some $206 million. They have not offered any evidence that there is any likelihood of being called upon on their guarantees, and to the contrary Ms. Walton says that all of the projects except perhaps one or two of them are or expected to be profitable. There is no reason why an experienced receiver/manager with capable property managers cannot continue with the success of the ventures.

52 The respondents contend that with the controls over the bank accounts and the other provisions of the two orders made to date, there is plenty of protection for Dr. Bernstein. There may be something in this argument, but it ignores one of the basic problems caused by the way the business has been run. There is no clear evidence yet what exactly has been put into the properties by the Waltons, and that is crucial to understanding what both Dr. Bernstein and the Waltons are entitled to. In the month since the Inspector was appointed, Ms. Walton has caused back dated invoices to be prepared for past work said to have been done. What they have been prepared from is not at all clear. With some of the troubling things about changing records that have become apparent as a result of digging by Mr. Reitan and the Inspector, discussed above, and the diversion of money that has taken place, there is reason to be concerned exactly what Ms. Walton is doing to shore up her position. The Inspector is not in a position to know what is being prepared on an *ex post facto* basis or from what, and Dr. Bernstein should not have to rely on a hope that something untoward will no longer be done. The present situation is causing considerable harm to Dr. Bernstein.

Conclusion

53 Schonfeld Inc. is appointed as manager/receiver of all of the properties in schedule B, effective immediately. I was provided with a draft order that is based on the model order in use in our Court and approved by the Users' Committee. It appears satisfactory but there were no submissions as to its terms. If the respondents have any submissions with respect to the draft order, they are to be made in writing within three days and the applicants or Schonfeld Inc. shall have until Wednesday of next week to respond. In the meantime, the appointment of Schonfeld Inc. as manager/receiver is not to be delayed and Schonfeld Inc. shall immediately have the powers contained in the draft order pending any objection to it by the respondents.

54 The applicants have applied to have Schonfeld Inc. appointed as receiver over four properties mortgaged to Dr. Bernstein with expired mortgages that are not schedule B corporations. Ms. Walton has stated in her affidavit that funds are being raised that will see these mortgages paid in full by the end of November, 2013. In light of that statement, this application is adjourned *sine die*. It can be brought on after the end of November in the event that the mortgages have not been paid in full.

55 The applicants have also requested a certificate of pending litigation over 44 Park Lane Circle, the residence of the Waltons in light of the evidence that money from one of the 31 schedule Dr. Bernstein corporations was used to pay for renovations to the residence. I was advised by counsel for Ms. Walton during the hearing of the motion that the money would be repaid that day. Based on that statement, the request for a certificate of pending litigation is adjourned *sine die* and can be brought back on in the event that evidence of the payment is not provided to the applicants and Schonfeld Inc.

56 The Inspector moved for approval of his interim reports and the actions taken as disclosed in the reports, and approval for his fees and disbursements and those of his counsel. No one opposed the request although Mr. Campion said that the respondents were not consenting to them. In my view, the actions taken by the Inspector have been entirely proper in difficult circumstances and in her affidavit Ms. Walton acknowledges that the Inspector was necessary because of her issues. The fees and disbursements also appear reasonable. At the conclusion of the hearing I granted the order sought.

57 The applicants are entitled to their costs from the respondents. If costs cannot be agreed, brief written submissions along with a proper cost outline may be made within 10 days and brief written reply submissions may be made within a further 10 days.

Motion granted.

Footnotes

* Affirmed at *DBDC Spadina Ltd. v. Walton* (2014), 2014 ONCA 428, 2014 CarswellOnt 6908, 22 B.L.R. (5th) 97 (Ont. C.A.).

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2014 ONCA 428
Ontario Court of Appeal

DBDC Spadina Ltd. v. Walton

2014 CarswellOnt 6908, 2014 ONCA 428, 22 B.L.R. (5th) 97, 241 A.C.W.S. (3d) 121

DBDC Spadina Ltd., and Those Corporations Listed on Schedule A Hereto, Applicants (Respondents in Appeal) and Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc., Respondents (Appellants) and Those Corporations Listed on Schedule B Hereto, To Be Bound by the Result

Doherty, Janet Simmons, M. Tulloch JJ.A.

Heard: May 21, 2014
Judgment: May 21, 2014
Docket: CA C58024, C58804

Proceedings: affirming *DBDC Spadina Ltd. v. Walton* (2013), 2013 ONSC 6833, 2013 CarswellOnt 15226, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Norma Walton, for herself
Howard C. Cohen, for Respondents / Appellants
Peter H. Griffin, P.E. Veel, for Applicants / Respondents

Subject: Corporate and Commercial

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

Business associations

III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.5 Miscellaneous

Business associations

III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.1 Order appointing receiver

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Applicants brought motion for appointment of receiver manager — Motion judge did not require that secured creditors be given notice of motion to appoint receiver manager — Motion judge made order appointing receiver manager — Respondents appealed — Appeal dismissed — Motion judge was not asked to require that notice be given to secured creditors and it could not be said that motion judge erred in principle or acted unreasonably in failing to make order he was never asked to make — Finding of oppression was open to motion judge — Motion judge accurately set out legal principles relevant to appointment of receiver manager under either Courts of Justice Act or Ontario Business Corporations Act — Motion judge did not misapprehend relevant evidence and did not make unreasonable assessment of evidence — Motion judge's findings were supported by record before motion judge — Remedy ordered by motion judge was fully justified in circumstances.

Table of Authorities

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

APPEAL from judgment reported at *DBDC Spadina Ltd. v. Walton* (2013), 2013 ONSC 6833, 2013 CarswellOnt 15226 (Ont. S.C.J. [Commercial List]), appointing receiver manager.

***Per curiam* (orally):**

1 Ms. Walton represented herself on the appeal. She is obviously very knowledgeable about the matters underlying this appeal. Mr. Cohen represented the other appellants. Not surprisingly, Ms. Walton's arguments differed to some degree from those her former counsel had advanced in their factum. We will address the arguments made by Ms. Walton. Mr. Cohen, for the other appellants, joined in and to some extent augmented Ms. Walton's arguments.

Issue #1 — Did the application judge err in failing to require that secured creditors be given notice of the motion to appoint a Receiver Manager?

2 Ms. Walton argues that the mortgagees should have been given notice of the application to appoint a Receiver Manager in light of the potential impact of that appointment on the properties and their security in the properties. Ms. Walton notes for example that the appointment of a Receiver Manager would automatically put the mortgages into default under the terms of those mortgages.

3 Ms. Walton correctly, in our view, does not argue that the application judge had no jurisdiction to make the order absent notice to the secured creditors. She does argue that the application judge should have exercised discretion in favour of requiring notice to them.

4 The application judge was not asked to require that notice be given to the secured creditors and specifically the mortgagees. Ms. Walton and the other appellants were certainly aware of the potential impact of the appointment of a Receiver Manager on the status of the mortgages. They were well positioned to ask the application judge to give the necessary notification if they thought it prudent or necessary to a proper hearing. Ms. Walton and the other appellants were all represented by counsel on the application. No such request was made by anyone. We cannot say that the motion judge erred in principle or acted unreasonably in failing to make an order he was never asked to make.

5 We also note that no attempt has been made by any secured creditor to intervene on the appeal and take up the argument that the secured creditors should have received notice of the application.

6 We are told that some mortgagees have participated in some of the many proceedings that have been taken since the appointment of the Receiver Manager. The nature of those proceedings and the positions advanced on behalf of some of the mortgagees in respect of either the appointment of the Receiver Manager or the conduct of the Receiver Manager since its appointment are not before this court and are not germane to the appeal. As Mr. Griffin put it, this appeal is about the appointment of the Receiver Manager not the conduct of the Receiver Manager since the appointment.

Issue #2 — Did the application judge improperly exercise his discretion in favour of the appointment of a Receiver Manager?

7 Ms. Walton forthrightly accepts that on the material before the application judge, a finding of oppression under the *Ontario Business Corporations Act* was open to the application judge. We agree with that concession. Ms. Walton submits, however, that the application judge was still required to consider the competing interests of Dr. Bernstein, the Waltons and the other creditors in deciding whether the appointment of a Receiver Manager was the appropriate order. She maintains that the appointment of a Receiver Manager is an extreme remedy to be granted sparingly. She further argues that the appointment of the inspector about a month earlier was enough to fully protect Dr. Bernstein's interests and that the application judge should have simply continued that order perhaps with modifications as needed to meet specific issues.

8 Ms. Walton points to two specific errors which she claims taint the exercise of the application judge's discretion. First, she says he failed to take into account the inevitable and disastrous consequences to the business affairs of the named companies that would flow from the appointment of a Receiver Manager. Second, she says that the application judge mischaracterized her conduct in relation to two of the properties as "theft" or "having the appearance of theft". Ms. Walton submits that this mischaracterization led the application judge to the "overkill" remedy of a Receiver Manager.

9 We have reviewed the application judge's reasons. He accurately set out the legal principles relevant to the appointment of a Receiver Manager under either the *Courts of Justice Act* or the *Ontario Business Corporations Act*: see paras. 41-44. The application judge considered whether an order continuing the inspectorship would suffice to protect Dr. Bernstein's interests: see para. 52. The application judge determined that given the difficulties the inspector had encountered in the month since his appointment and given the problems the inspector had identified in respect of the records of the corporations, the appointment of the Receiver Manager was necessary in that Dr. Bernstein's interests could not be adequately protected by a simple continuation of the inspectorship. We see no misapprehension of the relevant evidence. Indeed the evidence relating to the conduct of the inspectorship was unchallenged. Nor can we characterize the application judge's assessment of that evidence as unreasonable. That is as far as our review goes. It is not for this court to engage in a *de novo* review of the material.

10 The application judge also addressed the potential commercial implications of the appointment of a Receiver Manager:

see paras. 49-51. We were told in the course of oral submissions that the order has had serious financial repercussions for the Waltons and the companies. What may have happened after the order appointing a Receiver Manager was made and perhaps, more importantly, why those events happened are not before this court. If the application judge did not err in the exercise of his discretion based on the record before him, it cannot be that subsequent events render the exercise of that discretion improper. Problems that may have arisen in the course of the receivership or changes in circumstances subsequent to the appointment of the Receiver Manager are matters that are properly addressed in the context of the court's ongoing supervision of the Receiver Manager and are not matters to be addressed in an appeal which challenges the appointment of the Receiver Manager.

11 We also note that no stay of the application judge's order was sought. The applicants chose to accept the appointment of the Receiver Manager pending the outcome of this appeal. That position seems inconsistent with an argument that the appointment of the Receiver Manager would inevitably lead to dire consequences for the corporations. Were that the position one would have expected an effort to stay the order pending a challenge of the receivership.

12 We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation of funds in respect of at least one property. Whatever one might choose to call that conduct, it provided powerful evidence that Dr. Bernstein's interests in the property were being unfairly prejudiced by the conduct of the Waltons. The application judge's use of the word "theft" does not, in our view, taint his factual findings or the manner in which he exercised his discretion.

13 We have also reviewed the various features of the management of the affairs of the companies relied on by the application judge to support his findings and his order appointing the Receiver Manager. In our view, all of his findings are supported by the record before the application judge and justify the conclusion that Dr. Bernstein's interests in the companies were significantly prejudiced by the ongoing activities of the Waltons. The remedy ordered by the application judge, while undoubtedly one that should not be easily granted, was, in our view, fully justified in these circumstances.

14 The appeal is dismissed. A number of related appeals that were transferred to this court from the Divisional Court on the order of Strathy J.A. are also dismissed.

15 The respondents are entitled to costs in the amount of $20,000, inclusive of relevant taxes and disbursements.

Appeal dismissed.

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TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: M & K Construction Ltd. v. Kingdom Covenant International | 2015 ONSC 2241, 2015 CarswellOnt 5609, 252 A.C.W.S. (3d) 642 | (Ont. S.C.J., Apr 20, 2015)

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

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

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Receivers --- Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred* *to*

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

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

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

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the

monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

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

5 On his cross-examination, Mr. Freure admitted:

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

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

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

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

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

Receiver/Manager

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

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

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

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 1/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

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

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

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

Motions granted.

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Carnival National Leasing Ltd. | 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79 | (Ont. S.C.J., Feb 15, 2011)

1997 CarswellOnt 988
Ontario Court of Justice, General Division

Royal Bank v. Chongsim Investments Ltd.

1997 CarswellOnt 988, [1997] O.J. No. 1391, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 70 A.C.W.S. (3d) 72

Royal Bank of Canada, Plaintiff v. Chongsim Investments Ltd. and ESC Recreation Development Corporation, carrying on business as WWK Partnership, Chongsim Investments (Canada) Ltd. and Wild Water Kingdom Ltd., Defendants

Epstein J.

Heard: January 30 and 31, 1997
Judgment: April 4, 1997
Docket: 96-CU-103033

Counsel: *George Vegh* and *Debora Steggles*, for plaintiff.
John D. Campbell, for defendants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

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

Debtors and creditors

VII Receivers
  VII.3 Appointment
    VII.3.b Application for appointment
      VII.3.b.i General principles

Headnote

Receivers --- Appointment — Application for appointment — General

Defendant companies and partnership, which carried on water park business, were guarantors of credit facility granted by plaintiff bank to related company and also had credit facility with plaintiff secured by debenture and general security agreement — Related company's facility structured as demand loan which plaintiff agreed not to call absent default — Plaintiff established practice respecting facility interest payments whereby funds would be transferred from loan account to cover payment in event of deficiency in operating account and related company would be notified so that it could make deposit, the plaintiff not treating overdrafts as defaults — Plaintiff later departed from established practice, reversed interest payments on several occasions when overdrafts occurred, failed to provide specific notification of non-payment of interest — Plaintiff then wrote indicating arrears, and in response to request for particulars of arrears, called loan thereafter refusing to accept payment and commencing proceedings against related company and guarantors — Plaintiff moved to appoint receiver and manager of water park business on basis that partnership had failed to honour guarantee — Motion dismissed — Neither just nor equitable to appoint receiver in circumstances — Appointment could have serious, permanent adverse affect on business, deprive defendants of right to defend action — Plaintiff had adequate security for amount owed — Plaintiff did not act in good faith in departing, without notice, from established practice relied on by defendant, to create default with view to forcing restructuring of credit facilities to its benefit — Plaintiff failed to meet obligation to provide particulars of arrears and opportunity to make correction — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

The defendants CI Ltd. and ESC Co. carried on a water park business as WWK partnership and WWK Ltd. The partnership had a credit facility with the plaintiff bank. It was secured by a debenture and a general security agreement, with both contracts binding the partnership and WKK Ltd., and both containing cross-default provisions. While it was structured as a demand loan, the parties agreed that the loan would not be called absent default. In terms of the value of the security, in 1992 the plaintiff had received an appraisal in the amount of $11.3 million. Since 1992, a first mortgage had been paid down from $1.7 million to $.9 million.

The defendant C.I. (Can.) Ltd., also had a credit facility with the plaintiff, structured in the same way as that of the partnership, and guaranteed by CI Ltd., ESC Co. and the partnership.

Between 1992 and 1995 the plaintiff established a practice respecting interest payments on the latter facility. Payment was made from the operating account by automatic transfer. If there were insufficient funds in that account to cover the payment, the plaintiff would make up the deficiency by transfer from the loan account. If the loan account were fully drawn, the plaintiff would allow the operating account to go into overdraft and notify CI (Can.) Ltd., which would then make a deposit. In accordance with that practice, the plaintiff did not return any of CI (Can.) Ltd.'s cheques on the basis of insufficient funds nor did it treat the temporary overdrafts as defaults under the facility.

In early 1995, however, when an interest payment created an overdraft, the new account manager, in a manner contrary to established practice, reversed the payment and failed to contact CI (Can.) Ltd. about the non-payment. The next month, the plaintiff temporarily returned to past practice, but again in March and April reversed interest payments without contacting CI (Can.) Ltd. During this time and into May, the account manager further intervened, again without specifically notifying his customer, by causing various amounts to be deducted from the operating account and credited to interest interest on the loan facility, and returned one of CI (Can.) Ltd.'s cheques NSF for the first time.

In June, the account manager wrote to CI (Can.) Ltd. indicating interest arrears in excess of $12 000. C, the principal of the defendant companies, requested particulars as to how the arrears had accumulated. The plaintiff responded by demanding payment in full of the facility by C.I. (Can.) Ltd., C.I. Ltd., and ESC Co.. CI (Can.) Ltd. then offered to pay the arrears, even though the plaintiff had not clarified the accounting behind the amount claimed. The plaintiff refused to accept payment, and commenced proceedings. It moved for an order appointing a receiver and manager of the water park business, alleging that such an order would be just an equitable as the partnership had failed to honour its guarantee on the loan in question.

Held: The motion was dismissed.

Section 101 of the *Courts of Justice Act* provides that a receiver may be appointed where it is just and convenient. As the appointment of a receiver is particularly intrusive, it is relief which should only be granted sparingly. In the exercise of its discretion, the court should consider the effect of such an order on the parties. Since it is an equitable remedy, the conduct of the parties is also a relevant factor.

Appointment a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations.The plaintiff intended to attempt to sell the water park; a sale under these circumstances frequently results in a lower price and always in substantial receivership fees. In the interim, the receivership might well damage the park's good relations with its landlord, employees, suppliers and customers.

The damage to the defendants must be compared to the position of the plaintiff were receivership not granted. The principal amount outstanding on its current first mortgage had been reduced substantially since 1992, there was no evidence of any problems with creditors, and the plaintiff had more than adequate security for what it was owed.

The order sought would effectively result in a loss to the defendants of some of their investment and of their right to defend the bank's action on the loan. If it were not granted, an acceptable *status quo*, protecting the interests of all parties, could be maintained. Given these observations, it would not be just to appoint a receiver.

Nor would it be equitable having regard to the conduct of the parties.

The worst that could be said about the representatives of CI (Can.) Ltd. was that they failed to notice irregularities in the bank statements indicating the plaintiff's departure from past practice, and perhaps that C had not pressed the plaintiff aggressively enough for particulars of the arrears.

The plaintiff, on the other hand, had been less than straightforward in its handling of the CI (Can.) Ltd. account. Its account manager departed from past practice in reversing loan payments and effectively caused a default, and this knowing that it was reasonable for his customer to assume that the plaintiff would not change its practice without some direct notification. Also notable was the precipitous nature of the demand as well as the plaintiff's failure to provide specific details of the default, to explain what was required for correction and to establish a reasonable timetable for correction.

Given the agreement that the plaintiff would not call the loan unless C were in default, the plaintiff set out to do whatever was necessary to create a default, with a view to forcing C to restructure his credit facilities to its advantage. Parties to a contract have an obligation to deal with each other in good faith toward fulfillment of the agreement. The agreement between the plaintiff and CI (Can.) Ltd. had been modified by established practice, which modification, to the plaintiff's knowledge, was relied on by CI (Can.) Ltd. The plaintiff had a legal obligation to support the defendants so long as they were honouring their obligations under the agreement. However, rather than trying to fulfill its obligations, it was deliberately trying to sabotage the relationship. Against this background it would be neither just nor equitable to grant relief sought.

Table of Authorities

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

MOTION by creditor for appointment of receiver.

***Epstein J.*:**

1 This is a motion brought by the plaintiff the Royal Bank of Canada (the "bank") for an order appointing a receiver and manager of the property of the defendants Chongsim Investments Ltd. ("Chongsim Investments") and ESC Recreation Development Corporation ("ECS") carrying on business as WWK Partnership (the "partnership") and Wild Water Kingdom Ltd. ("WWK Ltd.").

2 The partnership owns and operates a water park on premises just north of Toronto. These premises are owned by the government and are leased to WWK Ltd. as bare trustee for, and on behalf of, the partnership.

3 The bank's position is that such an order would be just and equitable in the circumstances of this case based on the allegation that the partnership failed to honour the guarantee it provided to the bank in respect of a loan given by the bank to the defendant Chongsim Investments (Canada) Ltd. ("Chongsim Canada").

4 The primary position of the defendants is that the equitable jurisdiction of this court should not be available to the bank. It is their submission that the bank orchestrated the default upon which it attempts to rely in requesting that a receiver be appointed. Secondly, the defendants argue that the partnership did not, in fact, guarantee the obligations of Chongsim Canada. Accordingly, the demand upon the partnership is invalid.

5 Shortly after the matter was argued, I advised counsel of my decision to dismiss the bank's motion. The following is a brief summary of the reasons for this decision.

6 By commitment letter of May 22, 1992, the bank granted a $1.1 million credit facility to the partnership that was secured by a debenture (the "debenture") executed by WWK Ltd. The partnership agreed to be bound by the terms of the debenture. The bank also had a general security agreement in place (the "GSA") as a result of an earlier credit facility. The GSA was granted by the partnership and was consented to by WWK Ltd. These contracts contain cross-default provisions. A default of the partnership is also a default under the security agreements. The debenture and GSA are the only potential *contractual* sources of the bank's entitlement to a receiver.

7 The Wild Water Kingdom credit facility was structured as a demand loan. However, the parties agreed that the bank would not call for payment on the loan as long as the credit facility was kept in good standing.

8 The bank has considerable security in respect of this credit facility. The commitment letter required "receipt by the bank of an appraisal ... reflecting replacement cost of not less than $11 million ..." The bank received an appraisal dated March 31, 1992, in the amount of $11.3 million. The bank has not disputed this value. I also note that the bank's security has improved through the pay down of a first mortgage from $1.7 million to approximately $900,000.

9 Chongsim Canada is a holding company with several interests. It also has a credit facility with the bank. This facility is reflected in a commitment letter dated August 18, 1992. Again, the parties agreed that the loan would not be called absent default. Chongsim Investments and ESC Recreation guaranteed this facility. I find, based on the evidence, including the wording of the loan documentation, that the obligations of Chongsim Canada were also guaranteed by the partnership.

10 I now turn to the events leading up to the default upon which the bank relies in its efforts to put in a receiver.

11 The monthly payments of the Chongsim Canada credit facility were made from the operating account on the 26th day of each month by automatic transfer. If there were insufficient funds in the operating account to cover the interest payment,

the bank would transfer the necessary amount to cover the deficiency from the loan account. If the loan account were fully drawn, the bank would allow the operating account to go into overdraft and would then notify Chongsim Canada's office. Chongsim Canada would then make a deposit to bring the operating account into a positive balance. Prior to May 29, 1995, the bank at no time returned any of Chongsim Canada's cheques on the basis of insufficient funds. Similarly, at no time prior to that date did the bank treat these temporary overdrafts as defaults under the Chongsim Canada credit facility.

12 It was therefore not unusual when on January 26, 1995, Chongsim Canada's interest payment of $7,378.64 created an overdraft. Contrary to the manner in which the bank had historically dealt with such a situation, the then new manager of the account, Mr. Smith, caused the interest payment to be reversed. Further contrary to established practice, the bank did not contact Chongsim Canada about the non-payment of interest.

13 On February 27, 1995, the bank returned to established practice. The automatic withdrawal was made to pay interest. An overdraft was thereby created. The bank still had not tried to contact its customer about the default that had taken place in January as a result of the bank's unprecedented reversal of the interest payment.

14 Again, in March and in April, the bank reversed the interest payments without contacting Chongsim Canada. During this time and into May 1995, Mr. Smith further intervened by causing various amounts to be deducted from the operating account and to be credited to interest on the loan facility. He also, for the first time, returned a Chongsim Canada cheque as "NSF." Again, Mr. Smith did not specifically notify anyone at Chongsim Canada of the nonpayment of interest, of the other transfers or of his decision to refuse to honour one of his customer's cheques.

15 Then, on June 5, 1995, Mr. Smith sent a letter to Chongsim Canada indicating interest arrears of $12,222.04. Dr. Chong, the principal of these various companies, expressed surprise and asked for particulars as to how these arrears could have accumulated.

16 Instead of providing any type of meaningful response, the bank, by letter dated June 22, 1995, demanded payment in full of the Chongsim Canada credit facility from Chongsim Canada, Chongsim Investments and ESC Recreation. Shortly thereafter, Chongsim Canada offered to pay any interest arrears even though the bank still had not clarified the accounting behind the amount claimed to be due. The bank refused to accept any payment, taking the position that the default could not be cured.

17 Technically, Chongsim Canada defaulted on its loan by failing to maintain its obligation to pay interest. However, is this default, having regard to all of the circumstances, one that warrants the exercise of the court's discretion to put a receiver in charge of the affairs of the operation?

18 The jurisdiction to order a receiver is found in section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

19 As far as the impact of the order sought, there can be no doubt but that the effect of installing a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations. The bank has indicated that it intends to attempt to sell the water park. A sale under these circumstances frequently results in a lower price and always results in substantial receivership fees (estimated by the bank at $400,000). In the meantime, the receivership may well damage the park's apparently good relations with its landlord, employees, suppliers and customers.

20 This damage to the defendants in the form of added expense and reduction of value must be compared to the position of the bank if the receivership is not granted. The first mortgage is current. In fact, the principal amount outstanding has been reduced from $1.7 million in 1992 to $900,000 today. There is no evidence of any problems with creditors. The bank has more than adequate security for the $2 million it is owed.

21 If a receiver is ordered, then the park will be sold, the bank will be paid, and the litigation in which the bank's right to call the loan is in dispute will be rendered academic. There will be a loss to the defendants not only of some of their

investment but also of their right to defend the bank's action. If the order is not granted, an acceptable *status quo* can be maintained in which the investment and interests of all parties are protected.

22 In the face of these observations, it would certainly not be "just" to put in a receiver.

23 Nor would it be equitable having regard to the conduct of the parties. The worst that can be said of the conduct of the representatives of Chongsim Canada is that they failed to notice the irregularities that appeared in the monthly bank statements that would have alerted them to the fact that the bank had deviated from established practice and interest payments were therefore not being made. Secondly, perhaps Dr. Chong can be faulted for not pressing the bank aggressively enough for particulars of the arrears in response to a clear demand for payment.

24 However, the conduct of Chongsim Canada must again be compared with that of the bank. The bank has a recognized obligation to treat its customers fairly, meaning in an honest, straightforward fashion. While the evidence is not sufficient for me to make a finding that the bank was dishonest in its dealings with the defendants, there is certainly ample evidence suggesting that Mr. Smith was being less than straightforward in his handling of the Chongsim Canada account. By reversing the loan payments for January and March 1995, Mr. Smith effectively caused a default. He did this knowing that it was reasonable for his customer to assume that the bank would not change its practice in relation to the account at least without some direct notification. In fact, the evidence shows that Mr. Smith actually met with Dr. Chong during the critical period when the defaults were being created and said nothing to him about this serious state of affairs.

25 Then there was the precipitous nature of the demand. If the bank intended formally to demand, it had an obligation in the circumstances of this case to provide specific details of the default, what was required for correction and establish a reasonable timetable for such correction. This it did not do.

26 The bank relies almost exclusively on the evidence of Mr. Smith in support of the order sought. I find certain aspects of Mr. Smith's evidence troublesome. For example, the record shows regular communication between Mr. Smith and his superior, Mr. Brown, about the Chongsim Canada situation throughout December 1994 and January 1995. Then, curiously, on January 29, 1995 (the same day as Mr. Smith first reverses an interest payment) all communication of this nature stops until after Mr. Brown decided to call the loan. Further, Mr. Smith claims to have been unaware of the default that he created until he requested a computer summary of the Chongsim Canada account on May 31, 1995. Mr. Smith gave this evidence in the face of other evidence that he regularly reviewed weekly computer printouts throughout this time period that showed, among other things, interest arrears. I also note that Mr. Smith, in an effort to explain his deviation from the bank's practice of allowing the Chongsim Canada operating line to go into overdraft, testified that he had authority to permit an overdraft only "up to $5,000." However, in November 1994, he permitted a $9,338 overdraft in the Chongsim Canada account.

27 The conclusion is inescapable that the bank was determined to force Dr. Chong to agree to restructure his credit facilities with the bank to the bank's advantage. Given the agreement that the bank would not call the loan unless Dr. Chong was in default, the bank only had one option — to do whatever was necessary to create a default. The bank was successful — technically, but against this background it would neither be just nor equitable to grant the interlocutory relief requested by the bank and put in a receiver.

28 Parties to a contract have an obligation to deal with each other in good faith toward the fulfilment of the agreement. The agreement between the bank and Chongsim Canada had been modified by established practice. To the bank's knowledge, Chongsim Canada relied on this modification. In this case, the bank had a legal obligation to support the defendants as long as they were honouring their obligations to the bank. On the facts, I find that rather than trying to fulfill its obligations to its customers, the bank was deliberately trying to sabotage the relationship.

29 The motion is dismissed. If the parties are unable to agree as to costs they may make submissions in writing by facsimile. The defendant's submissions should be sent to the plaintiff's solicitors and my office by April 18, 1997, and the plaintiff's submissions should be sent to me and the defendant's solicitors by April 28, 1997.

Motion dismissed.

End of Document

TAB 4

2016 ONSC 1545
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. Aventura II Properties Inc.

2016 CarswellOnt 3746, 2016 ONSC 1545, 264 A.C.W.S. (3d) 483

Business Developmemt Bank of Canada, Applicant and Aventura II Properties Inc., Pavilion Sports Clubs Inc., Pavilion Sports ICE Inc., Pavilion Sports Food and Beverage Inc., and Pavilion Aquatic Club Inc., Respondents

Hainey J.

Heard: February 26, 2016
Judgment: March 4, 2016
Docket: CV-13-10285-00CL

Counsel: Lucas E. Lung, for Revital Druckmann
Sean N. Zeitz, for Jean-Jacques Myara
Kelli Preston, for Receiver, Pollard & Associates Inc.
Catherine Francis, for Duca Financial Services Credit Union Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

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

Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.d Actions against debtor in receivership

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iv Miscellaneous

Headnote

Debtors and creditors --- Receivers — Actions involving receiver — Actions against debtor in receivership

Mareva injunction — Extension — Debtors were subject to court-appointed receivership — Receiver was granted ex parte Mareva order against R, who was wife of debtors' principal — Receiver sought order extending Mareva order and immediate repatriation of certain funds that were originally paid to respondent P Inc. as Harmonized Sales Tax (HST) refund — Motion granted — Funds were misappropriated by debtors and others and diverted to bank account controlled by R — January 2014 order required debtors to advise monitor immediately upon receipt of any refund from Canada Revenue Agency and prohibited them from depositing or otherwise disbursing any refund received — Debtors clearly breached order by concealing and diverting HST refund — Debtors' conduct in respect of HST refund, including conduct of R, were deliberate and blatant acts of fraud designed to divert HST refund away from receiver — Mareva order should be continued to permit receiver to prevent R from further dissipating or transferring assets that receiver was entitled to possess under terms of receivership order — HST refund was asset subject to receivership order — Receiver was entitled to immediate possession of HST funds.

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Miscellaneous

Debtors were subject to court-appointed receivership — Receiver was granted ex parte Mareva order against R, who was wife of debtors' principal — Receiver sought order extending Mareva order and immediate repatriation of certain funds that were originally paid to respondent P Inc. as Harmonized Sales Tax (HST) refund — Motion granted — Funds were misappropriated by debtors and others and diverted to bank account controlled by R — January 2014 order required debtors to advise monitor immediately upon receipt of any refund from Canada Revenue Agency and prohibited them from depositing or otherwise disbursing any refund received — Debtors clearly breached order by concealing and diverting HST refund — Debtors' conduct in respect of HST refund, including conduct of R, were deliberate and blatant acts of fraud designed to divert HST refund away from receiver — Mareva order should be continued to permit receiver to prevent R from further dissipating or transferring assets that receiver was entitled to possess under terms of receivership order — HST refund was asset subject to receivership order — Receiver was entitled to immediate possession of HST funds.

MOTION for extension of Mareva injunction and repatriation of certain funds that were originally paid to respondent as Harmonized Sales Tax refund.

Hainey J.:

Background

1 Pollard & Associates Inc. ("Pollard") is the court-appointed receiver (the "Receiver") of the respondents (collectively, the "Debtors").

2 A Receivership Order was granted to Pollard's predecessor, Collins Barrow ("CB"), by McEwen J. on September 8, 2014 (the "Receivership Order").

3 On December 4, 2015, the Trustee applied for and I granted an *ex parte Mareva* Order against Revital Druckmann ("Revital"), who is the wife of the Debtors' principal, Johny Druckmann (the "*Mareva* Order").

4 The Trustee seeks an order extending the *Mareva* Order and the immediate repatriation of certain funds that were originally paid to the respondent Pavilion Sports Clubs Inc. ("PSCI") as an HST refund. These funds were misappropriated by the Debtors and others and diverted to a bank account controlled by Revital (the "HST Funds").

Facts

5 I accept as accurate the following facts set out at paragraphs 2-8 and paragraph 13 of the Receiver's factum:

2. PSCI was entitled to a HST refund in the amount of $986,594.96.

3. On August 5, 2014 the Debtors advised Collins Barrow ("CB"), the Debtors' previously court-appointed Monitor and thereafter receiver, that PSCI had not yet received the HST refund. This was not true. The HST Refund had in fact been received by PSCI on December 4, 2013. It was concealed from CB. Despite a court order that the Debtors were to advise CB of receipt of the HST Refund, the evidence before the court is that the office manager, Henry Karl, ("Karl") responsible for the books and records for the Debtors, received the HST Refund in about the time it was received from CRA. He thereafter put it in his desk and did not tell anyone about it until after the HST Refund had been diverted from PSCI. To further mislead CB, counsel for the Debtors emailed CB and advised that the HST Refund had been paid to "questionable people" who had indirectly threatened the Debtors' principals as well [as] Karl and his family. This too was not true.

4. The HST Refund had been diverted from PSCI to PAV Medical Inc. ("PAV Medical") on January 8, 2014. The HST Refund was transferred again on January 15, 2014 to a TD Bank account in the name of Sigal Stern (the "Stern Account"). The Stern Account was found to be debited by a bank draft issued August 26, 2014 payable to S. Stern in the amount of $1,016,000.00 (the "Bank Draft").

5. Revital had Power of Attorney over the Stern Account. Druckmann is the spouse of Johny Druckmann, ("Johny"), President of the Debtors.

6. On December 4, 2015 the Receiver successfully motioned *ex parte* for a *Mareva* injunction restraining Druckmann from dissipating her assets. On December 11, 2015, on an urgent basis, Druckmann sought to remove the freeze over the assets so that she may be able to pay her legal counsel and personal expenses. The Mareva injunction was extended to January 29, 2016. It was also varied to permit Druckmann access to her line of credit to pay for her living expenses and legal fees. Thereafter on January 29, 2016, at the request of Druckmann as well as at the request of a Mr. Jean-Jacques Myara ("Myara") (whose involvement on the motion will be described below) the motion was again adjourned to February 26, 2016.

7. From December 13, 2015 to January 6, 2016 Druckmann vacationed in Florida. From January 13, 2016 to February 11, 2016 Druckmann vacationed to Singapore, Tokyo, Sydney, and Auckland, where she embarked on a cruise for two weeks. Druckmann stated on her cross-examination that she is employed as a travel agent.

8. Through exercising the *Mareva* Order the Receiver has discovered that Druckmann has used the funds in the Stern Account to pay her personal expenses. She also diverted $550,000.00 from the Stern Account to non registered mutual funds in her name personally.

. . .

13. Druckmann has acknowledged that she has no entitlement to the monies held in her non registered mutual fund accounts. She has acknowledged that she has no entitlement to the money held in the Stern Account.

6 Jean-Jacques Myara ("Myara") has applied for intervenor status on this motion. He claims that the HST Funds belong to him. He bases his claim on the following facts that are set out at paragraphs 5-26 of his factum:

5. Myara has known Tali [Revital] for many years. He was formally a business partner of her late father, Mr. Wolfin. They were business partners and very close friends.

6. Tali is Johny Druckmann's spouse. Johny is the principal of the debtor corporations currently under receivership.

7. The Stern Account belongs to Sigal Stern. Sigal is Tali's sister and Johny's sister-in-law.

8. Tali and Sigal are like sisters to Myara.

9. The Stern Account was administered by Tali under a Power of Attorney granted to her by Sigal.

10. In or about 2003 Myara was approached by Johny inquiring whether Myara would be interested in investing in what

would become the Pavilion Sports Club and Ice Center. The investment was treated as a loan but it was not papered as such seeing as Myara was extremely close with Tali's father and considered Tali as a sister. At the time Myara did not see a need to reduce the loan to writing.

11. Myara's loans were recorded internally on the ledger of "Aventura Properties Inc." notwithstanding that the said corporation is not one of the Debtor Corporations. The aggregate amount that was recorded in the Quickbooks of "Aventura Properties Inc." was $1,241,290.01, exclusive of interest.

12. There is an entry stating the sum of $1,241,290.01 was an "investment returned to Myara". This is not so. Myara contacted Johny to inquire what this entry was about and was advised by him that at or about the same time the corporations were applying for financing with the Business Development Bank of Canada, the accounting firm Deloitte attended at the corporations' premises to conduct an audit. Deloitte advised Johny that it could not reflect a loan on the books and records in circumstances where there was no paper to substantiate the same. An internal decision was made by Johny in consultation with the auditors to indicate that the $1,241,290.01 balance owing to Myara was in fact "returned".

13. Myara, however, did not receive the sum of $1,241,290.01 on or about January 23, 2007 or at any time subsequent thereto.

14. Mr. Henry Karl is the former Office Manager and internal auditor of the Debtor Corporations. He maintained the books and records and delivered an affidavit deposing that, *inter alia*:

(a) When the books of Aventura II Properties Inc. were established on Quickbooks, the name of the corporation inadvertently omitted the Roman numeral "II". This was never corrected;

(b) The books and records where "Aventura Properties Inc." is reflected as the corporate entity are indeed the books and records of Aventura II. They are one and the same;

(c) There are no separate books and records for Aventura II.

15. Mr. Karl made a copy of the Quickbooks files for all of the Debtor Corporations immediately prior to the Receiver taking possession of them and has produced copies of various statements and ledgers from the files. These documents clearly reflect *expenses of Aventura II* notwithstanding reference to "Aventura Properties Inc." at the top of each page. Expenses such as hydro and payment of the loans to Duca, BDC and ROI are reflected. These payments have nothing to do with "Aventura Properties Inc."

16. The Receiver has been unable to produce copies of any and all records it has to suggest that Myara was paid the $1,241,290.01. This is because such evidence does not exist. The notation of the debt having been repaid to Myara was nothing more than an internal allocation done for auditing/fmancing purposes.

The $250,000 Loan:

17. Johny requested that Myara advance an additional $250,000.00 to the company on the promise that interest would be paid at 8% per annum on a monthly basis. On or about August 11, 2009 Myara advanced an additional $250,000.00 to the company which loan was booked internally by the company as a loan to "S. Stern".

18. Interest only payments were made on account of this debt as reflected in the "Transaction Detailed by Account" ledger produced as Exhibit "G" to the Myara Affidavit.

Demand for payment:

19. In or about early 2012 Myara wanted his money back. Johny and the Debtor Corporations did not have the money to pay Myara back at that time. Johny advised Myara that he was expecting a CRA refund to the tune of approximately $1,500,000.00 and that he was looking to pledge same in favour of Duca Credit Union to obtain financing. The financing was for the purpose of paying Myara out.

20. Duca refused to grant the financing. Johny subsequently advised Myara that he would repay him from the proceeds of the CRA refund of $986,594.95. The refund cheque was paid into Pavilion Sports Clubs Inc.'s account on or about December 4, 2013 and then paid out to PAV Medical Inc. Myara has no interest in that corporation.

21. Myara has no knowledge as to why these funds were paid into Pav Medical Inc.'s account. While he was not aware that the funds were transferred from the PAV Medical Inc. account, it was he who requested that the CRA refund be paid into the Stern Account as part repayment of his loans. Myara asked the companies' internal auditor, Mr. Karl, to deposit monies into the Stern Account as Myara did not want the money to be deposited into his personal account for tax planning purposes.

22. After the monies were deposited into the Stern Account in August 2014, Myara asked Tali to issue a bank draft payable to "S. Stern" from that account. Myara asked her to prepare a bank draft and to await further instructions. He later decided that it would be more advantageous for him to have the monies invested.

23. On or about March 6, 2015 Myara advised Tali to re-deposit the draft. He then instructed her to invest $300,000.00 with TD Bank and an additional $250,000.00 with RBC which investments are reflected in the Receiver's Flow Chart of Funds appended as Exhibit "H" to the Myara Affidavit.

24. In consideration for Tali administering the Stern Account which in turn was being used to assist Myara, and having regard to the fact Tali advised Myara that she was in need of funds, Myara authorized Tali to issue the drafts and payments referenced in the Receiver's Flow Chart of Funds.

25. Tali agreed to reimburse Myara for all these amounts no later than when she sells her home located at 12 Malka Gate, Thornhill Ontario. The only exception is the $18,236.49 draft Myara authorized be issued to Volkswagen which he does not require be paid back.

26. Myara is not claiming a priority over any of the Debtor Corporations' secured creditors; rather, it is his position that the funds in the Stern Account and the investments Tali made on his behalf belong to him and do not form part of the Receivership Estate.

7 I do not accept Myara's version of events. It does not have an air of reality and it does not accord with common sense. I find that it is neither an accurate nor truthful account of Myara's entitlement to the HST Funds. Myara's "story" is simply another fraudulent attempt to divert the HST Funds away from the Receiver.

8 Further, even if I were to accept Myara's version of events, which I do not, he would be an unsecured creditor of a bankrupt company. His alleged interest in the HST Funds would be subordinate to the Receiver's interest in the HST Funds.

9 Accordingly, for these reasons, I dismiss Myara's claim to any interest in the HST Funds.

Issues

10 Revital opposes the Receiver's motion. She submits that the Receiver did not satisfy the test for obtaining a *Mareva* injunction against her. Further, she submits that the Receiver is not entitled to immediate repatriation of the HST Funds.

Mareva Injunction

11 Revital submits that the *Mareva* injunction should not have been issued because:

(a) The Receiver did not make full and frank disclosure to the Court;

(b) A *Mareva* injunction was not available against Revital who was a non-party and had not been sued by the Receiver; and

(c) The Receiver did not provide an undertaking as to damages in respect of the *Mareva* injunction.

12 The HST Refund was the property of PSCI. On January 23, 2014, Justice David Brown ordered the Debtors to advise the Monitor immediately upon the receipt of any refund from the CRA. Further he prohibited them from depositing or otherwise disbursing any refund received. The Debtors clearly breached his order by concealing and diverting the HST Refund. Revital was a party to the breach. I find that the Debtors' conduct in respect of the HST Refund, including the conduct of Revital, were deliberate and blatant acts of fraud designed to divert the HST Refund away from the Receiver.

13 The Receiver was acting under the authority of the Receivership Order when it applied for and obtained the *Mareva* Order against Revital, who was in breach of D. Brown J.'s order and the Receivership Order. Further, Revital was party to serious fraudulent conduct on the part of the Debtors in misappropriating the HST Refund.

14 The Receivership Order gave the Receiver broad powers with respect to the Debtors' assets. The Debtors' assets included the HST Refund. Paragraph 2 of the Receivership Order provides as follows:

2. THIS COURT ORDERS that pursuant to subsection 243(1) of the BIA and section 101 of the CJA, CBTL is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to businesses carried on by the Debtors, including all proceeds thereof (collectively, the "Property").

15 Paragraph 3 of the Receivership Order sets out the Receiver's powers which include the following:

RECEIVER'S POWERS

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

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

. . .

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

. . .

16 The Receivership Order also provides as follows:

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

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

17 The Receiver obtained the *Mareva* Order on the strength of the Receiver's Fifth Report to the Court dated December 1, 2015. Paragraph 65 of that Report provides as follows:

> **MAREVA ORDER**
>
> 65. The information obtained by the Receiver indicates that the principals of the Debtors, including Johny Druckmann and his daughter Jennifer Bitton, lied repeatedly to CB as Monitor and later as receiver and acted in a dishonest and secretive manner. Among other things:
>
> (a) The HST refund was misappropriated during the period of the Monitor's appointment and deposited into a newly opened bank account;
>
> (b) The proceeds were delivered to PAV Medical Inc.;
>
> (c) The proceeds were further diverted to an account of S. Stern, which was controlled by Johny Druckmann's wife, Revital Druckmann;
>
> (d) The Druckmanns misled the Monitor, alleging that the tax refund had not been received;
>
> (e) After the Order of Mr. Justice Hainey, Revital Druckmann authorized the issuance of the Bank Draft;
>
> (f) Following the appointment of CB as receiver, the Druckmanns' counsel misled CB, advising that the funds had been paid to "questionable people" - when in fact the Bank Draft was issued to S. Stern and remained in a suspense account at TD until March 6, 2015;
>
> (g) On March 6, 2015, the Bank Draft was deposited into an unknown account.

18 This evidence demonstrates blatant fraud on the part of the Debtors and Revital. It provides a sufficient basis for the issuance of the *Mareva* Order against Revital and, in my view, constitutes full and frank disclosure by the Receiver. I am satisfied that the Receiver was justified in obtaining the *Mareva* Order against Revital on December 4, 2015 on the strength of this evidence. Under the circumstances, and in particular because of the Receivership Order, I conclude that:

(a) The Receiver made full and frank disclosure to the Court on the application for the *Mareva* Order;

(b) It was not necessary for the Receiver to first commence an action against Revital before applying for and obtaining a *Mareva* Order against her; and

(c) Because the Receiver was operating under the authority of the Receivership Order it was not necessary for an undertaking as to damages to be provided by the Receiver.

19 I am satisfied, therefore, that the *Mareva* Order should be continued to permit the Receiver to prevent Revital from further dissipating or transferring assets that the Receiver is entitled to possess under the terms of the Receivership Order.

Repatriation of Funds

20 There is no dispute that the HST Funds originated from the HST Refund. Revital has no interest in the HST Funds. They are assets that are subject to the Receivership Order. The Receiver is, therefore, entitled to possession of the HST Funds under the terms of the Receivership Order.

21 For these reasons the Receiver's motion to repatriate the HST Funds is granted.

Conclusion

22 For the reasons outlined above, the Receiver's motion is granted. The *Mareva* injunction is extended until further order of the Court and the Receiver is entitled to immediate possession of the HST Funds.

Costs

23 The Receiver is entitled to its costs of this motion against Revital and Myara. I urge counsel to settle the terms and amounts of the costs to be awarded. If they are unable to do so, they may file brief written submissions of no more than three pages with costs outlines attached.

Motion granted.

End of Document

2016 ONCA 300
Ontario Court of Appeal

Business Development Bank of Canada v. Aventura II Properties Inc.

2016 CarswellOnt 8631, 2016 ONCA 300, 268 A.C.W.S. (3d) 424, 37 C.B.R. (6th) 219

Business Development Bank of Canada, Applicant and Aventura II Properties Inc., Pavilion Sports Clubs Inc., Pavilion Sports Ice Inc., Pavilion Sports Food and Beverage Inc. and Pavilion Aquatic Club Inc., Respondents

van Rensburg J.A., In Chambers

Heard: April 5, 2016
Judgment: April 22, 2016
Docket: CA M46240, M46279, M46303 (C61854)

Proceedings: refusing leave to appeal *Business Development Bank of Canada v. Aventura II Properties Inc.* (2016), 2016 CarswellOnt 3746, 2016 ONSC 1545, Hainey J. (Ont. S.C.J. [Commercial List])

Counsel: Sean N. Zeitz, for Revital Druckmann and Jean-Jacques Myara
Kelli Preston, for Receiver, Pollard & Associates Inc.
Catherine Francis, for DUCA Financial Services Credit Union Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

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

Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.c Actions by debtor in **receivership**
Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.d Actions against debtor in **receivership**
Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iv Miscellaneous

Headnote

Debtors and creditors --- Receivers — Actions involving receiver — Actions by debtor in **receivership**

Debtors were subject to court-appointed **receivership** — Receiver was granted ex parte Mareva order against RD, who was wife of debtors' principal — As **result** of obtaining Mareva order, receiver **traced** HST refund originally issued to one of debtors through account to two unregistered mutual funds, personal account and vehicle, all in name of RD — Receiver brought motion to extend Mareva order and repatriate funds — Motion was granted — RD brought motion for leave to appeal — Motion dismissed — There was no arguable merit to RD's proposed appeal — RD did not claim any interest in HST refund, funds in account or property or investments she acquired using such funds — RD could not appeal repatriation part of order, nor did she challenge substantive grounds on which Mareva order was made, rather RD's concerns were strictly procedural — Obligation on moving party to file factum in injunction motion applied in contested but not ex parte motions and motion judge's granting of Mareva order was based on application of settled principles and entirely justified by evidence — Motion judge was entitled to grant Mareva order without requiring undertaking as to damages and he did so for good reason — Suggestion that receiver had obligation to sue RD in separate action for recovery of funds before moving for Mareva injunction was rejected — Mareva order was granted on basis of overwhelming evidence.

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Miscellaneous

Debtors were subject to court-appointed **receivership** — Receiver was granted ex parte Mareva order against RD, who was wife of debtors' principal — As **result** of obtaining Mareva order, receiver **traced** HST refund originally issued to one of debtors through account to two unregistered mutual funds, personal account and vehicle, all in name of RD — Receiver brought motion to extend Mareva order and repatriate funds — Motion was granted — RD brought motion for leave to appeal — Motion dismissed — There was no arguable merit to RD's proposed appeal — RD did not claim any interest in HST refund, funds in account or property or investments she acquired using such funds — RD could not appeal repatriation part of order, nor did she challenge substantive grounds on which Mareva order was made, rather RD's concerns were strictly procedural — Obligation on moving party to file factum in injunction motion applied in contested but not ex parte motions and motion judge's granting of Mareva order was based on application of settled principles and entirely justified by evidence — Motion judge was entitled to grant Mareva order without requiring undertaking as to damages and he did so for good reason — Suggestion that receiver had obligation to sue RD in separate action for recovery of funds before moving for Mareva injunction was rejected — Mareva order was granted on basis of overwhelming evidence.

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Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 3408, 2001 CarswellOnt 3409, 281 N.R. 200, 156 O.A.C. 200 (note) (S.C.C.) — referred to

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 193(e) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 39.01(6) — referred to

R. 40.03 — considered

R. 40.04(1) — referred to

R. 56.01 — considered

R. 61.06(1)(a) — considered

R. 61.06(1)(b) — considered

MOTION by wife of debtors' principal for leave to appeal judgment reported at *Business Development Bank of Canada v. Aventura II Properties Inc.* (2016), 2016 ONSC 1545, 2016 CarswellOnt 3746 (Ont. S.C.J. [Commercial List]), extending

Mareva order and repatriating funds originally issued to debtor.

***van Rensburg J.A., In Chambers*:**

A. The Motions

1 There are three motions before the court, in respect of an appeal and proposed appeal of the order of Hainey J. dated March 4, 2016 made in the context of a court-appointed **receivership** (the "Order"). Pollard & Associates Inc. is the court-appointed receiver (the "Receiver") of the debtor companies (the "Debtors"). A **receivership** order was granted by McEwen J. on September 8, 2014 (the "**Receivership** Order").

2 The Order at issue on these motions extended a Mareva injunction against Revital Druckmann ("Revital"), who is the spouse of Johny Druckmann, the principal of the Debtors. The Order also directed that the Receiver is entitled to immediate possession or "repatriation" of certain monies, which are the proceeds of an HST refund paid to one of the Debtors and diverted in contravention of the **Receivership** Order. The Order dismissed the claim by Jean-Jacques Myara ("Myara") to an interest in the monies.

3 Revital seeks leave to appeal the Order under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Importantly, she asserts no claim of her own to the monies in question and does not oppose the repatriation of the funds. Rather, she challenges the procedure followed by the Receiver in obtaining, on an *ex parte* motion, the original interim Mareva injunction against her.

4 In his appeal, Myara claims that the monies are his and resists the repatriation of the funds. The Receiver and the secured creditor, DUCA Financial Services Credit Union Ltd. ("DUCA") each move for security for costs of Myara's appeal.

5 For the reasons that follow, I dismiss Revital's motion and grant an order for security for costs against Myara in favour of the Receiver and DUCA.

B. Brief History

6 The history of this matter is described in some detail in the reasons of the motion judge reported at 2016 ONSC 1545 (Ont. S.C.J. [Commercial List]). For the purpose of these motions, the relevant facts are as follows.

7 The Debtors and their representatives failed to advise a court-appointed monitor, contrary to its appointment order dated October 24, 2013 and a subsequent order dated January 23, 2014, that on December 4, 2013, one of the Debtors (Pavilion Sports Clubs Inc. or "PSCI") was issued an HST refund by the Canada Revenue Agency (the "CRA") in the sum of $986,594.96 (the "HST Refund").

8 In September 2014, pursuant to an order dated August 20, 2014, the monitor made inquiries of the CRA and learned that the HST Refund had been issued to the Debtors eight months earlier. The monitor was then appointed as receiver by order dated September 8, 2014 in a contested **receivership** application. After obtaining an order dated October 28, 2014 requiring the Toronto-Dominion Bank ("TD") to release certain information, the receiver **traced** the HST Refund from a new TD account opened in the name of PSCI into a TD account in the name of "S. Stern" (Revital's sister), over which Revital had power of attorney. That account had been debited by a bank draft issued to S. Stern in the amount of $1,016,007.50 on August 26, 2014.

9 On April 17, 2015, Pollard & Associates Inc. was substituted as receiver of the Debtors. The Receiver learned from TD that the bank draft had been cashed on March 6, 2015 and deposited into an unknown account.

10 On December 4, 2015, Hainey J. granted the Receiver's *ex parte* motion for an interim "freeze and disclosure" order against Revital (the "Mareva Order"). The Mareva Order provided that it would cease to have effect if Revital provided

security by paying the sum of $1,016,007.50 into court. The Mareva Order was later extended on consent to January 29, 2016.

11 As a **result** of obtaining the Mareva Order, the Receiver **traced** the HST Refund through the S. Stern account (the draft had in fact been held and then re-deposited into that account on March 6, 2015) to, among other things, two non-registered mutual fund accounts with TD and Royal Bank of Canada ("RBC"), a personal account at RBC, and a 2015 Volkswagen Jetta, all in the name of Revital. Some funds remained in the S. Stern account.

12 The Receiver brought a motion against Revital to repatriate the funds, also returnable on January 29, 2016. On January 26, 2016, counsel for Myara contacted the Receiver to advise that his client claimed an interest in the funds in the S. Stern account, and was seeking an adjournment.

13 The motion to extend the Mareva Order and to repatriate the funds was heard on February 26, 2016. Myara attended at the motion. He sought intervener status, claiming to be a "former lender" to the Debtors. He claimed a beneficial interest in all the funds that were in the S. Stern account and in the two mutual fund accounts. He claimed to be an investor in the Debtors and referred to "loan advancements" totalling $1,241,290.01 made between March 2003 and August 2005 to Aventura II Properties Inc.[1] Myara said that after he wanted his money back in 2012, Johny Druckmann had promised to pay him the HST Refund, and he had directed it to be deposited into the S. Stern account. He had directed Revital to issue a bank draft in the name of S. Stern in August 2014, and seven months later to make investments on his behalf in her name. He claimed that internal records showing that he had been paid back were inaccurate.

14 Of course, Revital's dealings with the HST Refund, that Myara claims occurred on his behalf, took place after the appointment of the monitor and in violation of court orders requiring the disclosure of the HST Refund. At no time prior to January 26, 2016 did anyone suggest that the HST Refund had been received but belonged to Myara. Revital's affidavit of December 28, 2015 stated that the mutual funds were her property.

15 On March 4, 2016, Hainey J. granted the Order. He found that the diversion of the HST Refund was in breach of the order dated January 23, 2014, which required the Debtors to advise the monitor immediately on the receipt of any refund from the CRA and prohibited the deposit or disbursement of any refund received. The Debtors breached the order and Revital was party to the breach. They engaged in deliberate and blatant acts of fraud. Hainey J. also found that Revital was in breach of the **Receivership** Order. He referred to the Receiver's powers under that order and para. 4, which required anyone with notice of the order to advise the Receiver of any property of the Debtors in their possession or control and to deliver such property to the Receiver at the Receiver's request. He rejected Revital's arguments that the Mareva Order was procedurally defective.

16 Hainey J. rejected Myara's claim, which he characterized as a fraudulent attempt to divert the HST Refund away from the Receiver. Even if Myara had a claim to the funds, it would be as an unsecured creditor of a bankrupt company, and his alleged interest would be subordinate to the Receiver's interest in the HST funds. He extended the Mareva Order until further order of the court, and granted the Receiver's motion to repatriate the funds.

C. Revital's Motion for Leave to Appeal

17 Revital seeks leave to appeal the Order under s. 193(e) of the *BIA*. Leave is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (Ont. C.A.), at para. 29.

18 The second part of the test requires the applicant to convince the court that there are "legitimately arguable points raised so as to create a realistic possibility of success on the appeal": *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at paras. 28-29; see also *Osztrovics (Trustee of) v. Osztrovics Farms Ltd.*, 2015 ONCA 463 (Ont. C.A.), at para. 11. Although this is a relatively low bar, I am not persuaded that there is any arguable merit to Revital's proposed appeal.

19 First, Revital does not claim any interest in the HST Refund, or in the funds in the S. Stern account, or, even now, the

property and investments she acquired using such funds. As such, she does not and cannot appeal the repatriation part of the Order. Nor does Revital challenge the substantive grounds on which the Mareva Order was made and extended. Rather, as her counsel acknowledges, Revital's concerns are strictly procedural.

20 In her proposed appeal to this court Revital raises the same procedural issues she argued before the motion judge. She asserts that the motion judge erred in continuing the Mareva injunction against her because there were procedural defects in the *ex parte* Mareva Order dated December 4, 2015.

21 Revital says that Hainey J. erred in granting the Order because (a) the Receiver had not made full and frank disclosure on the original *ex parte* motion; (b) he did not require an undertaking for damages from the moving party or grant an order dispensing with that requirement; and (c) the Order could not be made against her as a "third party" where there was no pending or intended proceeding against her.

22 I do not see any merit to any of Revital's arguments.

23 There is no question that the Receiver, in moving for the *ex parte* order, was required to make full and frank disclosure of material facts, and to inform the court of any material facts or points of law that favoured the other side: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(6); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.). Revital's complaint is not with respect to the *facts* that were put to the court; rather, she says that the Receiver ought to have delivered a factum and provided the court with legal authorities on Mareva injunctions, in particular referring to the need for an undertaking as to damages and a pending legal action against the target of the order.

24 First, the obligation on a moving party to file a factum in an injunction motion applies in contested, but not *ex parte*, motions: see r. 40.04(1). Second, the motion judge's granting of the Mareva Order was based on the application of settled principles and entirely justified by the evidence placed before him. And, as I will explain, the points that Revital raises were not in fact impediments to the relief granted by the court in this case.

25 As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed **receivership**. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel. 24), 4th ed. (Toronto: Canada Law Book, 2012), at para. 2.470. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the **receivership** order and to act honestly and in the best interests of all parties, including the debtor: *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), at para. 30, leave to appeal refused, [2001] S.C.C.A. No. 217 (S.C.C.). The Receiver has a duty to recover the property of the Debtors, including the HST Refund, and the order sought was in aid of powers granted to the Receiver by court order. The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.

26 Finally, Revital says that the Mareva Order should not have been issued against her because there was no existing or proposed action in which she was a defendant. She relies on cases stating that such orders cannot be made in the absence of a law suit or "litigation process" in which she could assert her defences: see e.g. *Standal Estate v. Swecan International Ltd.* (1989), 26 C.P.R. (3d) 421 (Fed. C.A.). Without commencing proceedings against her, Revital says it was impossible for the Receiver to meet the "strong *prima facie* case" requirement for a Mareva order.

27 Again, this argument has little merit, and I reject entirely the suggestion that the Receiver had an obligation to sue Revital in a separate action for recovery of the funds before moving for a Mareva injunction.

28 In the typical "Mareva" case, the moving party seeks security for a future judgment, where neither liability nor the amount of the judgment has been determined. Here, however, the order granted was contemplated by and expanded upon powers granted to the Receiver under the **Receivership** Order. Those powers authorize the Receiver to take possession and control of the Debtors' property and proceeds from such property, receive and collect all monies owing to the Debtors, and apply to the court for assistance in carrying out its duties: see especially paras. 2, 3(a), 3(f), 12 and 28 of the **Receivership**

Order. The Receiver had the duty and right to collect the HST Refund, and Revital was in breach of the **Receivership** Order when she placed it beyond the Receiver's reach and failed to disclose its existence. Indeed, the misappropriation of the HST Refund precipitated the appointment of the Receiver and part of the Receiver's mandate was to find and recover the HST Refund.

29 The Mareva Order was granted on the basis of overwhelming evidence. The Receiver not only had a strong *prima facie* case that Revital had misappropriated the HST Refund proceeds, but had directly **traced** the monies into the S. Stern account, the mutual fund accounts, Revital's personal RBC account, and the automobile. Revital admitted she had used or disposed of the remaining funds. Any requirement for a pending action is met by the fact that the motion was brought in the context of the **receivership** proceedings. This is the framework in which the Mareva Order was made, and contrary to Revital's assertions, this was the forum in which she could assert any available defences.

30 While this is sufficient to dispose of Revital's motion for leave to appeal, I also note that there is nothing in her proposed appeal that raises any issue of general importance to bankruptcy and insolvency practice or the administration of justice. Contrary to Revital's submission, the motion judge did not apply a new test for the order he granted, exempting receivers from the usual requirements for a Mareva injunction. The motion judge applied settled legal principles to the facts of the case that demanded the relief he granted.

D. Security for Costs Motions

31 The Receiver and DUCA are respondents to Myara's appeal and both move against him for security for costs of his appeal. Their motions are under r. 61.06(1)(a). The moving party must establish that there is "good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal."

32 The second part of the test is not in dispute. Myara lives in Florida and apparently owns a casino in Peru. There is no evidence that he has assets in Ontario.

33 The first part of the test involves a consideration of "[t]he apparent merits of the appeal, the presence or absence of an oblique motive for the launching of the appeal, and the appellant's conduct in the prosecution of the appeal" as well as other factors that may be specific to the case: *Schmidt v. Toronto Dominion Bank* (1995), 24 O.R. (3d) 1 (Ont. C.A.), at para. 18.

34 The moving parties rely on the fact that the motion judge found Myara's version of events had no air of reality and did not accord with common sense, and that his "story" was simply another fraudulent attempt to divert the HST Refund away from the Receiver. They say there is no merit to his appeal and that its purpose is to simply further delay the Receiver's recovery of the Debtors' property.[2]

35 Myara contends that his appeal has merit. He says that, because he was not cross-examined on his affidavit, his evidence about his claim to the HST Refund was uncontroverted and ought to have been believed by the motion judge. He argues that DUCA lacks standing to bring the motion for security for costs. Finally, he says that an order for security for costs should not be made against him because he was "forced into" the jurisdiction: see *Diversitel Communications Inc. v. Glacier Bay Inc.* (2004), 181 O.A.C. 6 (Ont. C.A.), at para. 8.

36 I am satisfied that each of the Receiver and DUCA is entitled to security for costs of Myara's appeal. The appeal appears to have little chance of success. Myara seeks to overturn the motion judge's factual findings, which were made on a compelling record with little, if anything, to support Myara's claim and much to contradict it.

37 The fact that DUCA is a respondent to Myara's appeal and that Myara seeks costs of the appeal and of his motion in the court below from DUCA, is sufficient to satisfy the standing requirement for its motion for security for costs.

38 Myara's reliance on the *Diversitel* case is misguided. In that case, this court considered a motion for security for costs of an appeal under r. 61.06(1)(b), which allows this court to make an order for security for costs where it appears that "an order for security for costs could be made against the appellant under rule 56.01". Interpreting the combined effect of those provisions, this court in *Diversitel* held that r. 61.06(1)(b) is confined to making an order for security for costs against an appellant who was the plaintiff or applicant in the initial proceeding. A respondent on appeal may not rely on rule 61.06(1)(b)

to obtain an order for security for costs against an appellant who was the defendant or respondent in the initial proceeding. Armstrong J.A. explained that "[t]he policy rationale is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others." See also *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2010 ONCA 137 (Ont. C.A. [In Chambers]).

39 Here, the motions are brought under r. 61.06(1)(a), which permits security for costs to be ordered against an appellant where there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal. Application of this subrule is not restricted to appeals by appellants who were plaintiffs or applicants in the initial proceedings. In any event, Myara was not "forced into" court by anyone. He brought himself into the jurisdiction to assert a claim to the HST Refund proceeds, by attempting to intervene in the motion below.

40 I fix the amount to be paid by Myara as security for the costs of his appeal in the sum of $15,000 for each of the Receiver and DUCA. This is a reasonable estimate of the party and party costs each of these respondents might expect to recover if successful in responding to Myara's appeal.

E. Disposition

41 For the foregoing reasons, Revital's motion for leave to appeal the Order is dismissed and the Receiver's and DUCA's motions for security for costs are granted. I order Myara to pay into court as security for the costs of his appeal the sum of $30,000 on or before May 2, 2015, failing which a judge of this court may dismiss the appeal on motion. No assets covered by the **Receivership** Order may be disposed of or pledged in order to post security for costs.

42 The Receiver and DUCA shall have their costs of responding to Revital's motion fixed in the sum of $10,000 each, inclusive of HST and disbursements. The Receiver and DUCA shall have their costs of their motions for security for costs against Myara fixed in the sum of $5,000 each, inclusive of HST and disbursements. These costs amounts are inclusive of the costs of the March 27, 2016 attendances before Roberts J.A.

Motion dismissed.

Footnotes

1 Myara explained that the loans were recorded on the ledger of "Aventura Properties Inc.", which is not one of the Debtors, but claimed that this corporation and Aventura II Properties Inc. are in fact the same corporate entity.

2 They also contend that Myara has no standing to appeal the repatriation order. That issue was directed by Roberts J.A. on consent to be heard by the panel hearing the appeal.

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CANADIAN IMPERIAL BANK OF COMMERCE	- and -	**1299746 ONTARIO INC. o/a COMPUQUEST2000 et al.**
Applicant		Respondents

Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

BRIEF OF AUTHORITIES OF THE MOVING PARTY

(Motion returnable January 25, 2017)

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