Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND
D&S RAILWAY CONSTRUCTION INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 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

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

ROGER JAIPARGAS
Tel: (416) 367-6266
Fax: (416) 361-7067
Email: rjaipargas@blg.com
LSUC# 43275C

ANDREW HODHOD
Tel: (416) 367-6290
Fax: (416) 361-2799
Email: ahodhod@blg.com
LSUC# 66314K

Lawyers for the Applicant

INDEX

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 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

TAB 1

2001 CarswellOnt 1019
Ontario Court of Appeal

Ma, Re

2001 CarswellOnt 1019, [2001] O.J. No. 1189, 104 A.C.W.S. (3d) 261, 143 O.A.C. 52, 24 C.B.R. (4th) 68

In the Matter of the Bankruptcy of James Hoi-Pang Ma, of the City of Mississauga, in the Regional Municipality of Peel, in the Province of Ontario

James Hoi-Pang Ma (Bankrupt (Appellant)) and
Toronto Dominion Bank (Applicant (Respondent))

Abella, Charron, Sharpe JJ.A.

Judgment: March 23, 2001
Judgment: April 4, 2001 (Written Reasons)
Docket: CA C34958

Proceedings: affirming (2000), 20 C.B.R. (4th) 267 (Ont. Bktcy.); affirming (2000), 19 C.B.R. (4th) 117 (Ont. Bktcy.)

Counsel: *Chi-Kun Shi*, for Appellant
Bruce S. Batist, for Respondent
William J. Meyer, Q.C., for Trustee in Bankruptcy

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

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

Headnote

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Creditor of undischarged bankrupt brought motion for order lifting stay of proceedings to permit creditor to commence and continue fraudulent misrepresentation action against bankrupt — Creditor's motion was granted — Deputy registrar held creditor's proposed action was type of claim that should be allowed to proceed — Deputy registrar held examination of merits of claim was not appropriate — Bankrupt's appeal was dismissed — Presence in proposed action of defendants other than bankrupt was sufficient prejudice to justify lifting stay — Bankrupt appealed — Appeal dismissed — Reviewing judge correctly concluded deputy registrar was correct in finding sufficient prejudice to creditor to justify lifting stay — No requirement existed to establish prima facie case — Onus was on creditor to establish basis for order lifting automatic stay under s. 69.4 of Bankruptcy and Insolvency Act — Deputy registrar's finding accorded with s. 69.4 of Act and was supported by record — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

Table of Authorities

Cases considered:

Arrojo Investments v. Cardamone (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) — referred to

Bowles v. Barber (1985), 36 Man. R. (2d) 209, 60 C.B.R. (N.S.) 311 (Man. C.A.) — not followed

Francisco, Re (1995), 19 C.L.R. (2d) 146, 32 C.B.R. (3d) 29 (Ont. Bktcy.) — applied

Francisco, Re (1996), 40 C.B.R. (3d) 77 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 69.4 [rep. & sub. 1997, c. 12, s. 65(1)] — considered

APPEAL by bankrupt from order lifting stay of proceedings against bankrupt, 2000 CarswellOnt 4416, 20 C.B.R. (4th) 267 (Ont. Bktcy.).

Endorsement. *Per curiam*:

1 The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. (N.S.) 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More

importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.), at 29-30, a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

4 In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

Appeal dismissed.

End of Document

TAB 2

1994 CarswellOnt 255
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Cumberland Trading Inc., Re

1994 CarswellOnt 255, [1994] O.J. No. 132, 23 C.B.R. (3d) 225, 45 A.C.W.S. (3d) 199

Re proposal of CUMBERLAND TRADING INC.

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

Subject: Corporate and Commercial; Insolvency

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

Headnote
Bankruptcy --- Proposal — General

Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.

A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.

The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.

Held:

The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.

The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Table of Authorities

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *referred to*

Statutes considered:

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

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Motions by secured creditor for declaration that stay provisions of *Bankruptcy and Insolvency Act* no longer operated to prevent it from enforcing its security, for declaration that 30-day period to file proposal had terminated and for order allowing substitution of trustee.

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last

moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland

would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination.* In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.
>
> [emphasis added]

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim

receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

TAB 3

2006 CarswellOnt 7735
Ontario Superior Court of Justice

Maxium Financial Services Inc. v. Corporate Cars Ltd. Partnership

2006 CarswellOnt 7735, [2006] O.J. No. 4878,
153 A.C.W.S. (3d) 781, 29 C.B.R. (5th) 110

IN THE MATTER OF the PROPOSAL OF CORPORATE CARS LIMITED PARTNERSHIP and TRACEMOUNT/GLOJACK LEASING LTD.

AND IN THE MATTER OF APPLICATION under s. 67 of the Personal Property Security Act, R.S.O., 1990, c. P-10, s. 47 of The Bankruptcy And Insolvency Act, R.S.C. 1985, c. B-3 and s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

MAXIUM FINANCIAL SERVICES INC. (Applicant) and CORPORATE CARS LIMITED PARTNERSHIP and TRACEMOUNT/GLOJACK LEASING LTD. (Respondent)

C. Campbell J.

Heard: November 9, 2006
Judgment: November 21, 2006
Docket: 31-452767, 31-452788, 06-CL-6724

Counsel: Steven J. Weisz, Michael P. McGraw for Applicants
Joseph G. Speranzini, Michael J. Valente for Canadian Imperial Bank of Commerce
Craig Hill for Bank of Nova Scotia
Pamela Huff for Securcor / Sun Life Assurance Company of Canada
Sanj Mitra for KPMG
Christopher Besant, Frank Spizziri for Respondent, Corporate Cars
Ronald Reim for Segal & Partners Inc.

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

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Interim receiver — Appointment

M Inc. brought motion pursuant to s. 69 of Bankruptcy and Insolvency Act to lift stay of proceedings and creditor S sought relief similar to that of M Inc. — Between time of commencing of those motions, company filed proposal under Act and motion for appointment of interim receiver was brought by senior secured creditor bank supported by other senior secured creditor bank — Motion for appointment of interim receiver granted as was relief sought by M Inc. and creditor S — None of company's suggested steps had satisfied two senior secured creditor banks, as their debt was due even though some payments had been made on account — There must be more than suspicion or speculation concerning assets of company before interim receiver was warranted — Where major secured creditors who had most to risk had with legitimate reason lost confidence, there did not need to be actual immediate risk to assets — Appointment of interim receiver would not impair company bringing forth proposal that may have chance of success.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

M Inc. brought motion pursuant to s. 69 of Bankruptcy and Insolvency Act to lift stay of proceedings — Creditor S sought relief similar to that of M Inc. — Between time of commencing of those motions, company filed proposal under Act and motion for appointment of interim receiver was brought by senior secured creditor bank supported by other senior secured creditor bank — Motion for appointment of interim receiver granted — Relief sought by M Inc. and creditor S was granted.

Table of Authorities

Cases considered by *C. Campbell J.*:

Atsana Semiconductor Corp., Re (2005), 2005 CarswellOnt 3304, 14 C.B.R. (5th) 1 (Ont. S.C.J.) — considered

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

Royal Bank v. Zutphen Brothers Construction Ltd. (1993), 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) — followed

Statutes considered:

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

s. 47.1(1) [en. 1992, c. 27, s. 16(1)] — referred to

s. 50(12) — considered

s. 69 — referred to

s. 244 — referred to

MOTION by senior secured creditor for appointment of interim receiver.

***C. Campbell J.*:**

1 This is a motion brought by Canadian Imperial Bank of Commerce ("CIBC"), supported by the Bank of Nova Scotia ("BNS"), the senior secured creditors of Corporate Cars Limited Partnership ("Corporate Cars"), for the appointment of an interim receiver under s. 47.1(1) of the *Bankruptcy And Insolvency Act*, R.S.C. 1985 (the "BIA").

2 Corporate Cars opposes the appointment on the grounds that since it has now filed a proposal, there is an onus on those seeking the appointment to demonstrate that it is necessary for the protection of the applying creditors.

3 The proceedings before the Court commenced as a motion brought on behalf of Maxium Financial Services Inc. ("Maxium") pursuant to s. 69 of the BIA to lift the stay of proceedings that then existed on the basis that the stay of proceedings did not apply to it. Maxium also opposed the extension of the stay then sought by Corporate Cars.

4 Relief similar to that of Maxium was sought by Securcor, a creditor in similar but not exactly the same position.

5 Between the time of commencing of the Maxium and Securcor motions, two things happened: (1) Corporate Cars filed a proposal under the BIA; and (2) CIBC brought its motion for the appointment of an interim receiver.

6 When this matter was first addressed, Corporate Cars sought an adjournment to enable it to put in response material. The matter was adjourned to the next day to permit the filing of material by Corporate Cars, which was done.

7 The position on behalf of the Company can be succinctly put. The Company asserts that it has since August developed two proposals each of which would allow for the orderly disposition of the Company's portfolio of car leases, which would permit payment sufficient to discharge the debt to the Banks and permit Maxium and Securcor to in effect operate their own portfolios and leave equity to the owners of somewhere between $3 and $5 million.

8 Corporate Cars complains that the Banks have not provided information to it to suggest that the two proposals are not reasonable.

9 The position of the creditors is quite straightforward. They have lost confidence in the Company. They do not support either of the proposals. The Banks' position arises from certain events that were revealed in August and September.

10 Funds received from payments made on leases were not held in trust, as the terms of the arrangements with the creditors provided for. The Company does not dispute these past events and asserts that currently it is operating within the strictures of its various contracts. Indeed, the Company agrees with the relief sought by both Maxium and Securcor to protect the entitlement they have to certain aspects of the revenue stream.

11 None of the Company's suggested steps has satisfied the two major secured creditor Banks, as their debt is due even though some payments have been made on account.

12 The position of the Company is that the Banks have not only not met the test of establishing that there has been a dissipation of assets, but cannot meet the additional test that "the damages of dissipation of assets must be actual and immediate and not one based on suspicion and speculation."

13 The latter quote originated in a decision from Nova Scotia where Registrar Smith used that language in *Royal Bank v. Zutphen Brothers Construction Ltd.*, [1993] N.S.J. No. 640 (N.S. S.C.) in the context of a section 244 Notice.

14 Ground J. in *Bank of Nova Scotia v. D.G. Jewelry Inc.*, [2002] O.J. No. 4000 (Ont. S.C.J.) rejected the above test on the basis that it was not the law of Ontario. In *Atsana Semiconductor Corp., Re* (Ont. S.C.J.), Aitkin J. accepted the Nova Scotia test but does not appear to have been referred to the statement of Ground J. in *D.G. Jewelry.*

15 I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major secured creditors who have the most at risk have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets.

16 Both Banks do not believe the assumptions that underlie the Company's proposals are realistic. Added to that is the recent history of sales out of trust, loss of vehicles and questionable accounting. In that sense there is a realistic risk of asset dissipation if a Receiver is not appointed.

17 The only objection that the Company can muster in response is that the appointment of an interim receiver will add to the expense and undermine any proposal that would see a significant return to the equity holders. It suggests that the monitoring that has been and would continue to be available to the Banks should be sufficient.

18 The suggestion that the appointment be postponed for 20 days to allow all the creditors to vote does not make sense in the present context. The position of the Banks is such that without their agreement, the current proposals are doomed. It is the Company and not the Banks that will have to come up with a proposal (if there is one) that is acceptable to all creditors.

19 I have been referred to s. 50(12) of the BIA, which provides as follows:

> (12) Court may declare proposal as deemed refused by creditors — The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that
>
> (a) the debtor has not acted, or is not acting, in good faith and with due diligence;
>
> (b) the proposal will not likely be accepted by the creditors; or
>
> (c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

20 While it is not necessary for these motions to deem the proposal of the Company refused, that is the practical effect of the Banks' position.

21 In my view, the appointment of an interim receiver will not impair the Company bringing forth a proposal (if one is to be made) that may have a chance of success.

22 If there are circumstances for which it is appropriate to modify the terms of the model receivership order to accommodate legitimate needs, the matter may be returned on short notice.

23 The motion for appointment of an interim receiver is granted, as is the relief sought by both Maxium and Securcor. In the circumstances I trust that it will not be necessary to deal with the costs of the motions.

Motion granted.

End of Document

TAB 4

2012 ONSC 163
Ontario Superior Court of Justice [Commercial List]

Callidus Capital Corp. v. Carcap Inc.

2012 CarswellOnt 480, 2012 ONSC 163, 211 A.C.W.S. (3d) 861, 84 C.B.R. (5th) 300

Callidus Capital Corporation (Applicant / Respondent by cross-application) and Carcap Inc. and Car Equity Loans Corp. (Respondents / Applicants by cross-application)

Application under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43

Kaptor Financial Inc. and Carcap Auto Financing (Applicants by cross-application) and Callidus Capital Corporation (Respondent by cross-application)

Mesbur J.

Heard: December 14, 2011
Judgment: January 5, 2012
Docket: CV-11-00009498-OOCL

Counsel: Harvey G. Chaiton, George Benchetrit for Applicant / Respondent by cross-application
Mel Solmon, Fred Tayar, Colby Linthwaite for Respondents and applicants by cross-application
Robb English for Toronto Dominion Bank
A. Kaufman for Proposed Receiver, BDO Canada Ltd.
Jennifer Imrie for Third Eye Capital

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

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

Headnote

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

Applicant was debtors' first secured lender, and bank was their second secured lender — Applicant brought application for appointment of receiver — Application granted on certain terms — Credit facility agreement contemplated appointing receiver — As to likely effect on parties of appointing receiver, from applicant's point of view, it would allow it to protect its security and dispose of it in organized and court-supervised fashion — It proposed to sell businesses as going concern — Debtors conceded possible restructuring plan might be to liquidate, in which case hope would also be going concern sale — In this regard, no difference in outcome if receiver appointed — Applicant had legitimate concerns about businesses continuing as going concern while debtors attempted to restructure — Debtors' difficulties with bank overdraft had arisen in August of last year, and they had been given every opportunity since then to cure their defaults, and had failed to do so — Debtors had been in default with applicant since it demanded payment in October of last year, and delivered notice of intention to enforce its security — Debtors had failed to honour terms of forbearance agreement — Neither applicant nor bank had faith in debtors' management — Debtors' past conduct gave cause for concern if there was no receiver who could manage businesses and arrange for orderly sale under court's supervision — Applicant's security was declining in value — Both secured creditors' rights in it were being eroded — Given debtors' failure to come up with even rudimentary restructuring plan, it was time for receiver to take control, and manage businesses to extent necessary to result in orderly liquidation to protect interests of all stakeholders — Nothing prevented debtors from continuing efforts to restructure.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Applicant was debtors' first secured lender, and bank was their second secured lender — Applicant brought application for appointment of receiver — Debtors brought cross-application for initial order under Companies' Creditors Arrangement Act — Application granted on certain terms; cross-application dismissed — As regards cross-application, debtors had no operating capital — They were borrowers in default, with two unwilling lenders unprepared to lend more — Under Act these lenders had no obligation to advance more funds — Without further advances, debtors could not continue to operate without further deterioration in certain inventory and resulting deterioration in revenue — Debtors only brought their application after applicant had brought its application for receiver — Cross-application for relief under Act seemed more defensive tactic than bona fide attempt to restructure — Debtors had no restructuring plan — They did not even have "germ of a plan" — Debtors had been attempting to refinance for some time — They had failed to meet every deadline for payment agreed to with applicant as well as with bank — Even when date was delayed for receivership order to take effect in order to give debtors time to complete refinancing, they were unable to do so — Absence of even "germ of a plan" militated against granting relief under Act — Neither of major secured creditors would support plan of arrangement — They represented considerable part of debtors' creditors — No evidence any other creditors would support plan — There was no merit in making initial order and imposing stay in circumstances where plan of arrangement was most likely going to be defeated.

Table of Authorities

Cases considered by *Mesbur J.*:

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

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

GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co. (2011), 81 C.B.R. (5th) 47, 2011 ONSC 3851, 2011 CarswellOnt 5743 (Ont. S.C.J.) — referred to

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.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]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 47 — referred to

s. 244 — referred to

s. 244(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.01(b) [en. 2005, c. 47, s. 128] — referred to

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

s. 101 — referred to

APPLICATION by secured lender for appointment of receiver; CROSS-APPLICATION by debtors for initial order under *Companies' Creditors Arrangement Act.*

***Mesbur J.*:**

Introduction:

1 I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA) on December 14, 2011. At the end of the hearing I made the following endorsement:

For reasons to follow, an order will go in the following terms:

a) The debtors' cross application for an initial order under the CCAA is dismissed.

b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.

c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.

d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.

e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.

f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

2 Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

3 These are those reasons.

The application and cross-application:

4 The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act.*[3] The TD Bank, who is the respondents' second secured lender, supported

the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

5 The respondents brought a cross-application for relief under the *CCAA*. Both Callidus and TD Bank opposed the cross-application.

Facts:

6 The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

7 The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

Callidus provides financing

8 On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

9 Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

10 The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors."[4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

11 The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading."[5]

12 Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

13 The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

14 The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

Changes to the respondents' arrangements with TD Bank.

15 The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

16 What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

17 TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a

secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

Callidus advances

18 Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

The TD Bank's accommodation agreement is amended, then terminated

19 Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

20 On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

21 By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

22 Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

Callidus learns of the debt with TD Bank

23 Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

24 Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled - that is, paying off some specific silo investors.

25 Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

The field audit

26 Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

The Callidus demand

27 Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

The Callidus forbearance agreement and events following

28 On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

29 In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

30 The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

31 The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

32 Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA*.

33 Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

34 Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

35 On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

36 Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

37 The respondents have been looking for alternate financing. They have not been able to secure any.

Discussion:

38 Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

39 For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

Receiver?

40 Callidus brought its receivership application under both section 101 of the *Courts of Justice Act*, and s.47 of the *BIA*. The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA*.

41 The question is whether it is more in the interests of all concerned to have the receiver appointed or not.[6] In order to answer the question the court must consider all the circumstances of the case, particularly:

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

c) The nature of the property and the rights and interests of all parties in relation to it.[7]

42 Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed.[8]

43 Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

44 Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village*, the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

45 This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act or Bankruptcy and Insolvency Act*, or both, has been met.

46 What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

47 Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

48 The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

49 The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

50 Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

51 Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver.[9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining,

while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

52 The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

53 As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

54 At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed - even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

CCAA?

55 The respondents took the position that granting an initial order under the CCAA is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

56 The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances, the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

57 The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Marine Drive Properties Ltd., Re*[11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Inducon Development Corp., Re,*[12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

58 Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

59 The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

60 The absence of even a "germ of a plan" militates against granting relief under the *CCAA*.

61 Finally, in considering the question of whether to grant relief under the *CCAA*, I must also look at the position of the two major secured creditors. Neither will support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

62 Having considered all these factors, I decline to grant relief under the *CCAA*.

Conclusion:

63 It is for these reasons I made the order I did on December 14, 2011.

Application granted on certain terms; cross-application dismissed.

Footnotes

1 R.S.C. 1985 c. C-36

2 R.S.C. 1985 c. B-3 as amended

3 R.S.O. 1990, c. C-43, as amended

4 Credit facility agreement paragraph 17(k)

5 *Ibid.* paragraph 17(q)

6 *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])

7 *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) (CanLII)

8 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List])

9 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, [2011] O.J. No. 2954 (Ont. S.C.J.)

10 Section 11.01(b) of the *CCAA*

11 (B.C. S.C.)

12 (1991) (Ont. Gen. Div.)

End of Document

TAB 5

2009 CarswellOnt 7797
Ontario Superior Court of Justice [Commercial List]

Royal Bank v. Applied Energy Systems Inc.

2009 CarswellOnt 7797, 183 A.C.W.S. (3d) 327, 61 C.B.R. (5th) 104

ROYAL BANK OF CANADA (Applicant) v. APPLIED ENERGY SYSTEMS INC., DDR NORTH AMERICA INC., FLEXIBLE EUTECTIC SALES LTD., FLEXIBLE EUTECTIC SALES (USA) LTD., DDR AMERICAS INC. and DDR AMERICAS LTD. (Respondents)

Cumming J.

Heard: December 9, 2009
Judgment: December 11, 2009
Docket: CV-09-8498-00CL

Counsel: Steven L. Graff, Ian E. Aversa for Royal Bank of Canada
Glenn Cohen for Respondents, Applied
O. Pasparaigis for RSM Richter Inc.
G. Benchetrit for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

A Inc. and D Inc. entered into loan agreements with bank and provided general security agreements in favour of bank — F (USA) Ltd. and F Ltd. guaranteed D Inc.'s obligations under loan agreement and gave general security agreement in favour of bank — F (USA) Ltd. and F Ltd. borrowed from another bank against same receivables and inventory that D Inc. had pledged to bank — A Inc., D Inc., F (USA) Ltd., F Ltd. and two other corporations were related entities owned indirectly by one person — Inventory collateral to bank's security was labelled at business site as purportedly belonging to third party — Other purported inventory was held offsite in control of third party — Bank statements did not reflect operational or lending structure that A Inc. and D Inc. represented to bank — Bank made demand for payment to A Inc. and D Inc. accompanied by notices of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act — Bank brought application for appointment of interim receiver in respect of assets of six related corporations — Application granted — It was necessary that interim receiver be appointed immediately to preserve and protect debtors' estates and interests of bank — Evidence established that there was real danger that assets would disappear — A Inc. and D Inc. made material misrepresentations to bank and were in serious breach and default of loan agreements — Bank's security had been compromised — Evidence presented prima facie case of fraudulent activity.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(1) — pursuant to

s. 47(3) — referred to

s. 244(1) — referred to

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

APPLICATION by bank for appointment of interim receiver in respect of assets of six related corporations.

***Cumming J.*:**

The Application

1 On December 9, 2009 the Royal Bank of Canada ("RBC") brought an Application pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C43, as amended for the appointment of RSM Richter Inc. ("RSM") as Interim Receiver in respect of the assets of the six Respondent corporate entities, being: Allied Energy Systems Inc. ("AES"), DDR North America Inc. ("DDR"), Flexible Eutectic Sales Ltd. ("Flexible Canada"), Flexible Eutectic Sales (USA) Ltd. ("Flexible USA") (collectively, referred to as "Flexible"), DDR Americas Inc. ("Americas Inc.") and DDR Americas Ltd. ("Americas Ltd.").

2 At the outset, counsel for AES and DDR moved for an adjournment, given that the Application Record was only served December 8, the day prior to its return. After submissions, the request for an adjournment was refused.

3 An appointment of an interim receiver may be made if a court is satisfied that a notice is about to be sent or was sent under s. 244(1) of the *BIA*, and it is established by a preponderance of evidence that the appointment of an interim receiver is necessary for the protection of the debtor's estate or the interests of the creditor sending the notice: ss. 47(1),(3) of the *BIA*.

4 After extensive submissions, RBC's Application was granted and an Order appointing RSM as Interim Receiver was signed, given my view that it was necessary that the Interim Receiver be appointed immediately to preserve and protect both the debtors' estates and the interests of RBC. I undertook to give written reasons for my decision. These are my reasons.

The Evidence

5 The six Respondents are related entities, owned indirectly by Louis Garas. RBC has recently determined that two other related entities are also owned or controlled by Mr. Garas, being Americas Inc. and Americas Ltd. (collectively, "Americas").

6 AES is a borrower from RBC pursuant to a Loan Agreement dated December 19, 2007. AES provided a General Security Agreement in favour of RBC. AES has present indebtedness to RBC of some $875,000.00 under a "Demand Facility".

7 RBC and DDR are parties to a Loan Agreement dated April 2, 2009. DDR provided a General Security Agreement in favour of RBC. DDR has present indebtedness to RBC of some $800,000.00 under a "Demand Facility" and some $2,365,000.00 under an "Operating Facility".

8 Flexible Canada and Flexible USA (collectively "Flexible") guaranteed DDR's obligations under the DDR Loan Agreement and a General Security Agreement was given in favour of RBC as security for the obligations under the guarantee.

9 RBC has made a demand for payment to AES and DDR accompanied by Notices of Intention to Enforce Security pursuant to s. 244(1) of the *BIA* contemporaneously with the Application Record.

10 Mr. Robert D. Fick, Manager Special loans at RBC has provided an affidavit in support of the Application. He makes several allegations on behalf of RBC in his 19 page affidavit.

11 RBC financed the acquisition of Flexible by DDR, with RBC to have a first ranking security interest in all the personal property of DDR and Flexible. Prior to the acquisition, Flexible's operating lender was the Bank of Montreal ("BMO"). Mr. Fick states that DDR represented that upon completion of the acquisition of Flexible that Flexible's operating line with BMO would be repaid in full and its security cancelled.

12 However, it is now determined that Flexible continues to have a lending relationship with BMO (with present indebtedness of some $1.3 million).

13 Moreover, since the acquisition of Flexible, the management of DDR and Flexible have been submitting the same borrowing base certificates to RBC and BMO. Thus, Flexible is borrowing from BMO against the same receivables and inventory that DDR has pledged to RBC.

14 BMO supports the Application of RBC for the appointment of an Interim Receiver.

15 Mr. Fick's review of the debtors' bank accounts indicate that there are a substantial number of transactions, in both number and value, among AES, DDR, Flexible and their related entities, without regard to the sanctity of the lending relationship with RBC and the security granted to RBC.

16 For example, between December 13, 2007 and October 30, 2009 DDR paid some $961,000.00 to Americas. For example, between July 31, 2009 and October 30, 2009 AES made cheques payable to both DDR and DDR Americas Flexible Eutectic Sales Ltd. amounting to some $1.6 million which were endorsed and deposited into an Americas bank account at BMO.

17 These payments from AES to Americas are inconsistent with DDR's understood operational role as the exclusive distributor for certain products manufactured by De Dietrich Themique ("DDT") pursuant to a distributorship agreement with DDT. The distribution agreement purportedly entered into December 21, 2007 between DDT and DDR is integral to the business of AES and DDR and a fundamental basis to the financing by RBC of their supposed operations. However, the website of DDT indicates that Americas is DDT's dealer in both Canada and the United States.

18 The DDR bank statements reflect minimal activity related to what was purported to be DDR's on-going business operations. The business activity related to what was reasonably thought by RBC to be DDR's business is not being transacted through DDR's bank accounts. The payments by AES to Americas are also apparently inconsistent with the accounts receivable and accounts payable records of DDR and AES.

19 Mr. Fick states that the amount of assets and liabilities reported for AES in the 2007 and 2008 financial statements do not reconcile with the amount of assets and liabilities reported for AES in the 2009 financial statements. The book values of the assets and liabilities reported for DDR in the 2008 financial statement do not reconcile with the book value of the assets and liabilities reported for DDR in the 2009 financial statements. As well, the notes to DDR's financial statements misstate the credit facilities with RBC and BMO.

20 An RBC officer, Mr. Jack Unger, reportedly attended at DDR's head office and questioned Mr. Garas as to the location of inventory. Mr. Unger was told that there was a significant quantity of inventory at, and was taken to, 185 Durham Street West, Mount Forrest, Ontario. RBC has

determined that this location is owned by 2088608 Ontario Inc. ("208"), a corporation of which Vivian Farag Garas, the spouse of Mr. Garas, is listed as the sole director and officer.

21 Mr. Fick and Mr. Robert Kofman of RSM met with Mr. Garas on December 1, 2009. Mr. Garas represented that Flexible had discontinued its lending arrangement with BMO and that counsel was arranging for the imminent discharge of BMO's security against Flexible. Mr. Kofman and Mr. Fick later spoke to BMO and determined that Flexible still owed some $1.3 million to BMO under an operating line of credit and that no steps had been taken by BMO to discharge the security.

22 Mr. Kofman and Mr. Fick toured the facilities of AES and DDR on December 1, 2009. They noted that the inventory in the warehouses was labelled "DDR Americas" notwithstanding that the inventory was reported on the borrowing certificates filed by DDR with RBC (and by Flexible with BMO).

23 Thus, it appears that the inventory collateral to the RBC's security is labelled at the debtors' business site as purportedly belonging to a third party, "DDR Americas". Other purported inventory is held offsite to the debtors' business in the control of a third party, 208. Two banks have been unwittingly lending in respect of this same collateral. The bank statements do not reflect the operational or lending structure that AES and DDR represented to RBC and which was the basis for RBC's agreement to finance the acquisition of Flexible. AES and DDR appear to be carrying on business through a myriad of companies reflecting a multitude of inter-corporate transactions, all of which is inconsistent with their representations and obligations to RBC.

Disposition

24 The overall evidentiary record establishes by a preponderance of evidence that AES and DDR have made material misrepresentations to the RBC, that they are in serious breach and default of their loan agreements with RBC, that the security of RBC has been compromised and that AES and DDR have shown a disregard with respect to their obligations in the loan agreements and security agreements. Indeed, the evidence presents a *prima facie* case of fraudulent activity.

25 The evidence establishes that there is a real danger that assets will disappear and that it is just and equitable that an interim receiver be appointed immediately for the preservation of assets and for the protection of the interests of RBC as creditor.

Application granted.

End of Document

TAB 6

2012 ONSC 288
Ontario Superior Court of Justice [Commercial List]

EPM Global Services Inc. v. Signifi Solutions Inc.

2012 CarswellOnt 281, 2012 ONSC 288

In the Matter of Section 243 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

EPM Global Services Inc., Applicant and Signifi Solutions Inc., Respondent

Signifi Solutions Inc., Plaintiff and EPM Global Services Inc., Defendant

Cummings J.

Heard: January 11, 2012
Judgment: January 11, 2012
Docket: CV-11-9487-00CL,CV-11-9505-00CL

Counsel: Andrea McEwan, Rebecca L. Lewis, for Applicant / Defendant, EPM Global Services Inc.
Antonin I. Pribetic, for Respondent / Plaintiff, Signifi Solutions Inc.

Subject: Insolvency

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

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

E Inc. and S Inc. entered into manufacturing service agreement whereby E Inc. was to manufacture certain products for S Inc. — S Inc. granted general security agreement (GSA) to E Inc. — E Inc. demanded payments from S Inc. for amounts outstanding and issued notice of intention to enforce security pursuant to s. 244 of Bankruptcy and Insolvency Act (BIA) — E Inc. commenced receivership application under ss. 47 and 243(1) of BIA and s. 101 of Courts of Justice Act — S Inc. commenced action against E Inc., seeking declaration that GSA was null and void — Pending return of application for appointment of receiver and manager, E Inc. sought appointment of interlocutory or interim receiver — S Inc. brought motion to stay application for receiver or, alternatively, consolidate proceedings — Application of E Inc. granted to extent of appointing interim receiver with limited powers;

motion of S Inc. dismissed — Application for receiver or interim receiver was free-standing originating process — Evidence established on preponderance of evidence basis that S Inc. was insolvent, was unable to meet its current obligations as they became due without incurring further liabilities, did not generate sufficient cash flow from its current operations to meet its current liabilities and continued to operate at deficit — GSA provided that S Inc. was in default thereof if it "becomes insolvent" — Thereupon, security interest under GSA became enforceable — Hence, E Inc. was secured creditor with significant financial interest at stake in S Inc. — It was necessary for protection of interest of secured creditor, E Inc., in respect of estate of insolvent debtor, S Inc., that requested interim receiver be appointed.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(1) — referred to

s. 243(1) — referred to

s. 244 — referred to

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

RULING on request by applicant, pending return of application for appointment of receiver and manager, for appointment of interlocutory or interim receiver, and on motion by respondent to stay application for receiver or, alternatively, consolidate certain proceedings.

***Cummings J.*:**

The Evidence

1 The Applicant, EPM Global Services Inc. ("EPM") and the Respondent, Signifi Solutions Inc. ("Signifi") entered into a Manufacturing Service Agreement ("MSA") on January 7, 2011 whereby EPM was to manufacture certain products for Signifi.

2 As security for its obligations to EPM, Signifi granted a general security agreement ("GSA") to EPM, dated May 19, 2011.

3 On November 9, 2011, EPM demanded payments from Signifi for amounts outstanding and issued a Notice of Intention to Enforce Security pursuant to s. 244 of the *BIA*.

4 On December 1, 2011, EPM commenced a Receivership Application under ss. 47 and 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

5 On December 7, 2011, Signifi commenced action CV-11-9505-00CL against EPM by way of a statement of claim, seeking a declaration that the GSA is null and void. Signifi asserts in its statement of claim that EPM was in breach of the MSA or the Amendment Agreement in respect thereof. Signifi makes many allegations in its 21-page statement of claim which have as the common theme that EPM was in breach of the contract, *i.e.* the MSA.

6 As well, Signifi asserts it was not an "insolvent person" when the purported s. 244 Notice was given by EPM.

The Application of EPM and Motion to Stay of Signifi

7 Pending the return of the Application for the appointment of a receiver and manager, EPM seeks the appointment of an interlocutory or interim receiver.

8 Signifi brings a motion to stay the application for a receiver or alternatively, consolidate the proceedings referred to above so that they are heard at the same time.

9 The application for a receiver or interim receiver is a free-standing originating process. The evidence establishes on a preponderance of evidence basis that Signifi is insolvent, is unable to meet its current obligations as they become due without incurring further liabilities, does not generate sufficient cash flow from its current operations to meet its current liabilities and continues to operate at a deficit.

10 The GSA provides that Signifi is in default thereof if it "becomes insolvent". Thereupon, the security interest under the GSA becomes enforceable.

11 Hence, EPM is a secured creditor with a significant financial interest at stake in Signifi.

Disposition

12 In my view, and I so find, it is necessary for the protection of the interest of the secured creditor, EPM, in respect of the estate of the insolvent debtor, Signifi, that the requested interim receiver be appointed under ss. 47(1) and 244 of the *BIA* and s. 101 of the *CJA*. The Application of EPM is granted to the extent of appointing an interim receiver with limited powers.

13 The terms of the requisite Order, in accordance with these reasons, have been reviewed with counsel.

14 The motion of Signifi for a stay of the Application, or in the alternative, an order for consolidation, is dismissed.

15 The parties have made submissions as to costs. Costs are fixed in favour of EPM at $15,000.00, inclusive of all disbursements and HST, payable forthwith.

16 A schedule has been agreed upon for the return of the Application for the appointment of a Receiver.

Order accordingly.

Court File No.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 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

TRISURA GUARANTEE INSURANCE COMPANY - and - **EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.**

Applicant | Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
40 King Street West
Toronto, Ontario
M5H 3Y4

ROGER JAIPARGAS
Tel: (416) 367-6266
Fax: (416) 361-7067
Email: rjaipargas@blg.com
LSUC# 43275C

ANDREW HODHOD
Tel: (416) 367-6290
Fax: (416) 361-2799
Email: ahodhod@blg.com
LSUC#66314K

Lawyers for the Applicant

TOR01: 5763106: v1