COURT FILE NUMBER	**1701-03460**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFF	**ALBERTA ENERGY REGULATOR**
DEFENDANTS	**LEXIN RESOURCES LTD., 1051393 B.C. LTD., 0989 RESOURCE PARTNERSHIP, LR PROCESSING LTD. and LR PROCESSING PARTNERSHIP**
DOCUMENT	**BENCH BRIEF OF THE RECEIVER**

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OF CALGARY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. This Bench Brief is submitted on behalf of Grant Thornton Limited, in its capacity as the court-appointed receiver (the "**Receiver**") of Lexin Resources Ltd. ("**Lexin**"), 1051393 B.C. Ltd. ("**105**"), 0989 Resource Partnership ("**0989**"), LR Processing Ltd. ("**LR Ltd.**") and LR Processing Partnership ("**LR Processing**" and collectively with Lexin, 105, 0989 and LR Ltd. the "**Lexin Group**"), in support of the Receiver's application to:

   (a) approve a sale of the Lexin Group's working interest in the Ghost Pine Unit pursuant to the Davilin PSA appended to the Receiver's Seventh Report dated April 9, 2018 (the "**Seventh Report**"); and

   (b) amend, *nunc pro tunc*, the receivership orders granted by the Court of Queen's Bench (the "**Court**") on March 20, 2017 and on June 13, 2017 (the "**Receivership Orders**"), to explicitly provide the Receiver with the entitlement to disclaim, abandon or renounce the Lexin Group's interest any contracts, agreements or other Property, notwithstanding that it is the Receiver's position that it has always had Disclaimer Powers at common law.

2. In early September, 2017, the Receiver commenced the Sales Process approved by this Honourable Court on July 14, 2017. The Sales Process was conducted through the Receiver's consultant, Sayer Energy Advisors Ltd. who broadly marketed the assets of the Lexin Group as set out in the Sixth Report of the Receiver dated November 27, 2017 and the Confidential Supplement to the Fifth Report dated October 18, 2017 (over which a sealing order was granted on October 25, 2017).

3. The Davilin PSA represents the first transaction sought to be approved by the Receiver arising out of the Sales Process.

4. The amendment of the Receivership Orders is sought, notwithstanding the Receiver's pre-existing common law rights, in order to provide clarity to third parties and efficiency in the within receivership process.

5. The facts in support of the Receiver's application are set-out in detail in the Seventh Report. The Receiver adopts the facts set-out in the Seventh Report as if they were reproduced herein. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Seventh Report.

APPLICABLE LEGAL PRINCIPLES

Receivership Sales

6. A Receiver has an obligation to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner.[1]

7. In considering whether to approve a proposed sale, the Court considers:

   (a) Whether the receiver made sufficient effort to obtain the best price and has not acted improvidently;

   (b) The interests of all parties;

   (c) The efficacy and integrity of the process by which the offers have been submitted; and

   (d) Whether there has been any unfairness in the process.[2]

Disclaimer Powers at Common Law

8. As held in *Bank of Montreal v. Scaffold Connection Corp.*, the "law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor."[3] As discussed extensively in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, notwithstanding the fact that Disclaimer Powers are often explicitly included in receivership orders, the source of a receiver's power to disclaim is the English common law, as adopted in Canadian jurisprudence.[4]

9. The central reason that a receiver is not bound at common law by the debtor's pre-receivership contracts is that there is no privity of contract between the receiver and the party who contracted with the debtor. It is "impossible to suggest" that a receiver could be liable for such contracts because "they are not with [the receiver]; they are contracts made with the company, which is still a company, and has not yet been wound up."[5] As such, when a receiver disclaims a pre-existing contract of the debtor, it should not be seen as "breaking" such a contract.[6] The contract still subsists as between the debtor and the contracting party, and the receiver's choice not to perform the

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 247 [***BIA***] [**TAB 1**].
[2] *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 1991 CarswellOnt 7706 (CA) [***Soundair***], at para 46 [**TAB 2**].
[3] *Bank of Montreal v. Scaffold Connection Corp.*, 2002 ABQB 706 [***Scaffold***], at para 11 [**TAB 3**].
[4] *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, at paras 21-32 [**TAB 4**].
[5] *Bayhold Financial Corp. v. Clarkson Co.*, 1991 CarswellNS 33, [1991] N.S.J. No. 488 [***Bayhold***], at para 48, quoting *Newdigate Colliery Ltd., Re; Newdegate v. The Co.*, [1912] 1 Ch. 468 (C.A.) [**TAB 5**].
[6] *Bayhold,* at para 48 [**TAB 5**].

contract will render the debtor, rather than the receiver, liable for breach of contract.[7] The supplier who suffers damages from a breach of contract is left with a provable claim against the debtor in the insolvency proceeding.[8]

10. At common law, a court-appointed receiver may become bound by a debtor's pre-receivership contracts *only* if the receiver elects to affirm such a contract.[9] As discussed in *Pope & Talbot Ltd., Re*, "in order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication."[10] The common law requirement that the receiver affirm a contract before it may become bound by it is not dependant on any express power to disclaim contract granted to the receiver by the receivership order. For example, in *Pope,* the receivership order did not explicitly authorize the receiver to disclaim or cease to perform pre-receivership contracts.[11] The court nonetheless found that the receiver in *Pope* was not bound by the contract in question because it had at no point explicitly or impliedly affirmed it. [12]

11. The receiver must exercise "proper discretion in [disclaiming a contract] since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it."[13] The receiver must also consider whether affirming or disclaiming a contract would result in a preference in favour of one interested party over another, and whether the equities support an affirmation or disclaimer.[14] In order to ensure that the receiver's discretion to affirm or disclaim is exercised in an appropriately fair and reasonable manner, the receiver must generally seek the court's leave "if it seeks to break a *material* contract" [emphasis in original].[15] However, advance court approval is not necessary in all cases for a receiver to exercise its responsibility to affirm or disclaim a contract. As noted in *Pope,* in some circumstances the onus is on the contracting party to take steps to establish that the receiver has actively affirmed the contract in question before it can claim that the receiver has become bound by the contract.[16]

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[7] *Bayhold,* at para 49-55 [**TAB 5**].
[8] *Pope & Talbot Ltd., Re* , 2009 BCSC 17 [***Pope***], at para 17 [**TAB 6**].
[9] *Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc.* 2015 ABQB 208, at para 32 [**TAB 7**].
[10] *Pope,* at para 15 [**TAB 6**].
[11] Order Appointing PricewaterhouseCoopers Inc. as Law and Equity Receiver dated June 16, 2008 [***Pope* Receivership Order**] [**TAB 8**].
[12] *Pope,* at para 22-24 [**TAB 6**].
[13] *Bayhold,* at para 53 [**TAB 5**].
[14] *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, at paras 41-44 [**TAB 9**].
[15] *Royal Bank v. Penex Metropolis Ltd.,* 2009 CarswellOnt 5202, [2009] O.J. No. 3645, at para 23 [**TAB 10**].
[16] *Pope,* at paras 18-24 [**TAB 6**].

Jurisdiction to Amend Order Nunc Pro Tunc

12. The Receivership Orders contain clauses authorizing any interested party to apply to vary or amend such order on 7 days' notice.[17]

13. This Court has jurisdiction to issue orders *nunc pro tunc.*[18] The following non-exhaustive factors are relevant to, but not determinative of, the exercise of the Court's discretion to grant such an order:

(a) the opposing party will not be prejudiced by the order;

(b) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;

(c) the irregularity is not intentional;

(d) the order will effectively achieve the relief sought or cure the irregularity;

(e) the delay has been caused by an act of the court; and

(f) the order would facilitate access to justice.[19]

14. The Receiver already possesses the Disclaimer Powers at common law. However, as there has been some confusion on this issue, the Receiver submits that it is appropriate to amend the Receivership Orders *nunc pro tunc* to explicitly state that the Receiver has had the Disclaimer Powers since it was appointed as the Receiver (the "**Amendment**"). The Amendment will clarify this issue for third parties and in doing so streamline the receivership process. In addition, no interested party will be prejudiced by the Amendment, as it will have no impact on any party's substantive rights. Rather it will only serve to provide a clear and explicit statement of all parties' pre-existing rights and powers and their application in the context of this receivership.

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[17] Receivership Order, dated March 20, 2017 at para 33; Consent Receivership Order, dated June 13, 2017, at para 37.

[18] *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 [***Green***], at para 85 [**TAB 11**]. *BIA,* s.183(1) [**TAB 1**].; Alberta *Rules of Court,* AR 124/2010, at Rule 1.3 [**TAB 12**].; *Judicature Act,* RSA 200, c J-2, s.8 [**TAB 13**].

[19] *Green,* at para 90 [**TAB 11**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF APRIL, 2018.

BORDEN LADNER GERVAIS LLP

Per: ______________________________
Robyn Gurofsky
Solicitors for the Receiver/Applicant

TAB

1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to March 26, 2018

Last amended on December 12, 2017

À jour au 26 mars 2018

Dernière modification le 12 décembre 2017

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http://lois-laws.justice.gc.ca

shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

Final statement of receipts and disbursements

(3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

R.S., 1985, c. B-3, s. 181; 2004, c. 25, s. 86; 2005, c. 47, s. 109.

Stay on issue of order

182 (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

mais les biens du failli sont dévolus à la personne que le tribunal peut nommer, ou, à défaut de cette nomination, retournent au failli pour tout droit, domaine ou intérêt du syndic, aux conditions, s'il en est, que le tribunal peut ordonner.

État définitif des recettes et des débours

(3) Malgré l'annulation de la faillite, le syndic prépare sans délai l'état définitif des recettes et des débours visé à l'article 151.

L.R. (1985), ch. B-3, art. 181; 2004, ch. 25, art. 86; 2005, ch. 47, art. 109.

Suspension de l'émission de l'ordonnance

182 (1) L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

TAB

2

1991 CarswellOnt 7706
Ontario Court of Justice (General Division)

Royal Bank of Canada v. Soundair Corp.

1991 CarswellOnt 7706, 26 A.C.W.S. (3d) 683

BETWEEN: THE ROYAL BANK OF CANADA Plaintiff and SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED and CANADIAN INSURERS' CAPITAL CORPORATION Defendant

Rosenberg J

Judgment: May 1, 1991
Docket: 48593/90Q

Counsel: Lyndon Barnes and Lawrence Ritchie for the Royal Bank of Canada
William G. Horton, Nancy Spies and Carmen theriault for Ontario Express Ltd. and Frontier Air Ltd., Sean F. Dunphy for Ernst & Young Inc., Receiver of Soundair Corporation, Jack Berkow and S. Goldman Canadian Pension Capital Limited and Canadian Insurer's Capital Corporation, John Morin for Air Canada

ROSENBERG J:

NATURE OF PROCEEDINGS

1 Ernst & Young Inc. (the "Receiver") moved for an order approving the share Purchase agreement dated March 8, 1991 between Frontier Air limited, Ontario Express Limited ("OEL"), 174590 Canada Inc. and the Receiver (the "OEL Offer") and for an order authorizing and directing the Receiver and 174590 Canada Inc., as vendors, to complete that agreement in accordance with its terms.

2 The defendants, Canadian Pension Capital limited and Canadian Insurers' Capital Corporation (collectively "CCFL"), moved for an order approving the offer of 922246 Ontario Limited ("922") dated April 5, 1991 (the "922 Offer") to purchase the assets of Air Toronto, a division of Soundair Corporation ("Air Toronto" and "Soundair", respectively), or in the alternative for directions regarding the sale of the assets of Air Toronto.

3 Either as a result of the motion by CCFL or as a practical matter, the third possibility before the court is to order that neither offer be accepted and to make an order setting out the procedure to be adopted by the Receiver in dealing with the two competing groups wishing to purchase the assets of Air Toronto.

PARTIES

4 Matters involving the Soundair receivership came before me on a number of occasions and it was necessary to make a number of preliminary orders with regard to the aforesaid motions (i.e. ordering disclosure of certain information setting out time tables for offers to be submitted, scheduling cross-examinations, etc.). As a result of these preliminary appearances and on hearing what cross-examinations had taken place and who participated, it became clear that the real issue to be determined was whether OEL or 922 would be successful in purchasing Air Toronto assets. This was the real contest before me. The OEL offer was supported by Canadian International Airlines Limited ("Canadian International") and the CCLF offer was supported by Air Canada and Air Canada was a substantial participant in this 922 offer by the time the motion was heard. Accordingly, I added OEL as a party with the full right to participate in the proceedings. CCFL being a party to the one motion was allowed to participate fully as a party with regard to both motions and Air

reasonable from a business point of view at the time that the OEL offer was accepted. By that time any inequities to CCFL had been erased in that CCFL had all necessary information. They promised an offer and then submitted an offer that was entirely inconsistent with that promise. CCFL conveyed to the Receiver that there was no practical alternative to the OEL offer. Entering into the type of negotiations with CCFL and Air Canada that had taken place in the past was not desirable as the end was not predictable. The OEL offer was in final form and as counsel for the Receiver put it, the Receiver was looking at a fully baked loaf of bread versus some dough that possibly could be fashioned into a loaf of bread that might be marginally superior. On March 8, 1991 when the Receiver accepted the OEL offer, the Receiver had no assurance that the objectionable clauses in the 922 offer could be removed. Having determined that the process leading to the acceptance of the OEL offer and the entering into the contract subject to court approval was proper and further having determined that the interest of the creditors were marginally better served by the 922 offer, it is appropriate to consider the principals established by the case law to determine which offer should be approved by the court.

42 While the playing field was level and that the process was fair at the time the OEL offer was accepted, the process did not remain fair until the April 5th offer was received from 922. While it was clear when the parties appeared before me in March that the offer of 922 must in some respect be better than or at least arguably be better than the OEL offer, there was no assurance to that effect. However, by the agreement that resolved the Inter Lender dispute between the Royal Bank and CCFL, CCFL was able to determine that at least from the Royal Bank's point of view if they removed the objectionable condition their offer would be better than the OEL offer.

43 The Royal Bank knew the details of the OEL offer. By my order the two offers were to be made without either offeror knowing what the other offer's terms were. To this extent 922 received an advantage. For instance, if they had said in the negotiations with Royal Bank - no details of these negotiations were disclosed to the court - that we will remove the conditions and agree to the priorities but we will reduce our offer by $1 million and the Royal Bank had said, "no, that is not satisfactory", then they would have an indication of what was required in the Royal Bank's mind to beat the OEL offer. They had accordingly an assurance that what they were offering was better than the OEL offer from the Royal Bank's point of view. OEL had no equal information with regard to the 922 offer when they started their negotiations in good faith that culminated in a signed offer on March 8th. Accordingly, the process from March 8th to April 5th lacking in fairness and equity was through no fault of the Receivers.

THE LAW

44 I consider first whether or not the contract between OEL and the Receiver should be approved by the court. In light of my decision in that regard, I do not have to consider the question of the 922 offer being accepted or the third alternative of directing the Receiver as to the Receiver's further activities.

45 A body of case law has developed with regard to the court's approval of sales by court appointed receivers. A secured creditor has other options. He could appoint a private receiver. That gives the secured creditor such as the Royal Bank a freedom of action but the bank would bear the consequences of doing so directly. By having a court appointed receiver the bank reduces the risk of a suit by a debtor with regard to an allegation of an improvident realization of assets and is relieved from legal liability for failure to close a transaction. Also the bank reduces the possibility of unfavourable publicity but the *quid pro quo* is that the creditor has a degree of loss of control when the court supervises. The process of a sale by a court appointed receiver has a unique vulnerability. In the intervening time between the contract by the receiver and the court approval there is a window of opportunity to be used by unsuccessful bidders or by creditors or by others to improve on the offer. The case law attempts to balance the process and the credibility of the process against the interest of the creditors and provides that while the interests of the creditors is always the primary consideration of the receiver and the court, it is not the only consideration. The courts have consistently held that they will also consider the fairness and the effectiveness of the process and the role of the receiver.

46 In the case of *Crown Trust Co. et al. v. Rosenberg et al.* (1986) 39 D.L.R. (4th) 526, Mr. Justice Anderson considered the bidding process with regard to a bid that was some $15 million higher than the group of bids that the receiver had recommended be accepted. He stated at p.531:

> The duties of the court I conceive to be the following, and I do not put them in any order of priority:
>
> I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently ....
>
> II. The court should consider the interests of all parties, plaintiffs and defendants alike ....
>
> III. The court must consider the efficacy and integrity of the process by which the offers are obtained ....
>
> IV. The court should consider whether there has been unfairness in the working out of the process ....

In that case Anderson J. refused to allow the bidder to intervene notwithstanding that his bid appeared to be some $15 million higher than the group of bids that were accepted. He found that the $15 million was not a significant increase in light of the total amount involved. In my view the activities of the receiver in this case comply with all four of the duties of the court as defined by Justice Anderson in the *Crown Trust* case.

47 The argument put forth by Mr. Berkow on behalf of the 922 offer is supported by the decision of the *British Columbia Development Corporation v. Spun Cast Industries limited et al.*26 C.B.R. (N.S.) at p.28. Justice Berger held that when everyone with a financial stake in the assets sought approval of the sale the court does not having a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow.

48 A leading case with regard to this issue and one often referred to is the case of *Cameron v. Bank of Nova Scotia et al.* (1981), 38 C.B.R. (N.S.) 1. In that case the court's decision was unanimous, however, the decision delivered by Hart J.A. and agreed with by Pace J.A. included the following:

> ... Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. otherwise he could have deprived the creditors of a substantial sum of money. (p.10).

49 On the other hand, Macdonald J.A. while agreeing in the result saw the matter somewhat differently and stated at p.11.

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.
>
> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where

TAB

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2002 ABQB 706
Alberta Court of Queen's Bench

Bank of Montreal v. Scaffold Connection Corp.

2002 CarswellAlta 932, 2002 ABQB 706, [2002] A.W.L.D. 420, [2002] A.J. No. 959, 115 A.C.W.S. (3d) 620, 36 C.B.R. (4th) 13

BANK OF MONTREAL (Plaintiff) and SCAFFOLD CONNECTION CORPORATION, P.S.P. ERECTORS INC., SC ERECTORS INC., SCAFFOLD WORKS INC., INDUSTRIAL INNOVATIONS AND SERVICES LIMITED, AND SCAFFOLD CONNECTION (USA) INC. (Defendants)

Wachowich C.J.Q.B.

Heard: July 23, 2002
Judgment: July 26, 2002
Docket: Edmonton 0103-23333

Counsel: *J. Hocking*, *D. Polny*, *T. Reid*, for Receiver
R. Rutman, for Plaintiff
D. Shell, for Roynat Inc.
J. Topolniski, for Sit Down Export AB and Sit Down AB

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

APPLICATIONS by receiver for approval of sale of assets of debtor companies and for declaration that assets would vest in purchaser free and clear of all charges or claims.

Wachowich C.J.Q.B.:

1 KPMG Inc., the Court-Appointed Receiver and Manager (the "Receiver") of the Defendants ("Scaffold"), seeks the Court's approval of a sale of certain assets ("Seating Equipment") of Scaffold. Some or all of the Seating Equipment was acquired by Scaffold from Sit Down Export AB, a secured creditor of Scaffold.

2 The Receiver further seeks a declaration that: the Seating Equipment shall vest in the Purchaser free and clear of all encumbrances, charges, interests or claims; and Sit Down Export AB, Swedish Export Funding AB and the Swedish Export Credits Guarantee Board, or any party claiming through or under them, have no claims whatsoever to the Seating Equipment or the proceeds of the Sale, or against the Receiver in respect of the Sale. The Receiver's applications were adjourned to allow Sit Down to present its objection to the proposed sale.

3 Under the Consent Receivership Order filed November 16, 2001, the Receiver is empowered to sell the property of Scaffold.

4 Sit Down disputes this Court's jurisdiction in this matter on the basis that the assessment of the propriety of the proposed sale requires an interpretation of the Distributor Agreement between Sit Down and Scaffold, which Agreement specifies that all disputes arising in connection with the Agreement shall be arbitrated in London, Great Britain and that the Agreement shall be construed according to the laws of Sweden.

5 The Distributor Agreement clearly provides that upon termination of the Agreement, Scaffold shall be allowed to sell any existing units within its possession at the time of termination.

6 In a letter dated November 23, 2001 to the Receiver, counsel for Sit Down advised that Sit Down considered the contract between it and Scaffold to be at an end pursuant to Article 1.18 of the Distributor Agreement. In a further letter dated November 28, 2001 to Scaffold, Sit Down's Swedish counsel terminated the agreements in effect between Scaffold and Sit Down.

7 Counsel for Sit Down submits that the Distributor Agreement contains restrictions on the use of Sit Down's intellectual property rights in and relating to the Seating Equipment, and requires the parties to exert reasonable efforts to "transit (which Sit Down defines as "convey") the relationship of the parties", which Sit Down understands to be the package of rights under the Distributor Agreement. Counsel for Sit Down did not articulate the manner in which the proposed sale would result in breach of any intellectual property rights.

8 The Receiver, the Bank of Montreal and Roynat Inc. (secured creditor) argue that the Receiver is not bound by the contracts entered into by Scaffold. The contemplated sale does not purport to assign any interest in intellectual property, nor does it purport to convey the distribution or manufacturing rights which arose under the agreements between Sit Down and Scaffold. The clear language of the Distributor Agreement permits sale of units in Scaffold's possession upon termination.

9 The Receiver provided evidence that there will not be sufficient assets to discharge the claims of Roynat and the Bank of Montreal and therefore no funds will be available for subordinate creditors.

10 Further, under s. 82(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, where any property of a bankrupt vesting in a trustee consists of patented articles that were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the patented articles free and clear of the restrictions or limitations. The Receiver argues that by analogy, the Receiver likewise should not be bound. I note that ss. (2) provides that where the manufacturer or vendor of the patented articles objects to the disposition and gives notice, the manufacturer or vendor has the right to purchase the patented articles at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

11 The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159 (N.S. C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341. The Receiver in this case is not breaking a contract which it has adopted, as the agreements between Sit Down and Scaffold were terminated by Sit Down shortly after the appointment of the Receiver. Thus, there is no basis to suggest that the Receiver is bound by any of the contractual terms entered into between Sit Down and Scaffold.

12 Although the Receiver is not bound by the Distributor Agreement, the Receiver does have a duty to act fairly and reasonably, and I conclude that this Court may consider that Agreement in determining whether the Receiver has fulfilled its duty in relation to the proposed sale.

13 The very clear language of the Distributor Agreement would have permitted Scaffold to sell the Seating Equipment on termination. There is nothing before the Court beyond speculation to suggest that the provisions in question would be interpreted any differently by a London arbitrator applying Swedish law. Further, there is nothing before the Court beyond vague speculation that the proposed sale will adversely affect any intellectual property rights of Sit Down, and counsel for Sit Down did not propose any concrete method of avoiding the result it fears.

14 The applications of the Receiver are granted.

Applications granted.

End of Document

TAB

4

2005 BCCA 154
British Columbia Court of Appeal

New Skeena Forest Products Inc. v. Kitwanga Lumber Co.

2005 CarswellBC 578, 2005 BCCA 154, [2005] B.C.W.L.D. 2755, [2005] B.C.W.L.D. 2957, [2005] B.C.J. No. 546, 137 A.C.W.S. (3d) 1137, 210 B.C.A.C. 185, 251 D.L.R. (4th) 328, 348 W.A.C. 185, 39 B.C.L.R. (4th) 327, 9 C.B.R. (5th) 267

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation, Kitwanga Lumber Co. Ltd. (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd., and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corporation (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation (Respondents / Petitioners) And Main Logging Ltd. (Appellant / Respondent)

Southin, Braidwood, Oppal JJ.A.

Heard: February 17, 2005
Judgment: March 18, 2005
Docket: Vancouver CA032519, CA032539, CA032528

Proceedings: affirmed *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.* ((December 13, 2004)), Doc. Vancouver L033220 ((B.C. S.C.))

Counsel: P. Voth, Q.C., M.S. Oulton for Appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.
R.A. Millar for Respondents, Ernest & Young Inc.
F.M. Kirchner for Respondents, Coast T'simshian Resources
S.B. Jackson for Appellant, Main Logging
R. Leong for Attorney General of Canada
D.J. Hatter for H.M.T.Q. in Right of British Columbia
S.R. Ross for Intervenor, Truck Loggers Association

Subject: Natural Resources; Insolvency

APPEAL by logging companies from order allowing receiver to dispose of assets of company under protection of Companies' Creditors Arrangement Act.

***Braidwood J.A.*:**

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> .....
>
> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

21 Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

22 There is no provision in the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The *Act* only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1)(k) of the *Bankruptcy & Insolvency Act* the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

23 The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English *Bankruptcy Act, 1869* (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, *Insolvency Act 1986* (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (*Bankruptcy Act 1966*, (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

24 However, the power of trustees to disclaim contracts has its roots in the English law where there was a common-law power in assignees (who took control of debtor property prior to use of trusteeships in bankruptcy) to disclaim contracts. There is a weight of authority supporting the existence of such a power prior to the enactment of the *1869 Act*.

25 In his 1922 text, Lewis Duncan, in *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 304-5, cites several venerable English cases for the proposition that:

> There is no section in the Canadian *Act* corresponding with section 54 of the English *Act* [earlier s. 23] which gives the trustee the right to disclaim onerous contracts or property. The law under *The* [Canadian] *Bankruptcy Act* will be the same as the law in England before the Act of 1869 was passed, with the exception that section 44 of the *Bankruptcy Act* gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it.

26 In *Sneezum, Re* (1876), 3 Ch. D. 463 (Eng. C.A.), at 472, James L.J. said that at common law, prior to the passing of the *1869 Act*, assignees in bankruptcy had the option of deciding whether or not to carry on with performance of an executory contract.

27 To similar effect, in *Gibson v. Carruthers* (1841), 8 M. & W. 321 (Eng. Ex. Ct. Pleas), at 326 -27, a case in which the assignees wished to assume a contract under which the defendant, who had contracted with the bankrupt, had agreed to deliver 2000 quarters of linseed to a charter ship, Gurney B. said:

> ...it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate.

28 In Canada, the Ontario Supreme Court Appellate Division in *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.) recognized such a power; see also *Denison v. Smith* (1878), 43 U.C.Q.B. 503 (U.C. Q.B.); *Stead Lumber Co. v. Lewis (No. 2)* (1957), 37 C.B.R. 24, 13 D.L.R. (2d) 34 (Nfld. T.D.), at 43; *Salok Hotel Co., Re* (1967), 11 C.B.R. (N.S.) 95, 66 D.L.R. (2d) 5 (Man. Q.B.), at 8.

29 In more recent times, L.W. Houlden & G.B. Morowetz in their text *Bankruptcy and Insolvency Law of Canada*, 3d ed, looseleaf (Toronto: Thomson Carswell, 2004) at F§45.2 state quite unequivocally that a trustee may disclaim a contract entered into by the bankrupt. Similarly, in a case comment on *Potato Distributors Inc. v. Eastern Trust Co.* (1955), 35 C.B.R. 161 (P.E.I. C.A.), at 166, L.W. Houlden writes:

> It is well established law that a trustee may elect to carry on with a contract entered into prior to bankruptcy, provided he pays up arrears and is ready to perform the contract. The trustee could also, if he saw fit, elect not to go on with the contract in which event the vendor would have the right to prove a claim for damages.

30 I observe that several Canadian commentators have recently opined that in the absence of an express statutory power, trustees in Canada may not disclaim executory contracts, specifically licences: see Piero Ianuzzi, "Bankruptcy and the Trustee's Power to Disclaim Intellectual Property and Technology Licencing Agreements: Preventing the Chilling Effect of Licensor Bankruptcy in Canada" (2001) 18 C.I.P.R. 367; Gabor F.S. Takach and Ellen Hayes, "Case Comment," *Re Erin Features #1 Ltd.* (1993) 15 C.B.R. (3d) 66 (B.C.S.C.); Mario J. Forte and Amanda C. Chester, "Licences and the Effects of Bankruptcy and Insolvency Law on the Licensee" (2001) 13 Comm. Insol. R. 25. However, the position taken by the authors of these articles departs from the traditional understanding of the law in this area.

31 In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

32 I observe that recently, in its 2002 *Report on the Operation of the Administration of the* Bankruptcy and Insolvency Act and the *Companies' Creditors Arrangements Act*, Industry Canada's Marketplace Framework Policy Branch considered the extent to which insolvency law should intervene in private contracts to ensure fair distribution or maximize value during an insolvency. The Report notes there is not universal support for the enactment of a detailed statutory provision like the American one. In a 2001 report on business insolvency law reform, the Insolvency Institute of Canada and the Canadian Association of Insolvency & Restructuring Professionals proposed the enactment of more detailed rules for both powers of trustees to disclaim executory contracts (*http://www.insolvency.ca/papers/2001ReportScheduleA.html*). Ultimately, it may therefore be preferable for the legislature to move to include a power in the statute, but until that time, in my view, trustees enjoy the power protected by the common law.

33 In the result, the order of 20 September 2004 grants the Receiver the power here exercised and I see no reason in principle that would cause me to alter that result.

Disposition

34 Accordingly, I would dismiss the appeal and order costs payable to the Receiver by the appellants.

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1991 CarswellNS 33
Nova Scotia Supreme Court, Appeal Division

Bayhold Financial Corp. v. Clarkson Co.

1991 CarswellNS 33, [1991] N.S.J. No. 488, 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 294 A.P.R. 198, 30 A.C.W.S. (3d) 832, 86 D.L.R. (4th) 127

BAYHOLD FINANCIAL CORP. LIMITED v. CLARKSON COMPANY LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.

Jones, Hallett and Matthews JJ.A.

Heard: September 18, 1991
Judgment: December 2, 1991
Docket: Doc. S.C.A. 02376

Counsel: *Douglas Caldwell, Q.C.*, and *Joel E. Fichaud*, for appellant.
Harry E. Wrathall, Q.C., and *Stephen Kingston*, for respondents.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Appeal from judgment of Kelly J. dated October 2, 1990, reported (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.), dismissing action for damages against receiver-manager.

The judgment of the court was delivered by *Hallett J.A.*:

1 This is an appeal from a decision of Kelly J. [reported at 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.)] dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited ("Community") which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver-manager to take possession of the assets of Community; that is, the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver-manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist season and thus obtain a good price for the hotel as a going concern. The hoped-for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981, at $623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for $200,000. The sum of $157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of $42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at $109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of $63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of Bayhold under the sale agreement. The terms of the agreement support this conclusion.

44 When one looks at all the facts surrounding this sale to Equitas, the removal of the chattels was certainly not the real cause of Equitas's failure to complete the agreement to purchase the hotel. Apart from the reason identified by the trial judge, Bayhold cannot be heard to complain too much about this lost sale being caused by Clarkson's removal of the chattels because Bayhold, by purporting to sell the chattels to Equitas pursuant to the terms of the agreement, was holding out to Equitas that it owned the chattels, whereas in fact it did not. The chattels were owned by Community and were subject to a first charge to Clarkson and then a second charge to Bayhold. Bayhold had no right to sell the chattels and can hardly be heard to assert that it lost the sale because Clarkson removed them from the premises. Bayhold really lost the sale because it didn't own the chattels; it didn't have any right to sell them in the first place and Equitas wasn't able to buy them at a price Equitas was prepared to offer to the receiver-manager.

45 There isn't any need to deal with the issue whether the trial judge was in error when he suggested Bayhold must first sue Equitas for a breach of contract before claiming damages for trespass.

46 I reject Bayhold's claim for damages which it asserts arises as a result of the trespass on April 29, 1983. The sale to Equitas was not lost because of Clarkson's technical trespass.

Issue 4

47 The appellant sets out this issue as follows:

> Are the respondents liable to Bayhold for mortgage interest owing to Bayhold during the term of the receivership until Bayhold acquired the hotel at the foreclosure?

48 The short answer is "no"; the receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver-manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:

> I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is un der any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

49 Buckley L.J. in the same case made it abundantly clear that receiver-managers are not personally bound by existing contracts. He stated at pp. 476-477:

> As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all.

50 In support of the argument that the receiver-manager is obliged to pay mortgage interest to Bayhold, the appellant relies on certain statements by Bennett, *Receiverships*, and Sir R. Walton and M. Hunter, *Kerr on Receivers*

and Administrators, 17th ed., (London: Sweet & Maxwell, 1989), the essence of which is that a receiver-manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver-manager is obliged to preserve (*Kerr*, pp. 31, 207, 219-220; *Halsbury's Law of England*, 4th ed., vol. 39 (London: Butterworths, 1982) (Receiverships) at para. 982; Bennett's *Receiverships* (1985), pp. 119, 110 and 118).

51 The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver-manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver-manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from *Kerr* at pp. 219-220 with emphasis by the appellant as follows:

> The receiver and manager is the agent neither of the company nor of the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, *subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment. Such contracts, unless they are contracts depending on personal relationship, such as contracts of employment, remain valid and subsisting, notwithstanding the appointment of a receiver and manager*. Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. *In this respect, a manager differs from a receiver appointed over the assets without any power to carry on the business*, who is under no obligation and has no power to carry out these contracts, nor to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts. *A manager must not, without leave of the court, disregard the contracts* in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages; *nor must he pick and choose which contracts he will carry out as being most profitable*.

52 The appellant's factum does not highlight the sentence which states that "[a]ny breach [of pre-existing contracts] will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business." This statement in *Kerr on Receivers and Administrators* is consistent with the views expressed by the justices who rendered opinions in the *Newdigate* case.

53 The reasons a receiver-manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver-manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver-manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver-manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver-manager only in the general sense that the receiver-manager must honour them to preserve the goodwill of the business. In Bennett on *Receiverships*, at p. 223, the author states:

> At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not he should complete those contracts.
>
> In a court-appointed receivership, the *receiver is not bound by existing contracts made by the debtor*. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[Emphasis added.]

54 The statement which I have underlined in Bennett is a contradiction of the following statement made by Bennett at p. 110 of his book on *Receiverships* and upon which the appellant relies: "The receiver will be bound by the terms of existing contracts. However, the receiver may move before the court for an order to breach such contracts." Bennett was merely making a general statement; the footnotes refer the reader to his section on contracts which starts at p. 223 where he makes a more specific statement, which I have quoted, and then goes on to discuss the *Newdigate Colliery* case.

55 That the receiver-manager is not personally liable for breaking pre-existing contracts is clear from the statements of the justices in the *Newdigate Colliery* case. Of course, if the receiver-manager adopts pre-existing contracts he then becomes personally liable for their performance. That is not the situation we have here. With respect to pre-existing contracts, it is the company in receivership that continues to be liable for such contractual commitments if the receiver-manager fails to honour them during the term of the receivership. That is all that the case of *Parsons v. Sovereign Bank of Canada*, supra, stands for.

56 There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:

> The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

57 The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts. The preservation of the goodwill of the hotel, if there was any, did not require payment of mortgage interest as the income from the operations was insufficient to do so. In short, the appellant has read into the case law and the statements in the text books a duty on a receiver-manager that he honour contracts and that if he does not he incurs personal liability for the breaches notwithstanding he was not a party to the contracts. The case law does not support such a proposition and, in fact, it supports the contrary (*Newdigate* case). The appellant had a remedy as a secured creditor which it eventually exercised to foreclose the mortgage and have the real property sold by the sheriff pursuant to court order. In conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

Issue 5

58

> Did Bayhold have priority over Clarkson for monies disbursed by Clarkson over $109,608.73?

TAB
6

2009 BCSC 17
British Columbia Supreme Court

Pope & Talbot Ltd., Re

2009 CarswellBC 88, 2009 BCSC 17, [2009] B.C.W.L.D. 1794, 174 A.C.W.S. (3d) 1067, 50 C.B.R. (5th) 99

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

AND AN APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

D. Brenner C.J.S.C.

Heard: November 19, 2008
Judgment: January 22, 2009
Docket: Vancouver S077839

Counsel: K. Jackson for Pope & Talbot
V. Tickle for PriceWaterhouseCoopers
F. Dearlove for Westcoast Energy Inc.
P. Rubin for Ableco

Subject: Insolvency; Corporate and Commercial

APPLICATION by gas supply company for payment by receiver.

D. Brenner C.J.S.C.:

1 The issue on this application is whether PricewaterhouseCoopers ("PWC"), the court-appointed receiver of Pope & Talbot Ltd ("P & T") is required to pay contractual standby charges to Westcoast Energy Inc. ("Westcoast") in respect of natural gas supply that continued to be available at two of the P & T mills from the date the receiver took possession until the mills were sold to third party purchasers.

2 P & T used the firm transportation services of Westcoast under the Firm Service Agreement ("FSA") to supply natural gas to its mills at Mackenzie and Fort St. James. Firm transportation service entitled P & T to a specified maximum daily capacity in the relevant zone of Westcoast's pipeline system. A fixed monthly charge known as the "Demand Toll" was payable in respect of this available capacity and a variable charge (the "Commodity Toll") calculated on the basis of gas actually delivered was also payable.

3 On May 10, 2008 the Receiver was appointed by the court as receiver of the assets and undertakings of P & T, but by the terms of the order was prohibited from taking possession of the two mills and from operating the business formerly carried on by P & T at the mills. On June 16, 2008 the court expanded the receivership to include the mills, but the receiver continued to be barred from operating the mills.

4 The Fort St. James mill sale completed August 22, 2008; the Mackenzie mill sale closed September 22, 2008. At no time from May 10 to September 22, 2008 did the receiver ever operate either mill.

5 Under the terms of the receivership order all suppliers including Westcoast were obliged to continue their contractual obligations to supply goods and/or services to Pope & Talbot as "may be required by the receiver". However since it never operated either mill, PWC never used natural gas from Westcoast.

6 On June 23, 2008 Westcoast's counsel wrote to the receiver. After noting the provision of the receivership order requiring Westcoast to continue providing the "firm service", its counsel asked for confirmation that the receiver would honour Westcoast's invoices. PWC never replied; periodic billings from Westcoast were never paid.

7 The amount outstanding from May 10 to September 30 is $147,190.01.

8 On June 30, 2008 as part of P & T's post filing creditors claim process, Westcoast filed a proof of claim seeking $44,855.78 for services for the month of April and May 1 to 9, 2008 in respect of unpaid firm service charges for the pre-receivership *CCAA* period. It also filed a contingent claim for $548,249.75 for the period May 10, 2008 to October 31, 2009 (the end of the term of the FSA) in the event the receiver sought to terminate the FSA.

9 On July 24, 2008 the receiver issued a notice of disallowance in respect of the contingent claim; it allowed the pre-receivership claim.

10 On August 18, 2008 the receiver advised Westcoast of the status of its efforts to sell both mills. It raised the possibility that if sold, the purchasers might want to take an assignment of the supply contracts with Westcoast. Sales of both have now closed; neither purchaser has requested an assignment.

11 The receiver denies liability to pay on the basis that no natural gas was ever supplied during the billing period and that it never affirmed the contract. It contends that since no natural gas was being supplied, it was not obliged to make an election to affirm or disclaim the contract until called upon to do so by Westcoast. No such demand was ever made.

12 Westcoast's response is that it was entitled to treat the contract as on foot until such time as the receiver made an election. Since the receiver never disclaimed the contract Westcoast says it was entitled to treat the contract as in good standing and that it is entitled to be paid the firm service charges. Westcoast billed periodically under the terms of the contract, but its accounts were never paid by the receiver.

13 The issue is this: on these facts, which party had a positive duty to act? Did the receiver have the obligation to assess this contract and make a decision whether to affirm or disclaim and notify Westcoast, or did Westcoast have a duty to call on the receiver to make the election and, in the absence of a response, apply to the court to force the receiver to make an election? Here neither party took such a step during the billing period. The question is: which party should bear the loss for its failure to act?

14 It is well settled law that, in the absence of an affirmation, a court appointed receiver is not bound by existing contracts made by the debtor. See *New Skeena Forest Products Inc., Re*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

15 In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication. Here there was clearly no express affirmation.

16 The question is whether, on the particular facts of this case, the receiver's silence or its August 18 letter constituted an implied affirmation.

17 Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether

it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

18 In this case, no goods were actually being supplied. While the contract did require the payment of a standby charge known as the Demand Toll, the mills were never operated and hence no natural gas ever flowed. By sending its invoices and the June 23 letter, Westcoast gave clear notice to the receiver that it expected to be paid for its standby charges. But it received no response to its letter and no payment of its invoices.

19 In the August 18 letter, PWC did not agree to pay the Demand Tolls. What it did was to advise Westcoast that sales for the two mills were pending. PWC raised the possibility that the outstanding amounts might be paid, in whole or part, by such purchasers.

20 In these circumstances can it be said that the receiver's conduct constituted affirmation of the contract?

21 In my view, on the rather unusual facts of this case where no actual goods or services were being supplied, the receiver did not come under an obligation to affirm or disclaim the contract until required to do so. In a receivership of this nature a receiver is in the position of having to assess many contracts and to decide whether to continue or terminate them.

22 If goods or services are being supplied, the receiver will be forced to complete this assessment and make its decisions within a reasonable time. But where no actual services or goods are being supplied, it is my view that the onus of taking a step rests with the other contracting party. It would have been a simple procedure for Westcoast to apply to the court for an order requiring the receiver to make its election. Other parties in this case did just that.

23 Here the receiver never gave any indication of ever wanting supply from Westcoast. It never made any payments nor indicated any intention of doing so. At best it raised the possibility that either or both of the mill purchasers might make the payment indicated to Westcoast. It was open to Westcoast to cease providing the firm transportation services under the FSA and to terminate the contract (or if in doubt to seek an order from the court permitting it to do so). It never did this and accordingly its application will be dismissed.

24 It is also clear that the receiver never had any intention of affirming this contract. That being the case it is apparent that this contract came to an end at a date prior to the date of this application. I will invite submissions from the parties as to when that effective date should be declared by this court.

Schedule A

Pope & Talbot, Inc.

MacKenzie Pulp Land Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

Application dismissed.

TAB

7

or should have known that Deloitte, Miller Thompson and Blakes sought and received priority charges with respect to their fees. Accordingly, Avison should have sought a priority charge for the payment of its commission as an advisor to 3 Eau Claire or Deloitte.

25 In its Supplemental Bench Brief, Bosa responds to Avison's arguments.

26 First, Bosa argues that the Listing Agreement does not create a valid trust. On intention, Bosa argues that the Listing Agreement does not establish that 3 Eau Claire intended to create a trust in favour of Avison. Bosa argues that instead, the Agreement evinces an intention to create a contractual agreement to pay Avison for its services, and provides that Avison will hold any deposit in trust for 3 Eau Claire, not for Avison itself. On subject matter, Bosa argues that the commission was not identifiable or held apart in trust for Avison. Rather, the $2.0 million dollars held in trust flowed from the purchaser to the bank account of the purchaser's solicitors subject to the terms of the Asset Purchase Agreement. That agreement was between the Receiver and Bentall as purchaser, with no relevance to the commission.

27 Second, Bosa argues that section 65.1(1) of the BIA is not applicable. Bosa argues that the section is intended to prevent contracting parties from taking advantage of clauses allowing for termination based solely upon insolvency and not for any other breach of contract. Bosa argues that the section is primarily with respect to the supply of goods which are necessary for the continuation of a debtor's business, and as Avison was not supplying goods upon which 3 Eau Claire relied for operations, Avison could have terminated, or at least sought direction from the Court. Further, Bosa argues that even if Avison was not entitled to terminate, it was not required to make advance of credit to 3 Eau Claire. In addition, Bosa argues that regardless, Avison could have secured a priority charge. Thus, by not terminating and continuing to market the lands without entering into a listing agreement with the Receiver or seeking a priority charge, Avison chose to provide services on unsecured credit.

28 Third, Bosa argues that the Receiver does not have unilateral authority to approve the payment of a commission to Avison where doing so would alter the priorities set out in the BIA. Absent an express assumption of the Listing Agreement or a section 64.2 priority charge, an obligation of 3 Eau Claire cannot be elevated to priority status.

29 Fourth, Bosa contests Avison's argument of unjust enrichment. Bosa argues that any deprivation suffered by Avison was not caused by Bosa but rather was due to the financial status of 3 Eau Claire and Avison's failure to contract with the Receiver or to seek a priority charge pursuant to section 64.2 of the BIA. Bosa also argues that the operation of the BIA, including its statutory regime establishing the relative priority of claims, is an adequate juristic reason for any enrichment to a bankrupt estate or its creditors. In particular, Bosa points to the valid security interest as the juristic reason for permitting the enrichment of the secured lender and the corresponding deprivation of unsecured claimants. Bosa objects to Avison's estoppel argument on the basis that it is permitted to protect its position when Avison seeks to subvert the BIA. In Bosa's view, Bosa had no obligation to compel Avison to exercise options available to it under the BIA. Bosa argues that it has no legal relationship with Avison and thus any estoppel argument fails.

Decision

30 This Court has some sympathy for Avison. The company successfully secured a lucrative sale of the Lands to the benefit of all creditors including Bosa. At the end of the day, however, Avison failed to protect its own financial position and remains an unsecured creditor after a long line of secured creditors.

Discussion

31 Avison's arguments must be viewed in the context of the alternative steps it could have taken.

32 Avison had an agreement with 3 Eau Claire. That agreement was never affirmed by the Receiver so there is no privity of contract between Avison and the Receiver. And, the Receiver is not bound by existing contracts made by 3 Eau Claire.[2]

TAB

8

No. S077839
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND IN THE MATTER OF THE LAW AND EQUITY ACT RECEIVERSHIP OF POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

ORDER

BEFORE THE HONOURABLE THE CHIEF JUSTICE	))))	MONDAY, THE 16TH DAY OF JUNE 2008

THE WITHOUT NOTICE APPLICATION of Her Majesty the Queen in right of the Province of British Columbia (the "Province") for an Order pursuant to Section 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended (the "LEA") appointing PricewaterhouseCoopers Inc. Receiver of the real property, including the immovables situate thereon or therein, of the Petitioners Pulp Mills and Sawmill (such real property and immovable property hereinafter referred to as the "Mills") more particularly described in Schedule "B" (in such capacity, the "Law and Equity Act Receiver") without security, coming on for hearing this day at the Courthouse, 800 Smithe Street, Vancouver, British Columbia.

AND ON READING the Notice of Motion dated June 16, 2008, and the Reports of the Monitor filed herein; AND ON HEARING David J. Hatter, counsel for the Province, and those counsel listed in Schedule "D" hereto, and on reading the consent of PricewaterhouseCoopers Inc. to act as the Law and Equity Act Receiver.

APPOINTMENT

1. THIS COURT ORDERS that pursuant to Section 39 of the LEA, PricewaterhouseCoopers Inc. is hereby appointed Law and Equity Act Receiver, without security, of the Mills.

LAW AND EQUITY ACT RECEIVER'S POWERS

2. The Law and Equity Act Receiver is hereby empowered to take any and all steps that may be necessary or advisable to reduce, eliminate, control, remediate or otherwise deal with any environmental condition or environmental damage affecting the Mills or to prevent the risk of any such environmental condition or damage, but the Law and Equity Act Receiver is not required by this Order to take any particular step unless otherwise required to do so by law or an order or direction of a Regulatory Body. If the Law and Equity Act Receiver is ordered to do so, and if the Province, the Selling Receiver or some other person does not agree to fund that work on terms satisfactory to the Law and Equity Act Receiver, it will be entitled to abandon or release the property in respect of which the said order is made in accordance with the provisions of s.14.06 of the BIA (the "14.06 Release") In this Order "Regulatory Body" means any person or body who has powers, duties or functions relating to the enforcement or administration of an enactment of Canada or the Province relating to health, safety or the environment.

3. For the purpose of carrying out its powers under paragraph 2 of this Order, the Law and Equity Act Receiver may:

   (a) take possession and control of the Mills;

   (b) take any and all steps that may be necessary or advisable to preserve, protect and maintain control of the Mills, or any part or parts thereof, including, but not limited to, changing of locks and security codes, relocating movables situate at the Mills to safeguard such movables, engaging of independent security personnel, the taking of physical inventories and placement of such insurance coverage as may be necessary or desirable;

   (c) engage consultants, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

   (d) at the request of the Receiver appointed by this Honourable Court herein on May 10, 2008 (the "Selling Receiver"), provide the Selling Receiver with such assistance in facilitating a sale of the Mills or some or all of them or movables on or from the Mills, on such terms and in such a manner as the Law and Equity Act Receiver deems appropriate and to which the Selling Receiver agrees and, in the case of the sale of immovables without a sale of the remainder of the Mill, as agreed to by the Province or ordered by the court provided that in no event shall such cooperation result in the Selling Receiver being in or being deemed to be in possession or control of the Mills.;

& any of

(e) enter into contracts and agreements and execute, assign, issue and endorse documents of whatever nature in respect of any of the Mills, whether in the Law and Equity Act Receiver's name or in the name and on behalf of any of the Petitioners, for any purpose pursuant to this Order;

(f) report to, meet with and discuss with such affected Persons (as defined below) as the Law and Equity Act Receiver deems appropriate on all matters relating to the Mills or other subject matter of this Order, and to share information with such Persons, subject to such terms as to confidentiality as the Law and Equity Act Receiver deems advisable;

(g) register a copy of this Order and any other Orders in respect of the Mills against title to any of the Mills;

(h) apply for any permits, licences, approvals or permissions and any renewals thereof as may be required by any governmental authority for and on behalf of and, if considered necessary or appropriate by the Law and Equity Act Receiver, in the name of the Petitioners or any of them;

(i) commission environmental reports, reviews, studies and testing in respect of the Mills as the Law and Equity Act Receiver and the Province agree may be desirable or as a Regulatory Body may order or direct,

(j) consult with and co-operate with the Province and with any Regulatory Body in order to facilitate the environmental remediation and protection of the Mills,

(k) with the consent of the Selling Receiver, use any equipment, machinery or other movables located at a Mill; and

(l) take any steps reasonably incidental to the exercise of these powers and take any other action that is in the reasonable opinion of the Law and Equity Act Receiver necessary or desirable in the performance of duties or exercise of powers under or resulting from this Order,

and in each case where the Law and Equity Act Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below) except a Regulatory Body or a Person ordered or directed by a Regulatory Body to take such action or step, and without interference from any other Person except a Regulatory Body or a Person ordered or directed by a Regulatory Body to take such action or step.

4. THIS COURT ORDERS that the Law and Equity Act Receiver shall be prohibited from operating any business with respect to the Mills, including without limitation the business formerly carried on by the Petitioners.

5. The Law and Equity Act Receiver shall not be authorized or empowered to sell or realize upon any of the assets of the Petitioners, including the Mills or any property located thereon.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE LAW AND EQUITY ACT RECEIVER

6. THIS COURT ORDERS that (i) the Petitioners, (ii) all of the Petitioners' current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, (iii) the Selling Receiver and (iv) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith grant immediate and continued access to such Mills to the Law and Equity Act Receiver, and shall deliver all such Mills to the Law and Equity Act Receiver upon the Law and Equity Act Receiver's request.

NO PROCEEDINGS AGAINST THE LAW AND EQUITY ACT RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") other than Proceedings by a Regulatory Body, shall be commenced or continued against the Law and Equity Act Receiver or the Mills except with the written consent of the Law and Equity Act Receiver or with leave of this Court.

CONTINUATION OF SERVICES

8. THIS COURT ORDERS that all Persons having oral or written agreements with the Petitioners or any of them or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services of any kind to the Petitioners or any of them are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Law and Equity Act Receiver, and that the Law and Equity Act Receiver shall be entitled to the continued use of the Petitioners' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Law and Equity Act Receiver as may be agreed upon by the supplier or service provider and the Law and Equity Act Receiver, or as may be ordered by this Court, provided that such rights of the Law and Equity Act Receiver will terminate upon the sale of the foregoing assets by the Selling Receiver.

EMPLOYEES

9. THIS COURT ORDERS that the Law and Equity Act Receiver is authorized and empowered, but not obligated, to engage such former employees of the Petitioners or any other persons on a term and task basis who have entered into letter agreements with the Law and Equity Act Receiver and, in the case of union employees, in respect of whom the applicable union has entered into an agreement with the Law and Equity Act Receiver, in each case on terms satisfactory to the Law and Equity Act Receiver, all with a view to assisting the Law and Equity Act Receiver in the exercise of its authority hereunder.

10. THIS COURT ORDERS that the Law and Equity Act Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts other than such amounts as the Law and Equity Act Receiver may specifically agree in writing to pay.

REGULATORY BODY PROCEEDINGS

11. THIS COURT ORDERS that nothing in this Order or in any other Order made in these proceedings prevents or restricts a Regulatory Body from making an order or direction against the Law and Equity Act Receiver or any Person in connection with the Mills or any other subject matter of this Order.

BIA AND CCAA ENVIRONMENTAL CHARGE

12. THIS COURT ORDERS that nothing in this Order or in any other Order made in these proceedings alters, limits or otherwise affects the charge or the priority of such charge, if any, that has arisen or may arise under s. 11.8 of the *Companies' Creditors Arrangement Act* ("CCAA") or s. 14.06 of the *Bankruptcy and Insolvency Act* ("BIA") in favour of the Province or Canada.

LIMITATION ON THE LAW AND EQUITY ACT RECEIVER'S LIABILITY

13. THIS COURT ORDERS that the Law and Equity Act Receiver shall incur no personal liability as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Law and Equity Act Receiver by Section 14.06 of the BIA or by any other applicable legislation.

LAW AND EQUITY ACT RECEIVER'S ACCOUNTS

14. THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Law and Equity Act Receiver, including the fees of the Law and Equity Act Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Law and Equity Act Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Mill or Mills in respect of which the expenditure was made (the "Law and Equity Act Receiver's Charge") in priority to all mortgages, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any

Person, including without limitation the Administration Charge (the "Administration Charge"), the Directors' Charge (the "Directors' Charge") and the DIP Lenders' Charge (the "DIP Lenders' Charge"), as defined in and created by and under the Amended and Restated and Confirmed Initial Order pronounced herein on November 21, 2007 (the "Initial Order"), and the Receiver's Charge (the "Receiver's Charge") and the Receiver's Borrowings Charge (the "Receiver's Borrowings Charge"), as defined in and created by and under the Receivership Order pronounced herein on May 10, 2008 (the "Selling Receivership Order").

15. The Law and Equity Act Receiver's Charge as against any particular Mill shall not exceed $1 million or such greater amount as this Court may by further Order authorize.

16. THIS COURT ORDERS that the Law and Equity Act Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Law and Equity Act Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

17. THIS COURT ORDERS that prior to the passing of its accounts, the Law and Equity Act Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Law and Equity Act Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE LAW AND EQUITY ACT RECEIVERSHIP

18. THIS COURT ORDERS that the Law and Equity Act Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount of such borrowing does not exceed $3 million (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as the Law and Equity Act Receiver deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Law and Equity Act Receiver by this Order, including interim expenditures (the "Law and Equity Act Receiver's Borrowings"). The Law and Equity Act Receiver's Borrowings may be borrowed from the Selling Receiver and the Selling Receiver is authorized to loan funds to the Law and Equity Act Receiver for the purposes of this Receivership. Each of the Mills, including the immovables, shall be and is hereby charged by way of a fixed and specific charge (the "Law and Equity Act Receiver's Borrowing Charge") as security for the payment of the monies borrowed, together with interest and charges thereon providing that the Law and Equity Act Receiver's Borrowing Charge will only attach to the particular Mill and immovables in respect of which the funds are

expended and the Law and Equity Act Receiver will keep accounts of the amount expended in respect of any given Mill and in respect of its fees and disbursements in protecting and preserving any particular Mill. Such Law and Equity Act Receiver's Borrowing Charge will attach in priority to all mortgages, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, including without limitation the Administration Charge, the Directors' Charge, the DIP Lenders' Charge, the Receiver's Charge and the Receiver's Borrowings Charge but subordinate in priority to the Law and Equity Act Receiver's Charge and to any charge that has arisen or may arise under s. 11.8 of the CCAA or under s. 14.06 of the BIA.

19. THIS COURT ORDERS that neither the Law and Equity Act Receiver's Borrowings Charge nor any other security granted by the Law and Equity Act Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

20. THIS COURT ORDERS that the Law and Equity Act Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "C" hereto (the "Law and Equity Act Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

21. THIS COURT ORDERS that the monies from time to time borrowed by the Law and Equity Act Receiver pursuant to this Order or any further order of this Court and any and all Law and Equity Act Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Law and Equity Act Receiver's Certificates.

ALLOCATION

22. THIS COURT ORDERS that the Receiver shall, to the extent practicable, keep a record on a Mill by Mill basis of where and for what purpose its costs and fees, including the fees of its legal counsel, were incurred and shall make such information available to the court and, within a reasonable time, to any interested party (including the Province) upon request.

23. THIS COURT ORDERS that any interested party (including the Province) may apply to this court on notice to any other party likely to be affected, for an order respecting allocation of the Law and Equity Act Receiver's Charge and the Law and Equity Act Receiver's Borrowing Charge to a particular Mill.

GENERAL

24. THIS COURT ORDERS that the Law and Equity Act Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction, wherever located, to give effect to this Order and to assist the Law and Equity Act Receiver and its agents in carrying out the terms of this Order.

26. THIS COURT ORDERS that the Law and Equity Act Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal or regulatory or administrative body, wherever located, for recognition of this Order and for assistance in carrying out the terms of this Order and all such courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Law and Equity Act Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Law and Equity Act Receiver and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than two (2) clear business days' notice to the Law and Equity Act Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

28. THIS COURT ORDERS that the approval as to form of counsel appearing on this application, save for counsel for the applicant and counsel for PricewaterhouseCoopers Inc., is dispensed with.

BY THE COURT

~~DISTRICT~~ REGISTRAR

CJSC

APPROVED BY:

Counsel for Her Majesty the Queen in right of the Province of British Columbia

APPROVED BY:

Counsel for PricewaterhouseCoopers Inc.

SCHEDULE "A"

ADDITIONAL PETITIONERS

Pope & Talbot, Inc.

MacKenzie Pulp Landing Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

Schedule "B"

Fort St. James

Lands

	PID	Legal Description	Street Address	Owner
1.	026-468-646	Lot A, District Lots 4749, 4750, 4751 and 4752, Range 5, Coast District, Plan BCP20449	300 Takla Rd., Fort St. James, B.C.	Pope & Talbot Ltd.
2.	009-215-441	Lot 4, District Lot 314, Range 5, Coast District Plan 7468	3460 Roberts Rd., Fort St. James, B.C.	Pope & Talbot Ltd.

	Licenses Description	Street Address	Lessee
1.	Communication site license no. 703775 dated for reference the 15th day of June, 1999 between Her Majesty the Queen in right of the Province of British Columbia and Canadian Forest Products Ltd., as assigned by Canadian Forest Products Ltd. to the Company.*	300 Takla Rd., Fort St. James, B.C.	Pope & Talbot Ltd.
2.	License of occupation no. 703635 dated for reference the 10th day of June, 1997 between Her Majesty the Queen in right of the Province of British Columbia and Canadian Forest Products Ltd., Takla Division – Woodlands, as assigned by Canadian Forest Products Ltd. to the Company.	300 Takla Rd., Fort St. James, B.C.	Pope & Talbot Ltd.

Other – all licenses and permits and all rights reasonably necessary for the Law and Equity Act Receiver to carry out its role as a receiver of the Fort St. James Mill

Mackenzie pulp mill

Lands

1.	024-184-489	Lot B District Lot 12478 Cariboo District Plan PGP42628	1000 Coquiwaldy Road, Mackenzie, B.C.	Mackenzie Pulp Lan Ltd.
2.	023-271-299	Lot A District Lot 12479 Cariboo District Plan PGP39531	1000 Coquiwaldy Road, Mackenzie, B.C.	Mackenzie Pulp Lan Ltd.
3.	024-184-501	Lot D, District Lot 12478 Cariboo District Plan PGP42628	1000 Coquiwaldy Road, Mackenzie, B.C.	Mackenzie Pulp Lan Ltd.
4.	004-350-448	Lot 8, District Lot 12463, Cariboo District Plan 17642	1000 Coquiwaldy Road, Mackenzie, B.C.	Mackenzie Pulp Lan Ltd.
5.	015-219-208	District Lot 3470, Cariboo District except Plans 21721 and 22417	1000 Coquiwaldy Road, Mackenzie, B.C.	Mackenzie Pulp Lan Ltd.

Other property related interests

1. Lease no. 2926 between BCR Properties Ltd. and Fletcher Challenge Canada Limited made February 6, 1996 for PID 024-252-255, as assigned to Mackenzie Pulp Land Ltd. on June 14, 2001.

2. Lease no. 2509 between BCR Properties Ltd. and Fletcher Challenge Canada Limited made March 27, 1995 for PID 023-623-951, as modified by modification of lease dated March 25, 1997, as amended by letter dated May 4, 1998, as assigned to Mackenzie Pulp Land Ltd. on June 14, 2001.

3. Industrial siding agreement (TS261) made the 27th day of July 1981 between British Columbia Railway Company (now CN) and British Columbia Forest Products.

4. Statutory right of way dated March 13, 2000 in favour of Fletcher Challenge Canada Limited (now Mackenzie Pulp Land Ltd.) over PID 024-184-497.

5. Possibility of reverter dated November 11, 1970 in favour of Mackenzie Pulp Land Ltd. and Canadian Forest Products Ltd., each as to an undivided half interest, over PID 010-908-005.

6. Statutory right of way no. 703398 dated July 3, 1996 in favour of Fletcher Challenge Canada Limited (now Mackenzie Pulp Land Ltd.) over PID 023-366-583.

7. License over PID: 024-184-411, Lot A, District Lot 12478, Cariboo District, Plan PGP42628, appurtenant to Easement PM45176, in respect of the use of the moorage site, docks and related facilities thereon.

Crown Leases

1. Statutory right of way no. 703398 dated July 3, 1996 in favour of Fletcher Challenge Canada Limited (now Mackenzie Pulp Land Ltd.) over PID 023-366-583.

Other – all licenses and permits and all rights reasonably necessary for the Law and Equity Act Receiver to carry out its role as a receiver of the Mackenzie Pulp Mill

Harmac Pulp Mill

Mill Lands

	PID	Legal Description	Street Address	Owner
1.	008-627-100	That Part of Section 22, Range 1, Cedar District, outlined in Red on Plan 1499R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
2.	023-922-877	Lot 1 Section 1 Range 8 Nanaimo District and Section 21 Range 1 Cedar District Plan VIP65621	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
3.	023-922-893	Lot 3 of Sections 21, 22 and 23 Range 1 and Sections 21, 22 and 23 Range 2 Cedar District and District Lot 137 and 385 Nanaimo District Plan VIP65621	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
4.	003-926-516	West 60 acres of Section 22, Range 1, Cedar District Except that part shown outlined in Red on Plan 1499R and Except part in Plan VIP74868	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
5.	003-924-424	The East ½ of Section 2, Range 8, Nanaimo District, Except Plans 32333, 37427 and VIP74868	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
6.	009-779-159	Section 3, Range 8, Nanaimo District, Except those parts in Plans 16106 and 32333	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
7.	009-779-442	Section 4, Range 8, Nanaimo District, Except Parcel A (DD 35951I) and Except those parts in Plans 16106 and 17640	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
8.	008-747-695	Section 20, Range 2, Cedar District	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
9.	000-102-946	Lot 3, Sections 3 & 4, Range 8 and District Lot 137, Nanaimo District, Plan 32333	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
10.	009-045-	District Lot 17, Dunsmuir	1000 Wave Place,	Pope & Talbot

	PID	Legal Description	Street Address	Owner
	872	District containing 557.8 Acres, more or less	Nanaimo, B.C.	Ltd.
11.	008-475-431	That part of Block 68, Dunsmuir District, Plan 789, shown outlined in red on Plan 1580R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
12.	006-007-805	Section 13, Range, 1, Cedar District, except Parcel A (DD 6974N), and except Parcel B (DD 71270N), and except that part lying to the South and East of Plan 7914, and except those parts in Plans 573 RW, 1997 RW, 1572-R, 7914, 8955, 15443 and 23683	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
13.	004-226-216	That Part of Lot 4 Section 11 Range 1 Cedar District Plan 15311 shown outlined in red on Plan 1997 R.W.	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
14.	004-226-224	That Part of Lot 3 Section 11 Range 1 Cedar District Plan 15311 shown outlined in red on Plan 1997 R.W.	1000 Wave Place, Nanaimo, B.C..	Pope & Talbot Ltd.
15.	008-758-786	That Part of Section 12 Range 1 Cedar District outlined in red on Plan 1997 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
16.	008-752-133	That Part of Section 11 Range 1 Cedar District outlined in red on Plan 657 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
17.	008-754-144	That Part of Section 7 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.Pope & Talbot Ltd.	Pope & Talbot Ltd.
18.	008-754-187	That Part of Section 8 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
19.	008-758-174	That Part of Section 11 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
20.	008-759-243	That Part of Parcel A (DD 15075N) of Section 6 Range 1 Cedar District outlined in red on Plan 1523R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
21.	008-759-251	That Part of Parcel B (DD 15075N) of Section 6 Range 1 Cedar District outlined in red	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

	PID	Legal Description	Street Address	Owner
		on Plan 1523R		
22.	008-759-359	That Part of Parcel A (DD 15075N) of Section 6 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
23.	008-759-367	That Part of Parcel B (DD 15075N) of Section 6 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
24.	008-751-846	That Part of Section 9 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
25.	006-285-601	That Part of Lot 3 Section 17 Range 1 Cedar District Plan 3119 included in Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
26.	006-285-651	That Part of Lot 5 Section 17 Range 1 Cedar District Plan 3119 included in Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
27.	006-285-619	That Part of Lot 4 Section 17 Range 1 Cedar District Plan 3119 included in Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
28.	006-285-694	That Part of Lot 6 Section 16 Range 1 Cedar District Plan 3119 shown outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
29.	006-285-627	That Part of Lot 3 Section 17 Range 1 Cedar District Plan 3119 included in Plan 1694 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
30.	006-285-635	That Part of Lot 4 Section 17 Range 1 Cedar District Plan 3119 included in Plan 1694 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
31.	008-751-919	That Part of Section 10 Range 1 Cedar District containing 1.44 acres more or less and shown outlined in red on Plan 657 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
32.	008-751-811	That Part of Section 12 Range 1 Cedar District outlined in red on Plan 657 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
33.	008-753-806	That Part of Section 10 Range 1 Cedar District coloured red on Plan Deposited in DD	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

	PID	Legal Description	Street Address	Owner
		20845F included within the area shown outlined in red on Plan 573RW		
34.	008-758-212	That Part of Section 10 Range 1 Cedar District containing 1.56 acres more or less and shown outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
35.	008-758-042	That Part of Parcel C (DD 6974N) of Section 15 Range 1 Cedar District coloured red on Plan 1227R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
36.	008-754-012	That Part of Section 14 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
37.	008-754-128	That Part of Section 13 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
38.	008-754-101	That Part of Section 12 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
39.	008-758-280	That Part of Section 18 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
40.	008-758-301	That Part of Section 19 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
41.	008-758-433	That Part of Section 10 Range 1 Cedar District coloured red on Plan Deposited in DD 20845F and outlined in red on Plan 657 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
42.	008-758-387	That Part of Section 15 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
43.	008-758-778	That Part of Section 13 Range 1 Cedar District outlined in red on Plan 1997 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
44.	008-758-794	That Part of Section 18 Range 1 Cedar District outlined in red on Plan 1694 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
45.	008-759-260	That Part of Parcel A (DD 392261I) of Section 10 Range 1 Cedar District outlined in red	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

	PID	Legal Description	Street Address	Owner
		on Plan 1873R		
46.	008-758-328	That Part of Section 20 Range 1 Cedar District outlined in red on Plan 573 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
47.	005-432-928	Lot 1 Section 4 Range 7 Cranberry District Plan 8718 except part in Plan 12762	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
48.	005-564-549	Lot A Sections 4 and 5 Range 8 Cranberry District Plan 8575	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
49.	009-002-413	That Part of Section 5 Range 8 Cranberry District outlined in red on Plan 1447R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
50.	009-002-421	That Part of Section 5 Range 8 Cranberry District (including part of Plan 1364R) shown outlined in red on Plan 1517R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
51.	008-996-504	That Part of Section 5 Range 8 Cranberry District outlined in red on Plan DD 16767N and included within the area outlined in red on Plan 588 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
52.	006-347-134	That Part of Lot 1 Section 4 Ranges 7 and 8 Cranberry District Plan 2700 shown included in red on Plan 588 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
53.	008-996-431	That Part of Section 5 Range 8 Cranberry District shown outlined in red on Plan 588 RW except part included in the area outlined in red on Plan DD 16767N and except part in Plan 8330	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
54.	008-996-458	That Part of the East 60 Acres of Section 6 Range 8 Cranberry District included within the area outlined in red on Plan 588 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
55.	006-347-282	That Part of Lot 1 Section 4 Range 7 Cranberry District Plan 2700 included in red on Plan 1486-R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
56.	008-996-296	That Part of Section 4 Range 7 Cranberry District outlined in	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

	PID	Legal Description	Street Address	Owner
		red on Plan 1358R		
57.	009-002-456	That Part of Section 5 Range 7 Cranberry District outlined in red on Plan 1351R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
58.	008-758-182	That part of Section 18, Range 2, Cedar District, lying to the North of that part coloured red on Plan Deposited under DD 29718I, and to the East of the Production Northerly of the West Boundary of said part	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
59.	005-091-730	Lot 1, Section 4, Range 7, and of Sections 3 and 4, Range 8, Cranberry District, Plan 2700, except those parts of said lot shown outlined in red on Plans 588 RW, 1357 R, 1486 R, 8178, 12014 and 12762, except that part of said lot included within the boundaries of Plan 8330 and except those parts of said lot shown outlined in red and marked D and E on Plan 1485 R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
60.	006-347-151	That Part of Lot 1, Section 4, Range 8, Cranberry District, Plan 2700,included in red on Plan 1357-R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
61.	006-347-312	Those Parts of Lot 1, Section 4, Ranges 7 & 8, Cranberry District, Plan 2700 included in red and marked "D" and "E" on Plan 1485-R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
62.	006-347-509	Lot 6, Section 3, Range 8, Cranberry District, Plan 2700	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
63.	008-996-202	That part of Section 5 Range 8 Cranberry District outlined in red on Plan 1350R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
64.	008-996-245	That Part of Section 6 Range 8 Cranberry District outlined in red on Plan 1350R	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
65.	009-796-673	That part of the East 60 Acres of Section 6, Range 8, Cranberry District, lying to the	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

	PID	Legal Description	Street Address	Owner
		North of a boundary extending due East from the most Northerly iron pin of the area shown on Plan 1350R		
66.	005-500-605	Lot 1, Section 5, Range 7, and of Section 3, 4, and 5, Range 8, Cranberry District Plan 8330	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.
67.	024-089-320	That part of Nanaimo District being part of the bed of Northumberland Channel, shown on Plan 3078 RW	1000 Wave Place, Nanaimo, B.C.	Pope & Talbot Ltd.

Other interests

1. Sub-lease aquatic lands (of lease of aquatic lands no. 103441) effective August 1, 2005 between Pope & Talbot Ltd. and Nexen Chemicals Canada Ltd.

2. Lease agreement dated for reference November 1, 2004 between Nanaimo Port Authority and Pope & Talbot Ltd., as amended by lease modification agreement dated January 1, 2008.

3. Non-disturbance agreement dated for reference and made as of November 1, 2004 between Her Majesty the Queen in right of the Province of British Columbia and Nanaimo Port Authority and Pope & Talbot Ltd.

4. Nanaimo River Estuary Log Storage Association Agreement dated the __ day of __, 2004 between Weyerhaeuser Company Limited, Coastland Wood Industries Limited, Western Forest Products Inc. and Pope & Talbot Ltd.

5. Non-exclusive license effective April 1, 2005 between Pope & Talbot Ltd. and Nanaimo River Stewardship Society.

6. Nanaimo Harbour Users Group Debris Agreement Letter of Understanding made as of the 31st day of March, 2006 between Nanaimo Port Authority and Western Forest Products Inc., Cascadia – Island Phoenix Division, Coastland Wood Industries Ltd., Teal Jones, Island Timberlands, and Pope & Talbot Ltd.

7. Lease agreement dated for reference December 15, 2006 between TC Property Inc. and Pope & Talbot Ltd.

8. Option to purchase dated May 26, 1994 from The Nature Trust of British Columbia to MacMillan Bloedel Limited for PIDs 004-674-006, 004-678-478, and 004-678-486, as assigned by MacMillan Bloedel Limited to Harmac Pacific Inc. (now Pope & Talbot Ltd.) on May 26, 1994 (charge #EH70652 (assignment of R69305)).

9. Statutory right of way no. 105854 dated March 12, 1998 in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PID 024-089-320 (charge # EM24688).

10. Statutory right of way dated May 1, 1999 in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PID 002-308-151 (charge #EN 39180).

11. Statutory right of way in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PID 002-308-151, registered May 24, 1994, charge # EH 70653 (assignment of EH54371).

12. Statutory right of way dated May 1, 2005 in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PID 002-308-151.

13. Statutory right of way dated May 24, 1994 in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PIDs 008-996-369 and 008-996-318 (charge #EH70648).

14. Statutory right of way dated May 24, 1994 in favour of Harmac Pacific Inc. (now Pope & Talbot Ltd.) over PIDs 023-922-893, 023-922-907 and 023-922-915 (charge #EH70647).

15. Option to re-purchase dated August 31, 2002 from British Columbia Hydro and Power Authority to Pope & Talbot Ltd. for PID 025-586-840 (charge #EV16970).

16. Any licenses in favour of Pope & Talbot Ltd. appurtenant to any agreements registered on title to the Lands.

Crown Leases

1. Lease of aquatic lands no. 103441 dated for reference August 1, 1990 between Her Majesty the Queen in right of the Province of British Columbia and MacMillan Bloedel Limited, as assigned by MacMillan Bloedel Limited to Harmac Pacific Inc. pursuant to an agreement dated for reference May 26, 1994 between MacMillan Bloedel Limited, Harmac Pacific Inc. and the Majesty the Queen in right of the Province of British Columbia. This lease is subject to a sublease by way of mortgage in favour of Ableco Finance LLC.

2. Statutory right of way no. 105854 dated March 12, 1998 between Her Majesty the Queen in Right of the Province of British Columbia and Harmac Pacific Inc. (now Pope & Talbot Ltd.).

Other – all licenses and permits and all rights reasonably necessary for the Law and Equity Act Receiver to carry out its role as a receiver of the Harmac Pulp Mill

SCHEDULE "C"

LAW AND EQUITY ACT RECEIVER CERTIFICATE

CERTIFICATE NO. ____________________

AMOUNT $ ____________________

1. THIS IS TO CERTIFY that PricewaterhouseCoopers Inc., the Law and Equity Act Receiver (the "Law and Equity Act Receiver") of the Mills, as defined in the Order of the Supreme Court of British Columbia (the "Court") dated the 16th day of June, 2008 (the "Order"), made in SCBC Action No. S077839, Vancouver Registry, has received as such Law and Equity Act Receiver from the holder of this certificate (the "Lender") the principal sum of $__________, being part of the total principal sum of $3,000,000 which the Law and Equity Act Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [redacted] not in advance on the [redacted] day of each month after the date hereof at a notional rate per annum equal to the rate of [redacted] per cent above the prime commercial lending rate of Bank [redacted] from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Law and Equity Act Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Mills (as defined in the Order), in priority to the security of any other person (except as otherwise provided in the Order), but subject to the priority of the charges set out in the Order, and the right of the Law and Equity Act Receiver to indemnify itself out of the Mills in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at [redacted], British Columbia.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Law and Equity Act Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate to permit the Law and Equity Act Receiver to deal with the Mills as authorized by the Order and as authorized by any further or other order of the Court.

7. The Law and Equity Act Receiver does not undertake, and it is not under any personal liability, to pay any sum under this Certificate in respect of which it may issue certificates under the terms of the Order.

DATED the day of , 2008.

PricewaterhouseCoopers Inc. solely in its capacity as Law and Equity Act Receiver of the Mills (as defined in the Order), and not in its personal capacity

Per:
Name:
Title:

SCHEDULE "D"

LIST OF COUNSEL

In person unless otherwise indicated:

Mr. John Grieve (PricewaterhouseCoopers Inc.)

Mr. Bill Kaplan (Abelco Financial Corp)

Mr. S. Golick (Wells Fargo)

Mr. D. Hatter and Elizabeth Rowbotham (Her Majesty the Queen in right of the Province of British Columbia)

No. S077839
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF POPE & TALBOT LTD. AND OTHERS

LAW AND EQUITY ACT RECEIVERSHIP ORDER

DM_VAN/256107-00075/6873360.1

TAB

9

2018 BCSC 527
British Columbia Supreme Court

Forjay Management Ltd. v. 0981478 B.C. Ltd.

2018 CarswellBC 766, 2018 BCSC 527

Forjay Management Ltd. (Petitioner) and 0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijar, Mohan Vilkhu, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd. (Respondents)

Fitzpatrick J.

Heard: March 12, 2018; March 13, 2018; March 14, 2018; March 15, 2018; March 16, 2018
Judgment: April 4, 2018
Docket: Vancouver H170498

Counsel: Kibben Jackson, Daniel Byma, Layne Hellrung, for Petitioner and Reliable Mortgages Investment Corp.
Daniel Nugent, Janet Kwong, for The Bowra Group Inc.
Robert Cooper, Q.C., Nicolas Hooge, Eric Aitken, for 0981478 B.C. Ltd. and Mark Chandler
Kimberley Robertson, Thomas Boyd, for Kaur Group
Clinton Calwell, for Verne and Lorna Calwell, Margaret Cook, Marian Mahoney for herself and Mitsui Saito, Janet Milbradt, Purchasers for themselves or by agent
Ewan MacLeod, for Brigitte Osborn, Jacqueline and Earle Morriss, James and Judy MacLeod
Diego Solimano, for PeeverConn Properties Inc., Richard and Jacqueline Johnston
Amanda Pereira (A/S) (Agent), for Rebecca Darnell for Lucas Giuriato, Karen McIntosh, Gerrit and Thelma Smidt, Sheila Sharples and Susan Ternes
Steven Roxborough, for Josef and Maria Tomica
Patrick Selinger, John Wiebe, for David and Laurie Brummitt, Gary and Karen Janzen, Walter and Elsje Bisschop, Gopal Naidu, John Roberts, Guy and Myrena Bishop, Rosalie Hersch, Jagtar Kainth, Jordana Charlton, Thomas and Julie Wiebe
Trevor Hande, for Ingrid Kraus, Shannon Smyth, Gerald and Nicola Quinn, Rajeev and Dinsheet Gupta, Strephanie Fahlman, Alvin Los and Emily Rook, Colton Sommerville and Jessica Niven, Karen Batke, Drew St. Cyr, Frances Hansen, Allison Richardson, Elyse Vroom, Vitalii Lavrinovitch and Suk Da Kim, Kelly and Brigitte Burke, Gary and Linda Newton, Lisa McGhee, Warren Kindellan, David and Heather Ray, Nolan Killeen and Alisyn Burns, Alexandra Schoenit, Frederick and Joanne West, Doug and Laurie Lakusta, and Timothy Lamb
Joni Worton, Sandra Wilkinson, for Superintendent of Real Estate
Matthew Nied, Jeremy Shragge, for 625536 B.C. Ltd.
Gordon Plottel, Amanda Baron, for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust

to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

40 As stated above, paragraph 3(c) of the Receivership Order specifically empowered the Receiver to "cease to perform any contracts of [098]". This would include the power to not complete the sales contemplated by the 40 pre-sale contracts before me: *bcIMC* at para. 60. I agree that the Receiver has properly sought directions from the Court on that issue, given the level of conflict between the stakeholder groups.

41 It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests — or consideration of the equities as between the parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. For example, in *bcIMC*, Burnyeat J., at para. 96, stated that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not otherwise available to other unsecured creditors. See also *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848at para. 27 (Ont. S.C.J.).

42 Such an approach is evident from the court's reasoning in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. In that case, where similar facts were in issue, Justice Morawetz (as he then was) determined the legal priority as between the pre-sale purchasers and the lenders, and then considered whether there were any "equities" in favour of the purchasers so as to displace those prior legal rights: paras. 27, 32.

43 In *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426[*Romspen/Horseshoe*], Justice Wilton-Siegel stated:

> [31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."
>
> [32] In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.
>
> [Emphasis added.]

44 Mr. Nied, co-counsel for the third mortgagee, 625536 B.C. Ltd. ("625"), advances an analytical framework for consideration of the disclaimer issue. I substantially agree with those submissions and would, therefore, frame the issues as follows:

> a) Firstly, what are the respective legal priority positions as between the competing interests?
>
> b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
>
> c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

DISCLAIMER — DISCUSSION

1) Respective Legal Priorities

TAB
10

2009 CarswellOnt 5202
Ontario Superior Court of Justice

Royal Bank v. Penex Metropolis Ltd.

2009 CarswellOnt 5202, [2009] O.J. No. 3645, 180 A.C.W.S. (3d) 258

Royal Bank of Canada (Applicant) and Penex Metropolis Ltd.et al. (Respondents)

G.R. Strathy J.

Heard: August 24, 2009
Judgment: September 4, 2009
Docket: CV-09-8157-00CL

Counsel: David Foulds, Jonathan Davis-Sydor for Van Wagner Communications Company, Canada
Hilary Clarke, Larry Crozier, Lisa Brost for Reciever, Ernst & Young Inc.
Liz Pillon for EPR Metropolis Trusts, Metropolis Entertainment Holdings Inc.
Fred A. Platt for Cambrian Court

Subject: Corporate and Commercial; Estates and Trusts; Property

G.R. Strathy J.:

1 There are two motions before the Court. First, Van Wagner Communications Company, Canada ("Van Wagner") moves for an Order declaring that Ernst & Young Inc., the Court-appointed Receiver (the "Receiver") of the Respondents[1] is not entitled to disclaim the Exclusive Sales Agency Agreement between Van Wagner and the Respondents (the "Agreement"). Van Wagner also seeks a declaration that certain funds are held in trust by the Receiver for the benefit of Van Wagner, pursuant to the Agreement.

2 Second, the Receiver brings a cross-motion for a declaration that the Agreement is not binding on a purchaser of the business of the Respondents and that the Receiver is entitled to sell the assets of the business free and clear of any obligations under the Agreement.

Factual Background

3 This proceeding concerns a 13-floor, 332,000 square foot, mixed use, multi-media entertainment, retail and office complex located on the northeast corner of Yonge-Dundas Square in Toronto (the "Property") that is owned by Penex Metropolis Ltd. ("Penex"). Yonge-Dundas Square, which is said to be modeled after Times Square in New York and Piccadilly Circus in London, is home to a number of digital and billboard-type signs. The Property itself is covered on all sides by approximately 25,000 square feet of digital and static signage used for outdoor advertising. Penex is the legal owner of the Property.

4 Van Wagner is in the business of developing, marketing and selling outdoor advertising signage. It is an affiliate of one of the largest privately held out-of-home communications companies in North America.

5 Royal Bank of Canada ("RBC") acts as agent for a syndicate of lenders that provided financing for the construction of the Property and is the first secured creditor. The second secured creditor is a subsidiary of Entertainment Properties Trust, a REIT with its head office in Kansas City, Missouri. The second secured creditor has entered into a strategic alliance with the parent of Penex.

23 The author notes that a court-appointed receiver is not bound by existing contracts, but the receiver must exercise discretion before disclaiming a contract. If it seeks to break a *material* contract, it must seek leave of the court. At p. 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court.

24 I also accept the general proposition, set out in *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.) affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (Alta. C.A.), at para 40, that a receiver is not entitled to prefer the interests of one creditor over another. Its duty is to act for the benefit of all interested parties:

> The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

25 A receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. In deciding whether or not to adopt a contract, the duty of the receiver is to exercise the care "comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own": *Bayhold Financial Corp. v. Clarkson Co.*, 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (N.S. C.A.) at para. 15; *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.) at para. 21.

26 If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court. As noted by the Ontario Court of Appeal in *Ravelston Corp., Re*, 24 C.B.R. (5th) 256, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40.

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable differences. These decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others...The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

See also *Royal Bank v. Soundair Corp.*, 4 O.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at para. 14.

27 A receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (B.C. S.C. [In Chambers]) at para. 96.

The Receiver's Position

28 The Receiver says that after its appointment it considered the Agreement for the purpose of determining whether it should continue to perform it. As part of its analysis, the Receiver says that it:

> (a) reviewed the terms of the Agreement;
>
> (b) reviewed the historical sales revenue generated from all signage by both Van Wagner and Penex;

TAB

11

2015 SCC 60, 2015 CSC 60
Supreme Court of Canada

Canadian Imperial Bank of Commerce v. Green

2015 CarswellOnt 18335, 2015 CarswellOnt 18336, 2015 SCC 60, 2015 CSC 60, [2015] 3 S.C.R. 801, [2015] S.C.J. No. 60, 135 O.R. (3d) 334 (note), 260 A.C.W.S. (3d) 25, 346 O.A.C. 204, 391 D.L.R. (4th) 567, 44 B.L.R. (5th) 1, 478 N.R. 202, 77 C.P.C. (7th) 1, J.E. 2015-1921

Canadian Imperial Bank of Commerce, Appellant and Howard Green and Anne Bell, Respondents

Gerald McCaughey, Tom Woods, Brian G. Shaw and Ken Kilgour, Appellants and Howard Green and Anne Bell, Respondents and Canadian Foundation for Advancement of Investor Rights, Shareholder Association for Research and Education, Ontario Securities Commission and Insurance Bureau of Canada, Interveners

IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, Appellants and Marvin Neil Silver and Cliff Cohen, Respondents and Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission, Interveners

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Respondent

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Nabil Berzi, Respondent

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Huacheng Xing, Respondent and Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission, Interveners

McLachlin C.J.C., Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon, Côté JJ.

Heard: February 9, 2015
Judgment: December 4, 2015
Docket: 35807, 35811, 35813

Proceedings: affirming *Green v. Canadian Imperial Bank of Commerce* (2014), 370 D.L.R. (4th) 402, 314 O.A.C. 315, (sub nom. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*) 118 O.R. (3d) 641, [2014] O.J. No. 419, 50 C.P.C. (7th) 113, 2014 ONCA 90, 2014 CarswellOnt 1143, Doherty J.A., E.A. Cronk J.A., K. Feldman J.A., R. Juriansz J.A., R.A. Blair J.A. (Ont. C.A.); additional reasons at *Green v. Canadian Imperial Bank of Commerce* (2014), 68 C.P.C. (7th) 99, 2014 ONCA 344, 2014 CarswellOnt 5625, Doherty J.A., E.A. Cronk J.A., Kathryn Feldman J.A., R.A. Blair J.A., R.G. Juriansz J.A. (Ont. C.A.); reversing *Green v. Canadian Imperial Bank of Commerce* (2012), 29 C.P.C. (7th) 225, [2012] O.J. No. 3072, 2012 CarswellOnt 8382, 2012 ONSC 3637 (Ont. S.C.J.); and affirming *Silver v. Imax Corp.* (2012), [2012] O.J. No. 4002, 2012 ONSC 4881, 2012 CarswellOnt 10391, K. van Rensburg J. (Ont. S.C.J.); additional reasons at *Silver v. Imax Corp.* (2012), 2012 CarswellOnt 15182, 2012 ONSC 6020, K. van Rensburg J. (Ont. S.C.J.); and affirming *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2012), [2012] O.J. No. 5083, 113 O.R. (3d) 264, 2012 CarswellOnt 13292, 2012 ONSC 6083, Perell J. (Ont. S.C.J.)

Counsel: Sheila R. Block, James C. Tory, for Appellant, Canadian Imperial Bank of Commerce
Benjamin Zarnett, David D. Conklin, Jonathan Edge, for Appellants, Gerald McCaughey et al.
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Nigel Campbell, Andrea Laing, Ryan A. Morris, for Appellants Celestica Inc., Stephen W. Delaney, Anthony P. Puppi

cause this difficulty, but merely fails to relieve a specific group of litigants from the consequences of the *OSA* scheme. In other words, any adverse consequence flows naturally from the text of Part XXIII.1, which is not ambiguous.

81 Like Goudge J.A in *Timminco Ltd.*, I am unwilling to rely upon an isolated purpose of limitation periods, taken out of context, in order to give priority to one stakeholder over others, particularly where the legislature was so clearly alive to these considerations in making the choices it made generally for Part XXIII.1 *OSA*, and more specifically for s. 138.14.

82 Ultimately, in light of the underlying principle and the structure of class proceedings in Canada, the operation of s. 28 *CPA* must follow the granting of leave under s. 138.8 *OSA*. I should add that this interpretation is also compatible with the legislative choices embodied in Ontario's statutory scheme for secondary market misrepresentation. Above all, it is consistent with the ordinary and grammatical meaning of the words of the provisions.

(2) Conclusion

83 After considering the ordinary and grammatical meaning of the words of the provisions as well as the entire legislative context, I am of the view that s. 28 *CPA* cannot operate to suspend the limitation period for a statutory claim for secondary market misrepresentation before leave for that claim has been granted under 138.8 *OSA*. Given my conclusion, which accords with the result in *Timminco*, there is no need to address the question whether the Court of Appeal erred in overturning its own precedent. I will now turn to the second issue of these appeals.

B. Jurisdiction for Relief

84 The interposition of *Timminco Ltd.* in the proceedings below upset the presumption on which the plaintiffs were operating. A presumption, I should add, that was based on an erroneous reading of the provisions at issue. Before the motion judges and in this Court, the plaintiffs therefore asked that equity be used to save their statutory claims. In this Court, the argument centred on whether the courts below could and should have relied upon the doctrine of *nunc pro tunc* or the doctrine of special circumstances. Although there is some confusion on this point in the motion judges' reasons, *nunc pro tunc* and special circumstances are two separate doctrines. As a result, they need to be addressed separately.

(1) Doctrine of Nunc Pro Tunc

85 The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: "An order is effective from the date on which it is made, *unless it provides otherwise*".

86 The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.

87 One of the oldest and most often cited cases, *Turner v. London & South Western Railway* (1874), L.R. 17 Eq. 561 (Eng. Ex. Ch.), dealt with this very circumstance: the plaintiff had died after the hearing but before the court rendered its judgment. The court ordered that its judgment be entered *nunc pro tunc*, as of the day when the argument terminated, noting that this would not cause an injustice to the other party and that such a result was appropriate in a case in which the delay had resulted from an act of the court. A long line of Canadian cases has followed *Turner*, as courts have granted *nunc pro tunc* orders where parties have died after hearings: *Gunn v. Harper* (1902), 3 O.L.R. 693 (Ont. C.A.); *Young v. Gravenhurst (Town)* (1911), 24 O.L.R. 467 (Ont. C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C. S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109 (B.C. C.A.); *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369 (B.C. S.C.).

88 LeBel and Rothstein JJ. drew upon this line of cases in *Hislop v. Canada (Attorney General)*, 2007 SCC 10, [2007] 1 S.C.R. 429 (S.C.C.), affirming "the correctness of this approach" and concluding that the estate of any class member in a class proceeding who was alive on the date that argument concluded was entitled to the benefit of the judgment: para. 77.

89 In *CIBC*, Strathy J. suggested that a court has inherent jurisdiction to issue an order *nunc pro tunc*, but only in the case of a slip or oversight. In my opinion, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction, but is instead one example of a situation in which it may do so. To hold otherwise would run counter to the historical basis for the development of the doctrine.

90 In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (*New Alger Mines Ltd., Re* (1986), 54 O.R. (2d) 562 (Ont. C.A.), at pp. 570-71; *Gallo v. Beber* (1998), 116 O.A.C. 340 (Ont. C.A.), at paras. 7 and 10; *Krueger v. Raccah* (1981), 12 Sask. R. 130 (Sask. Q.B.), at paras. 11-15; *Parker v. Atkinson* (1993), 104 D.L.R. (4th) 279 (Ont. U.F.C.), at p. 286; *Hogarth v. Hogarth*, [1945] 3 D.L.R. 78 (Ont. H.C.), at pp. 78-79; *DeGroote v. Canadian Imperial Bank of Commerce* (1998), 37 O.R. (3d) 651 (Ont. C.A.), at p. 654; *Couture v. Bouchard* (1892), 21 S.C.R. 281 (S.C.C.), at p. 285; *Westman v. Gyselinck*, 2014 MBQB 174, 308 Man. R. (2d) 306 (Man. Q.B.), at para. 40, citing *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), at para. 28; *McKenna Estate v. Marshall* (2005), 37 R.P.R. (4th) 222 (Ont. S.C.J.), at paras. 23-24). None of these factors is determinative.

91 Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 65 Sask. R. 257 (Sask. Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see e.g., *Canadian Imperial Bank of Commerce Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (Sask. C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.

92 In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products Ltd.*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.

93 Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

94 This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.

TAB

12

ALBERTA
RULES OF COURT

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(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 *[Purpose and intention of these rules]* the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

TAB

13

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

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(i) the administration of justice where there exists no adequate remedy at law, and

(j) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

(4) The rules of decision in matters mentioned in subsection (3), except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on July 15, 1870.

RSA 1980 cJ-1 s5

Pronouncement on wills, etc.

6(1) The Court has jurisdiction

(a) to try the validity of last wills and testaments, whether relating to real or personal estate and whether probate has been granted or not, and

(b) to pronounce the wills and testaments to be void for fraud and undue influence or otherwise,

in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

(2) The Court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870, with regard to

(a) leases and sales of settled estates,

(b) enabling infants with the approbation of the Court to make binding settlements of their real and personal estates on marriage, and

(c) questions submitted for the opinion of the Court in the form of special cases on the part of those persons that by themselves, their committees or guardians, or otherwise, concur therein.

RSA 1980 cJ-1 s6

Jurisdiction regarding lunatics

7 In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that in England is conferred on the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

RSA 1980 cJ-1 s7

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

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

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

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