Court File No. CV-19-00628085-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

GRANT THORNTON LIMITED in its capacity as Court-appointed Receiver of MONEY GATE MORTGAGE INVESTMENT CORPORATION

Applicant

- and -

2450531 ONTARIO LIMITED

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

BOOK OF AUTHORITIES OF THE APPLICANT

(Re Appointment of a Receiver)
(Application returnable November 25, 2019)

November 20, 2019

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Maya Poliak (LSO No. 54100A)
Tel:(416) 218-1161
Fax:(416) 218-1844
E-mail: maya@chaitons.com

Lawyers for the Applicant

TO: **SERVICE LIST ATTACHED**

SERVICE LIST
(MGMIC – Euclid Property)

CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 **Harvey Chaiton** Tel: (416) 218-1129 Fax: (416) 218-1866 Email: Harvey@chaitons.com **Maya Poliak** Tel: (416) 218-1161 Fax: (416) 218-1844 Email: maya@chaitons.com **Saneea Tanvir** Tel: (416) 218-1128 Fax: (416) 218-1853 Email: stanvir@chaitons.com **Lawyers for the Receiver, Grant Thornton Limited**
GRANT THORNTON LIMITED 200 King Street West, 11th Floor, Box 11 Toronto, ON M5H 3T4 **Charles Skelton** Email: Charles.Skelton@ca.gt.com **Jonathan Krieger** Email: jonathan.krieger@ca.gt.com
BERKOW YOUD LEV-FARRELL DAS LLP 141 Adelaide Street West, Suite 400 Toronto, ON M5H 3L5 **Adam Wygodny** Tel: (416) 364-4900 x220 Fax: (416) 364-3865 Email: awygodny@byldlaw.com **Lawyers for 2450531 Ontario Limited**

Gowling WLG (Canada) LLP One Main Street West Hamilton, ON L8P 4Z5 **Amanda Jackson** Tel: 1 (905) 540-2479 Fax: 1 (905) 532-2504 Email: amanda.jackson@gowlingwlg.com **Lawyers for Home Trust Company**
YIGAL RIFKIND Barrister and Solicitor 5001 Yonge Street, Suite 301 Toronto, ON M2N 6P6 **Yigal Rifkind** Tel: (416) 222-4597 Fax: (647) 723-0546 Email: yigal@yigalrifkind.com Bradley George Email: bgeorge@yigalrifkind.com **Lawyers for Bita Ghaffari**
DEPARTMENT OF JUSTICE CANADA Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 **Diane Winters** Tel: (416) 973-3172 Fax: (416) 973-0810 Email: diane.winters@justice.gc.ca **Lawyers for Canada Revenue Agency**

MINISTRY OF FINANCE LEGAL SERVICES BRANCH
Michael Starr Building
33 King Street West, 6th Floor
P.O. Box 627, Station A
Oshawa, ON L1H 8H5

Kevin O'Hara
Tel: (905) 433-6934
Email: kevin.ohara@ontario.ca

ONTARIO SECURITIES COMMISSION
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Dihim Emami
Tel: (416) 596-4253
Email: DEmami@osc.gov.on.ca

Court File No. CV-19-00628085-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GRANT THORNTON LIMITED in its capacity as Court-appointed Receiver of MONEY GATE MORTGAGE INVESTMENT CORPORATION

Applicant

- and -

2450531 ONTARIO LIMITED

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

INDEX

1. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007
2. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CarswellOnt 2328 (SCJ)
3. *Bank of Nova Scotia v. D. G. Jewelry Inc.* 2002 CarswellOnt 3443 (S.C.J.)
4. *United Savings Credit Union* v. *F&R Brokers Inc.* 2003 CarswellBC 1084 (S.C. [In Chambers])
5. Marriott and Dunn, *Practice in Mortgage Remedies in Ontario* (5th ed.) (Toronto: Carswell, 2009)

TAB 1

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.C Conduct of parties

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Debtor was in business of leasing motor vehicles — Debtor was indebted to creditor bank; vehicles guaranteed indebtedness to $1.5 million — Creditor held security over assets of debtor including general security agreement under which it had right to appoint receiver of debtor or to apply to court for appointment of receiver — Under terms of wholesale leasing facility, total advances for used vehicle financing were not to exceed 30 percent of approved lease portfolio credit line — Creditor's account manager was informed that used car lease portfolio was 60 percent of leases financed by creditor, well in excess of 30 percent condition of loan — Creditor delivered demands for payment — Creditor applied for appointment of receiver — Application granted — Debtor relied on decision in which judge was critical of actions of bank in overstating its case and making unsupportable allegations of fraud — In case at bar there was no basis to refuse order sought because of alleged misconduct on part of creditor or its counsel — If anything, shoe was on other foot as factum filed on behalf of debtor was replete with allegations of false assertions on behalf of creditor, none of which were established — Cited case was relied upon in which it was held that where security instrument permits appointment of private receiver, extraordinary nature of remedy sought is less essential to inquiry — It was preferable to have court appointed receiver rather than privately appointed one as debtor stated that if private appointment was made it would litigate its right to do so.

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 Nova Scotia v. D.G. Jewelry Inc. (2002), 2002 CarswellOnt 3443, 38 C.B.R. (4th) 7 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 35 O.A.C. 305, 62 D.L.R. (4th) 277, 1989 CarswellOnt 191 (Ont. C.A.) — referred to

Royal Bank v. Boussoulas (2010), 2010 ONSC 4650, 2010 CarswellOnt 6332 (Ont. S.C.J.) — considered

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.) — distinguished

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Toronto Dominion Bank v. Pritchard (1997), 154 D.L.R. (4th) 141, 104 O.A.C. 373, 1997 CarswellOnt 4277 (Ont. Div. Ct.) — considered

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — not followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — referred to

s. 243(1) — considered

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

s. 101 — considered

APPLICATION by creditor for appointment of private receiver of debtor.

Newbould J.:

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act.*

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand.

Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed

leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

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

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

> 28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
>
> . . .
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security

permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts

receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

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
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

2002 CarswellOnt 3443
Ontario Superior Court of Justice

Bank of Nova Scotia v. D.G. Jewelry Inc.

2002 CarswellOnt 3443, [2002] O.J. No. 4000, [2002] O.T.C. 762, 117 A.C.W.S. (3d) 245, 38 C.B.R. (4th) 7

The Bank of Nova Scotia, Applicant and D.G. Jewelery Inc. et al, Respondents

Ground J.

Heard: October 9, 2002
Judgment: October 9, 2002
Oral reasons: October 9, 2002
Written reasons: October 15, 2002
Docket: 02-CL-4707

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy --- Interim receiver — Appointment
Creditor brought application pursuant to s. 47(1) of Bankruptcy and Insolvency Act for appointment of interim receiver with respect to property of debtor company — Application granted — Court-appointed interim receiver would be able to carry out its duties and obligations more effectively and efficiently than privately appointed receiver — Court-appointed receiver would be able to deal more effectively than private receiver with assets of debtor and its affiliates in United States and with any necessary proceedings under United States Bankruptcy Code — Creditor was not required to demonstrate that legal remedies available to it were defective or that appointment of interim receiver was necessary to preserve property from some danger which threatened it — Creditor was not required to demonstrate that there was actual and immediate danger of dissipation of assets — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47(1) — Bankruptcy Code, 11 U.S.C. 1982.
Table of Authorities
Cases considered by *Ground J.*:
Royal Bank v. Zutphen Brothers Construction Ltd., 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — considered

s. 47(1) — referred to
Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — referred to

APPLICATION by creditor for appointment of interim receiver pursuant to s. 47(1) of *Bankruptcy and Insolvency Act*.

***Ground J.* (orally):**

1 I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assests. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers Construction Ltd.*[1993 CarswellNS 22 (N.S. S.C.)] is not, in my view, the law of Ontario.

2 I accept the submission of Mr. MacNaughton that the objection based on the Notice of Application, not seeking an interlocutory order for the appointment of a Receiver is formalistic and could easily be remedied by amending the Notice of Application to seek some declaratory or other relief to create a lis as between the parties.

3 On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court-appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed. I believe that test is met in the case at bar. It appears that the role of the Receiver, in this case, will be to develop and carry out a reorganization or restructuring of the various companies and to bring a plan to this court for approval. This will permit all stakeholders to have an input into the structure and detail of such a plan. This is particularly important where there appears to be at least some possibility of some return to subsequent secured creditors, unsecured creditors or even shareholders. In addition, I am of the view that a court-appointed Receiver will be able to deal more effectively with the assets of D.G. Jewelry and its affiliates in the United States and, if necessary, to bring proceedings under the U.S. Bankruptcy Code than would a private Receiver.

4 With respect to KPMG being appointed as court-appointed Receiver, it is obvious that KPMG is well qualified to perform this function and, in view of its experience with and familiarity with the company, is the logical person to be appointed. Although I have some concerns about the same firm or related firms fulfilling various roles in CCAA/insolvency proceedings, the company in this case has consented to the appointment by the bank of KPMG as a private Receiver and it would seem illogical for the company now to object to KPMG being appointed a court-appointed Receiver with clear obligations to act in the interests of all stakeholders and the obligation to report regularly to this court and obtain the court's approval of its activities.

5 An order will issue, pursuant to Section 47(1) of the *Bankruptcy and Insolvency Act* and Section 101 of the *Courts of Justice Act* appointing KPMG Inc. as Interim Receiver of D.G. Jewelry Inc. I will ask counsel to submit and approve the form of order to me or arrange for a 9:30 a.m. appointment to settle the formal order. The appointment is effective October 9, 2002.

Application granted.

End of Document

TAB 4

2003 BCSC 640
British Columbia Supreme Court [In Chambers]

United Savings Credit Union v. F & R Brokers Inc.

2003 CarswellBC 1084, 2003 BCSC 640, [2003] B.C.J. No. 1057,
122 A.C.W.S. (3d) 162, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279

United Savings Credit Union (formerly United Civic Savings Credit Union) (PETITIONER) and F & R Brokers Inc., Everparks Ventures Incorporated, Moo Park, Sang Won Park, J.T.S. Mortgage Investments Corporation, LDS Tradehouse Inc., Fred Carline, Workers' Compensation Board, Her Majesty the Queen in right of the province of British Columbia, City of Vancouver (RESPONDENTS)

Burnyeat J.

Heard: December 9, 2002
Judgment: May 6, 2003
Docket: Vancouver H021226

Counsel: J.I. McLean for Petitioner
E.P. Morris for J.T.S. Mortgage Investments

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.C Mortgagee
Debtors and creditors
VII Receivers
VII.4 Order appointing receiver
Real property
VII Mortgages
VII.10 Sale
VII.10.d Judicial sale
VII.10.d.v Conduct of sale
VII.10.d.v.A Who may conduct sale

Headnote

Receivers --- Order appointing receiver

First mortgagee held mortgage against land and building of hotel and commenced foreclosure proceedings — Second mortgagee obtained order nisi in its own foreclosure proceedings, including order for conduct of sale — Hotel had limited number of rooms which were primarily rented on monthly basis and was likely to be subject to cease and desist order — First mortgagee brought application for appointment of receiver manager of hotel and for order permitting receiver manager to conduct sale of hotel — Application granted — Mortgagee is entitled to appointment of receiver or receiver manager as matter of course when mortgage is in default — Court should only exercise discretion not to make such appointment in rare occasions where mortgagor or subsequent charge holder can show compelling commercial or other reason why order ought not to be made.

Receivers --- Appointment — Application for appointment — Person entitled to make application — Mortgagee

First mortgagee held mortgage against land and building of hotel and commenced foreclosure proceedings — Second mortgagee obtained order nisi in its own foreclosure proceedings, including order for conduct of sale — Hotel had limited number of rooms which were primarily rented on monthly basis and was likely to be subject to cease and desist order — First mortgagee brought application for appointment of receiver manager of hotel and for order permitting receiver manager to conduct sale of hotel — Application granted — As s. 39 of Law and Equity Act makes no reference to enforcement of security where chattels and goodwill of company are charged, receiver manager may be appointed at instigation of mortgagee in foreclosure proceedings even though mortgagee does not have charge against chattels or goodwill of company — Although R. 47 of Rules of Court, 1990 only refers to appointment of "receiver", usual form of order under Rule permits management necessary to enforce mortgagee's right of possession under mortgage — Ability to manage hotel was only effective way for first mortgagor to realize on mortgage security and give effect to mortgage contract.

Mortgages --- Sale — Judicial sale — Conduct of sale — Who may conduct sale

First mortgagee was granted mortgage against land and building of hotel — Second mortgagee obtained order nisi in its own foreclosure proceedings, including order for conduct of sale — Hotel had limited number of rooms which were primarily rented on monthly basis — Second mortgagee exercised right under assignment of rents, and balance of rents were either not being paid or were being paid to current owners and not being expended for benefit of property — Several judgments had been registered against property and hotel was likely to be subject to cease and desist order — First mortgagee brought application for appointment of receiver manager of hotel and for order permitting receiver manager to conduct sale of hotel — Application granted — Receiver manager granted order for conduct of sale — Receiver manager would have best access to actual income and expense figures relied upon by prospective purchaser — Receiver manager to be paid on time basis rather than receive payment of negotiated real estate commission which would be insisted upon by agent employed by second mortgagee — Efforts of receiver manager would not be less effective than those of real estate agent.

Table of Authorities

Cases considered by *Burnyeat J.*:

Big Country Holdings Ltd. v. Bodale Holdings Ltd. (March 20, 1986), Doc. Vancouver H860054 (B.C. S.C.) — considered

Brooks v. Westshores Inn Ltd. (August 28, 1989), Doc. Kelowna 4453 (B.C. S.C. [In Chambers]) — considered

County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629 (Eng. C.A.) — referred to

Eaton Bay Trust Co. v. Motherlode Developments Ltd., 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247, 1984 CarswellBC 548 (B.C. S.C.) — followed

First Investors Corp. v. 237208 Alberta Ltd., 20 Sask. R. 335, 1982 CarswellSask 437 (Sask. Q.B.) — considered

Korion Investments Corp. v. Vancouver Trade Mart Inc., 1993 CarswellBC 2061 (B.C. S.C. [In Chambers]) — distinguished

Player v. Crompton & Co., [1914] 1 Ch. 954 (Eng. Ch. Div.) — considered

Pratchett v. Drew, [1924] 1 Ch. 280, [1923] All E.R. Rep. 685 (Eng. Ch. Div.) — referred to

Royal Trust Corp. of Canada v. Exeter Properties Ltd. (February 28, 1985), Doc. Vancouver H850260 (B.C. S.C. [In Chambers]) — followed

Salter v. Leas Hotel Co., [1902] 1 Ch. 332 (Eng. Ch. Div.) — referred to

Truman & Co. v. Redgrave (1881), 18 Ch. 547 (Eng. Ch. Div.) — considered

Whitley v. Challis, [1892] 1 Ch. 64 (Eng. Ex. Ch.) — referred to

Statutes considered:

Attorney-General Statutes Amendment Act, 1979, S.B.C. 1979, c. 2

Generally — referred to

Judicature Act, 1873 (36 & 37 Vict.), c. 66

Generally — considered

s. 25(8) — referred to

Judicature Act, 1879, S.B.C. 1879, c. 12

s. 3(8) — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

s. 39 — pursuant to

s. 39(1) — referred to

Laws Declaratory Act, R.S.B.C. 1960, c. 213

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 47 — pursuant to

R. 47(1) — referred to

APPLICATION by first mortgagee for appointment of receiver manager of hotel.

***Burnyeat J.*:**

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

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

3 J.T.S. obtained an order *nisi* in its own foreclosure proceedings. The redemption period in those proceedings will expire on January 17, 2003. On November 26, 2002, J.T.S. obtained an order for conduct of sale. J.T.S. contemplates listing the property at a listing price of 7% on the first $100,000 and 2-1/2% on the balance of the sale price over $100,000.

BACKGROUND

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

5 As well, there is a very real danger that the property will be subject to a cease and desist order from the City by virtue of problems associated with the property. There are a number of judgments which have been registered against the property so that it is unlikely that the owners have any equity which they will want to protect.

STATUTORY PROVISIONS

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

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

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

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

THE "USUAL" FORM OF ORDER

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

> 1. *[name of receiver]* is appointed as receiver *[and, where applicable add: without bond or security]* of the rents and revenues of the property at *address]* (the "Property") with power and liberty to do any or all of the following things:
>
> (a) to recover and enter forthwith into possession of the Property;
>
> (b) to collect, get in, and receive any and all rents, revenues, security deposits, and prepaid rents of, from, and collected with respect to the Property, including rents in arrears, and to enforce payment to the receiver of any such rents, revenues, security deposits, or prepaid rents or any part thereof at such time or times as the receiver may think fit and may take such proceedings as the receiver considers necessary or advisable;
>
> (c) to rent, re-rent, or enter into a lease or leases of the Property or any part thereof from time to time at such rentals and otherwise upon such terms as the receiver may consider necessary or advisable under the circumstances;
>
> (d) to take whatever steps the receiver may consider advisable for repairing and preserving the Property or any other part thereof, including any buildings and improvements thereon, but the receiver shall not be liable for waste;
>
> (e) to retain and employ some person or persons to assist in doing any of the things contemplated by this order and to assist generally in the receivership;
>
> (f) to apply at any time or times to this court for directions as to the discharge of any of its duties as receiver or for the determination of any matter arising out of the receivership;
>
> (g) to apply any money received by the receiver as rent or revenue of or from the Property in payment of the following items in the following order:
>
> (i) to the receiver in respect of the services as receiver a reasonable amount, either monthly or at such longer intervals as the receiver deems appropriate, which amount shall constitute an advance against the remuneration of the receiver when fixed;
>
> (ii) any costs, charges, and expenses incurred in respect of carrying on any of the foregoing activities, and all operating expenses relating to the Property;
>
> (iii) any charges for utilities or insurance premiums which relate to the Property;
>
> and the balance, if any, in accordance with the further order of this court;
>
> 2. any person or person in occupation of the Property or any part thereof attorn and become tenants of the receiver and pay to the receiver rents, arrears of rents, and accruing rents so long as the receiver shall continue in office;
>
> 3. the respondent, *[name of party in possession]*, forthwith deliver over to the Receiver all keys necessary to gain access to the Property or any part thereof and all books, documents, papers, and records of every kind and nature relating thereto;

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

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

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

DISCUSSION AND CASE AUTHORITIES: APPOINTMENT AS OF RIGHT?

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

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

> I think the right to the appointment of a Receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security has become realizable as one of the steps in such realization. (at p. 967)

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

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

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

13 Of similar result is the decision in *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]). However, the decision of Huddart, J., as she then was, in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (B.C. S.C. [In Chambers]) is often cited as authority for the proposition that the appointment of a Receiver or Receiver Manager will not be made as a matter of course.

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

> ***Korion*** rests its application on the usual practice and its right to enjoy the profits from its property. ... .
>
> The willingness to appoint a receiver in a mortgage action, even post-judgment, seems to derive not so much from an analysis of the facts of an individual situation as from an accepted view of commercial reality. Kerr on Receivers, supra,

says (at 6) that "[w]here there is an alternative legal remedy, as in the case of legal mortgages, the court has a discretion, but the appointment is now frequently made without proof of jeopardy" ... .

Kerr suggests that "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled.

It is on such a rule that ***Korion*** relies. However, it could not provide any B.C. authority for a presumption in favour of the appointment of a receiver in all mortgage foreclosure actions. In *Citibank Canada v. Calgary Auto Centre* (1909), 58 D.L.R. (4th) 447 (Alta. Q.B.) McDonald J. adopted as correct this approach from Price and Trussler, Mortgage Actions in Alberta, (1985) at p. 309:

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

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

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

16 The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

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

18 In the case at bar, the second mortgagee, J.T.S. has shown no good reason why a Receiver Manager should not be appointed. The situation which would allow the owners of this hotel to continue to collect some of the income available should

be unacceptable to all charge holders. Accordingly, it is appropriate that a Receiver or a Receiver Manager be appointed. The second question which arises is whether United should be entitled to the appointment of a Receiver Manager even though United has no charge against either the chattels which are used in the hotel operation or the goodwill of the company that owns the hotel.

DISCUSSION AND CASE AUTHORITIES: RECEIVER OR RECEIVER MANAGER?

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

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

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

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

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

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

23 The addition of the words "receiver manager" in what was formerly known as the ***Laws Declaratory Act*** was a clear indication by the Legislature that the person appointed could not only receive rents and profits but could also manage. Provisions in the ***Law and Equity Act*** and formerly the ***Laws Declaratory Act*** are statutory declarations of what the law is and usually represent changes thought by the Legislature to be appropriate. I am satisfied that that was what was intended by the Legislature in 1979.

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

25 In the case of a hotel or an apartment, these "usual" powers are required so that the ability to collect rents and profits is effective. In the case at bar, the ability to manage the hotel is the only effective way for United to realize on its mortgage security and give effect to the contract agreed to by the mortgagor.

26 The English authorities are consistent in establishing the proposition that a receiver of the rents and profits of a property appointed on the application of a mortgagee would also not be appointed manager of the business unless the business or its good will is expressly or impliedly included in the mortgage security: *Whitley v. Challis*, [1892] 1 Ch. 64 (Eng. Ex. Ch.); *Truman & Co. v. Redgrave* (1881), 18 Ch. 547 (Eng. Ch. Div.); *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal*

Colliery Co., [1895] 1 Ch. 629 (Eng. C.A.); and *Salter v. Leas Hotel Co.*, [1902] 1 Ch. 332 (Eng. Ch. Div.). However, these statements must be tempered by the fact that the British Columbia, Manitoba and Ontario legislation contains the words "or Receiver Manager" whereas the English legislation does not. As well, the ability of the Court in England to appoint a Receiver Manager is subject to the caveat that such an appointment can be made if it can be implied that a charge on the business or its good will is included in the mortgage security.

27 *Whitley* has been applied in Canada in *Big Country Holdings Ltd. v. Bodale Holdings Ltd.* ((March 20, 1986),), Doc. Vancouver H860054 (B.C. S.C.), unreported, and *First Investors Corp. v. 237208 Alberta Ltd.* (1982), 20 Sask. R. 335 (Sask. Q.B.). In *Big Country*, Leggatt, L.J.S.C., as he then was, refused to appoint a Receiver Manager where the mortgagee had only a chattel mortgage, an agreement for sale and where the chattel mortgage charged the "goods, personal chattels and personal property" of the mortgagor. However, I am satisfied that this decision must be limited in that Leggatt, L.J.S.C. found that: "... the charge does not cover good will and the chattels covered do not of necessity imply the business is included." The mortgage in question makes specific and repeated reference to chattels only and no where indicates that good will is covered by the charge." In *First Investors*, Walker, J. refused the appointment of a Receiver Manager of a hotel and tavern where there was no chattel mortgage and there was no mention that the mortgage covered the business or good will of the mortgagor.

28 However, a Receiver Manager of a hotel business was appointed in *Brooks v. Westshores Inn Ltd.*, [1989] B.C.J. No. 1633 (B.C. S.C. [In Chambers]) despite the fact that the mortgage in question did not include a charge against the chattels and the good will of the mortgagor. In appointing a Receiver Manager, Houghton, L.J.S.C., as he then was, stated:

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

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

30 I am satisfied that the agreement by the mortgagor to allow any receiver appointed to carry on the business that the mortgagor conducted on the lands is sufficient evidence of an intention the mortgage charge would also charge the business and the good will of the mortgagor so as to permit the appointment of a Receiver Manager even though United did not have a General Security Agreement.

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

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

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

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

34 Second, the Receiver Manager will be charging on a time basis whereas any agent employed by J.T.S. will insist upon the payment of a negotiated real estate commission. Even if the "usual" rate of 7% on the first $100,000 and 2-1/2% on the balance

of any sale price above $100,000 can be reduced by negotiation, I am satisfied that any negotiated fee would be far in excess of the fees charged on a time basis for the Receiver Manager to market the property. Third, I cannot be satisfied that the efforts of the Receiver Manager will be any less effective than any real estate agent that might be retained by J.T.S. In the circumstances of this case, I am satisfied that the Receiver Manager should be granted the ability to offer the property for sale.

Application granted.

End of Document

TAB 5

CARSWELL

MARRIOTT AND DUNN

PRACTICE IN MORTGAGE REMEDIES IN ONTARIO

The Practice in Mortgage Actions,
Power of Sale and Receiverships

FIFTH EDITION

VOLUME 2

by Gowling Lafleur Henderson LLP

Recovery Services Group

Former Authors

G. William Dunn

Master of the Ontario Court of Justice (General Division)

and Wayne Scarisbrick Gray

Barrister & Solicitor
Oakville

THOMSON REUTERS®

Chapter 54

COURT APPOINTMENTS

§54.1 Generally

Under English common law the courts had no jurisdiction to appoint a receiver or manager, however, a mortgagee could seek the appointment of a receiver and manager as an equitable remedy available in the Court of Chancery: *Hopkins v. Worcester* (1861), L.R. 6 Eq. 437 at 447. An example of this is where the mortgagee's claim against the property is merely by way of an equitable mortgage or charge on the property: see *Davis v. Duke of Marlborough*, [1812-23] All E.R. 13. The Eng lish common law, as received into Ontario, prevailed until the common law courts and the Court of Chancery were unified in 1881 pursuant to the Judicature Act, 1881, 44 Vic., c. 5, s. 3. The Superior Court of Justice and Court of Appeal administer the rules of equity and common law concurrently: Courts of Justice Act ("CJA"), ss. 96(1), (3).

The Superior Court of Justice may appoint a receiver or receiver and manager by an interlocutory order "*where it appears to a judge of the court to be just and convenient to do so*": CJA, s. 101(1), containing such terms as are considered just: CJA, s. 101(2).

Where no provisions for the appointment of a receiver or receiver and manager are found in the mortgage, the mortgage is an equitable mortgage, or the mortgagee prefers to seek a court appointed receiver, the mortgagee may make application to the Superior Court of Justice pursuant to CJA, s. 101(1) and R. 41 of the Rules of Civil Procedure. Notwithstanding the apparent limitation in the type of order which the Superior Court of Justice may issue pursuant to CJA, s.101(1), the order appointing a receiver or receiver and manager is interlocutory: see *McCart v. McCart*, [1946] O.R. 729 (C.A.) and *Wardlaw v. Whittaker* (1970), 1 O.R. 86 (C.A.). The court must be satisfied that the appointment will be just and convenient: see *Tillet v. Nixon* (1883), 35 Ch. D. 238; *Pease v. Fletcher* (1875), 1 Ch.D. 273; *County of Gloucester Bank v. Rudry Merthyr Steam & Coal Colliery Co.* (1895), 1 Ch. 629 at p. 625; *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (H.C.).

For a review of the law related to the appointment of a receiver by an equitable mortgagee, see *Falconbridge on Mortgages*, 4th ed., Chapter 36.

The foundation test which must be met if the appointment is to be made, subject to any statutory pre-conditions as may apply: see §53.4, is that it be "just and convenient" to do so. The application of the test necessitates the application of the rules of equity. There are 17 essential factors which may be considered by the court in considering the application:

1. If the mortgagee has complied with statutory pre-conditions, other conditions precedent or grace periods granted by the mortgagee have not expired: *Mercantile Bank of Canada v. Nelco Corp.* (1982), 47 C.B.R. (N.S.) 165 (Alta. Q.B.).

2. If there are triable issues between the mortgagee and mortgagor with respect to mortgage loan: see *T.D. Bank v. First Canada Land Corp.* (1989), 77 C.B.R. (N.S.) 189 (B.C. S.C.).

3. Whether irreparable harm may be caused if an order is not made: see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (H.C.), followed in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1981), 33 O.R. (2d) 97 (Gen. Div.); *T.D. Bank v. First Canada Land Corp.*, above.

4. The risk to the mortgagee: see *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.).

5. The nature of the mortgaged property: *Whitworth v. Whyddon* (1859), 2 Mac. & G. 52; *T.D. Bank v. First Canada Land Corp.*, above; *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.).

6. The rights of the parties to the mortgaged property: see *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (H.C.); *Third Generation Realty Ltd. v. Twigg Holdings Ltd.*, above.

7. If there is threatened or actual waste being committed to the mortgaged property: see *Wells, Re*, (1890), 45 Ch. D. 569; *Stevens, Re*, [1898] 1 Ch. 162 at p. 173; *Baird v. Walker* (1890), 35 S.J. 1 Ch. 325.

8. The preservation and protection of the property until there has been a judicial resolution: see *MacMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148 (Eng. Ch.); *Cummins v. Perkins*, [1899] 1 Ch. 16; *Hart v. Emelkirk Ltd.*, [1982] 3 All E.R. 15 (Eng. Ch. Div.); *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186 (S.C.O.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301 (Ont. Gen. Div.); *Confederation Life Insurance Co. v. Double Y Holdings Inc.* (September 3, 1991), Doc. 91-CQ-72 (Ont. Gen. Div.); *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Co.* (1978), 23 N.B.R. (2d) 261 (N.B. C.A.);

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 53 C.B.R. (N.S.) 18 (Sask. Q.B.).

9. The balance of convenience to the parties: see *North American Trust Co. v. Fontana Place Partnership* (1993), 147 A.R. 170 (Alta. Master).

10. That the mortgagee has the right to or has appointed a receiver or receiver and manager under the mortgage or debenture: see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (H.C.); *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.); *C.I.B.C. v. Quesnel Machinery Ltd.* (1983), 46 C.B.R. (N.S.) 50 (B.C. S.C.); *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.* (1992), 1 D.R.P.L. 160 (Ont. Gen. Div.).

11. The enforcement of the mortgagee's rights under the mortgage or debenture where difficulties with the mortgagor or other creditors is anticipated: see *Truman & Co. v. Redgrave* (1881), 18 Ch. D. 547 (Eng. Ch.); *Cardinal Insurance Co. v. Mendez Holdings (Canada) Ltd.* (1984), 26 A.C.W.S. (2d) 190 (Ont. H.C.); *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315 (Ont. Gen. Div.); *Royal Bank v. White Cross Properties Ltd.*, above.

12. If the appointment is necessary to enable the mortgagee or a privately appointed receiver to carry out the mortgagee's or receiver's duties and obligations more effectively: see *Tillet v. Nixon* (1883), 25 Ch. D. 238; *County of Gloucester Bank v. Rudry Merthyr, et., Colliery Co.*, [1895] 1 Ch. 629 (Eng. C.A.); *Bank of Nova Scotia v. Freure Village on Clair Creek*, above; *Royal Bank v. White Cross Properties Ltd.*, above; *Uvalde Investment Co. v. 754223 Ontario Ltd.*, above; *Macotta Co. of Canada v. Condor Metal Fabricators Ltd.*, above; *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.).

13. The effect of the appointment of a receiver on the parties: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (H.C.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.).

14. The conduct or *bona fides* of the parties: see *Baxter v. West* (1858), 28 L.J.Ch. 169, *cf Wood v. Hitchings* (1840), 2 Beav. 289; *Prowest Fabrications Ltd. v. R.* (1983), 50 C.B.R. (N.S.) 102 (Sask. Q.B.); *Royal Bank v. Chongsim Investments Ltd.*, above; *539618 Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd.* (1987), 22 C.P.C. (2d) 195 (H.C.); application to vary refused (1987), 65 C.B.R. (N.S.) 295 (H.C.).

15. The length of time that the receiver or receiver and manager will be required.

16. The costs of the receivership: see *Kotler v. Bayshore Investments Ltd.* (1982), 41 C.B.R. (N.S.) 223 (B.C. S.C.), reversed (1982), 42 C.B.R. (N.S.) 127 (B.C. C.A.); *Quesnel Machinery Ltd.* (1983), 47 C.B.R. (N.S.) 108 (B.C. S.C.); *Rea v. Rea Enterprises Ltd.* (1993), 44 A.C.W.S. (3d) 503 (B.C. Master); *King (Township) v. Rolex Equipment Co.* (1992), 8 O.R. (3d) 457 at 462 (Gen. Div.).

17. If the appointment will maximize the realization for the parties.

The relief is extraordinary by its nature and must be granted with caution: see *Fisher Investments Ltd. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.); *C.I.B.C. v. Jack* (1990), 20 A.C.W.S. (3d) 416 (Div. Ct.); *Bank of Nova Scotia v. Freure Village on Clair Creek*, above; *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Gen. Div.); *Macotta Co. of Canada v. Condor Metal Fabricators Ltd.* (1979), 35 C.B.R. (N.S.) 144 (Alta. Q.B.).

Also see *Bennett on Receivers*, 2nd ed., pp. 131 to 140, inclusive, where the author lists 17 factors and surveys the situations where the court will and will not appoint a receiver or receiver and manager.

The general rules of receivership and the exceptions to the rules set out in *Clark on Receiverships*, 3rd ed., 1959, Vol. 1, s. 22, p. 25 and Vol. 2, ss. 638, 640, pp. 1070-71, 1078 were accepted by the Court of Appeal in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.). The general rule is that mortgaged property subject to the receivership cannot be used in such a way as to subject the mortgagee to the expenses of the receivership and a court has no power to authorize expenses for the mortgaged property at the expense of a prior mortgagee without the express consent of the prior mortgagee: *King (Township) v. Rolex Equipment Co.* (1992), 8 O.R. (3d) 457 at 462 (Gen. Div.). However, where a mortgagee's actions amount to acquiescence to the appointment of the receiver, the receiver may have priority for expenses properly incurred: see *DBDC Spadina Ltd. v. Walton*, 2015 ONSC 870, 2015 CarswellOnt 1692 (S.C.J. [Commercial List]) where the mortgagee was found to have taken the position that it wanted the court appointed manager to continue administering the property, it knew the manager was incurring fees in reliance on the priority granted to it pursuant to the order under which it was appointed, and where the appointment was necessary to preserve and realize upon the property.

A court appointed receiver is an officer of the court: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (Ontario P.C.); *Ostrander v. Niagara Helicopters Ltd.* (1974), 1 O.R. (2d) 281 (H.C.). *Toronto-Dominion Bank v. W-32 Corp. Ltd.* (1983), 5 W.W.R. 476 (Alta. Q.B.), and not the party who sought the appointment: *Braid Builders v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305 (Man. C.A.). In *Parsons v. Sovereign Bank of Canada*, above, at p. 167, on appeal from the Supreme Court of Canada, Viscount Haldane defined the role of the receiver and manager as follows:

> A receiver and manager ... is the agent neither of the debenture-holders ... nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him ...

In the leading Canadian decision of *Ostrander v. Niagara Helicopters Ltd.*, above, at p. 286, the difference between a privately and court appointed receiver was stated as follows:

> A very clear distinction must be drawn between the duties and obligations of a receiver-manager ... appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the di-

(Continued on page 54-5)

rections given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest.

A court appointed receiver and manager, although appointed on the motion of the mortgagee, is not the mortgagee's agent and does not take direction from the mortgagee in fulfilling the receiver and manager's prescribed duties.

§54.2 Right to an Appointment

A court appointed receiver and manager may be sought where there is no provision for a private appointment in the mortgage or debenture, or where it becomes necessary because the privately appointed receiver and manager is facing difficulties getting possession of the mortgaged property at the instance of the mortgagor or subordinate creditors, obtaining records of the mortgagor's business being conducted on or in respect of the mortgaged property or where there is a multiplicity of creditors seeking to realize on their respective security at the same time: see *Bennett on Receiverships*, 2nd ed., p. 23.

A "receiver" is the same as a "receiver and manager" for the purposes of Rr. 41.02 to 41.06, inclusive: R. 41.01. The application must be made to a judge, a master having no jurisdiction to hear such an application: see *Sanden v. Price*, [1973] 1 O.R. 55 (H.C.); CJA, s. 101(1); R. 41.02. The order issued pursuant to R.41 shall set out and provide for the matters specified in R. 41.03 and, where required, the order may refer the conduct of all or part of the receivership in accordance with R. 54.

A mortgagee in possession has a *prima facia* right to have a receiver appointed if the mortgage is in arrears: *Aikens v. Blain* (1867), 13 Gr. 646, and to have the mortgagor deliver up possession of the mortgaged property to the receiver: *Pratchett v. Drew*, [1921] 1 Ch. 280 (Eng. Ch. Div.). Nevertheless, a mortgagee does not have an inherent right to have a receiver appointed if the purpose is simply to relieve the mortgagee from the consequences of being a mortgagee in possession: *Re Prytherch; Prytherch v. Williams* (1889), 42 Ch.D. 590; *National Trust Co. Ltd. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (H.C.); *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.). A prior ranking mortgagee may should be able to seek to have a receiver appointed and in so doing, have the receivership of a subsequent ranking mortgagee terminated as it relates to the mortgaged property: see *Fairweather v. Metropolitan Amalgamated Estates Ltd.*, [1912] 2 Ch. 497 (Eng. C.A.). Any appointment of receiver at the instance of a subsequent mortgagee should be subject to the rights of a senior mortgage, particularly where the senior mortgagee has not been mad a party to the proceedings: see *Underhay v. Read* (1887), 20 Q.B.D. 209 (Eng. C.A.); *Berney v. Sewell* (1820), 37 E.R. 515 (Eng.); *Aikens v. Blain,* above.

Generally, the court will not appoint a receiver at the instance of a subsequent mortgagee where the prior legal mortgagee is in possession and amounts are still due to the prior mortgagee under the mortgagee: see *Richards v. Gould* (1827), 1 Mol. 22. A subsequent mortgagee seeking an appointment must either have the prior mortgagee's consent or be able to demonstrate to the court that there has been misconduct on the part of the prior mortgagee which amounts to gross mismanagement: see *Rowe*

GRANT THORNTON LIMITED, et. al. -and- 2450531 ONTARIO LIMITED

Applicant Respondent

Court File No. CV-19-00628085-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Maya Poliak (54100A)
Tel: (416) 218-1161
Fax: (416) 218-1844

Lawyers for the Court-appointed Receiver, Grant Thornton Limited