Estate/Court File No. 31-2749576

ONTARIO
SUPERIOR COURT OF JUSTICE
[IN BANKRUPTCY AND INSOLVENCY]
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLAIREVILLE PROPERTY HOLDINGS INC.
A CORPORATION INCORPORATED UNDER
THE ONTARIO *BUSINESS CORPORATIONS ACT*

BRIEF OF AUTHORITIES OF THE DIP LENDER, CANNECT MORTGAGE INVESTMENT CORPORATION (Returnable December 14, 2021)

December 7, 2021

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Estate/Court File No. 31-2749576

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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLAIREVILLE PROPERTY HOLDINGS INC. A CORPORATION INCORPORATED UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT*

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(as at December 1, 2021)

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[1] Served with notification of Motion Record, Factum and Brief of Authorities via letter enclosing electronic location of documents on Proposal Trustee's or proposed Receiver's website.

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AND TO:	**DE LAGE LANDEN FINANCIAL SERVICES CANADA INC.**[7] 1-3450 Superior Court Oakville, ON L6L 0C4

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AND TO:	**TRADE ELECTRICAL CONTRACTORS INC.** 81 Zenway Blvd., Unite 5 Woodbridge, ON L4H 0S3 **Antonio Conte** A. Conte Professional Corporation M: 905.660.4775 E: a.conte@contelaw.ca
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Co-Tenancy Agreement Parties:[10]

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AND TO:	**EARL LEVY** 10 Edyth Drive Toronto, ON M4V 2V7
AND TO:	**RANDALL Y. C. HO** 3876 Nikolo Street Honolulu, Hawaii, 96815
AND TO:	**THE DEAD END CAPITAL CORP.** 255 Duncan Mill Road Suite 510, Toronto, ON, M3B 3H9
AND TO:	**AVA GROSS** 3800 Yonge St., PH18 Toronto, ON M4N 3P7
AND TO:	**J. ZACHERY JONES** 159 Kailuana Loop Kailua, HI 96734

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INDEX

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INDEX

TAB 1

2015 ONSC 5139
Ontario Superior Court of Justice

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 CarswellOnt 12962, 2015 ONSC 5139, 257 A.C.W.S. (3d) 520, 30 C.B.R. (6th) 315

NS United Kaiun Kaisha, Ltd., Moving Party (Respondent in the Proposal) and Cogent Fibre Inc., Responding Party (Applicant in the Proposal)

Penny J.

Heard: August 12, 2015
Judgment: August 17, 2015
Docket: 31-2016058

Counsel: Doug Smith, Roger Jaipargas for NS United Kaiun Kaisha, Ltd.
Ken Kraft, Sara-Ann Van Allen for Cogent Fibre Inc.
Sam Babe for Proposal Trustee

Subject: Civil Practice and Procedure; Evidence; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
II Assignments in bankruptcy
II.4 Procedure on assignment

Headnote

Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment
Debtor was woodchipping business and had five year shipping contract with creditor — Creditor was successful in arbitration, and next day debtor made notice in bankruptcy — Debtor had assets of approximately $261,000 and no operations, revenues or cash flow — Creditor was only significant non-contingent current creditor, although arbitration proceedings were in progress with another business — Debtor brought motion for extension of 30-day stay, creditor brought motion to terminate stay — Debtor's motion dismissed, creditor's motion granted — Debtor not acting in good faith, not using due diligence, and was not likely to make viable proposal — Unlikely that stay would allow for acceptable proposal to be put forth — Evidence of debtor was vague and there was no evidence of what it would be able to offer creditors in proposal — Debtor had not put forth outline of any plan or proposal despite no business being conducted — There was no attempt being made to rehabilitate business — Creditor had veto over proposal and refused to negotiate with debtor.

Table of Authorities

Cases considered by *Penny J.*:

Cantrail Coach Lines Ltd., Re (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. Master) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered

Janodee Investments Ltd. v. Pellegrini (2001), 2001 CarswellOnt 1232, 25 C.B.R. (4th) 47 (Ont. S.C.J.) — considered

Statutes considered by *Penny J.*:

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

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

MOTION by debtor for extension of 30 day bankruptcy stay, MOTION by creditor to terminate order.

***Penny J.*:**

1 In a brief handwritten endorsement of August 12, 2015, I dismissed the motion of the debtor, Cogent Fibre Inc., for an extension of the 30- day stay under s. 50.4(9) of the *Bankruptcy and Insolvency Act* and allowed the motion of the judgment creditor, NS United Kaiun Kaisha, Ltd. for an order terminating the 30-day stay under s. 50.4(11) of the BIA, with reasons to follow. These are those reasons.

2 Cogent is in the woodchip business. It had a five-year shipping contract with NS United. There was a dispute which became the subject of an arbitration commenced in February 2012. An arbitral award was made against Cogent for Cdn$15.3 million in January 2015. In July 2015, the District Court for the Southern District of New York confirmed the award. The day after the release of the confirming judgment, Cogent filed its NOI.

3 In an affidavit sworn in collateral bankruptcy proceedings in New York, Mr. Montrop, a director of Cogent, deposed that Cogent's management decided to wind down Cogent's business well before the release of the arbitral award or confirming judgment. It did so, he said, on the basis not only of pending maritime arbitrations but other factors including a "hostile market."

4 Mr. Montrop's evidence is, however, that Cogent was prompted to file its NOI on the basis of its "belief" that NS United "will expeditiously seek to record the judgment and proceed with collection actions."

5 The evidence is that Cogent currently has assets of approximately $261,000 and has no operations, revenues or cash flow. The professional fees of these proceedings are being paid by its parent corporation.

6 Cogent currently has one material, non-contingent creditor — NS United. There are no secured creditors. Another maritime shipping company, NYK, also instituted arbitration proceedings against Cogent. NYK alleges it is owed about $10.9 million. There has been no hearing and there is, obviously, no decision or award. Those proceedings are currently stayed. The NYK claim is entirely contingent. There is no evidence that NYK it at all interested in whatever it is that Cogent has discussed. I was advised that NYK takes no position on the motions before me. It is conceded by Cogent that NS United has a veto over any proposal.

The Cogent Motion to Extend

7 Section 50.4(9) sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay. The court may grant an extension, not to exceed 45 days, if satisfied on the evidence tendered in the application that:

(i) the insolvent person has acted, and is acting, in good faith and with due diligence;

(ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(iii) no creditor would be materially prejudiced if the extension being applied for were granted

8 There is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

9 I am not satisfied, however, on the evidence provided by Cogent that it has acted and is acting in good faith and with due diligence. I am also not satisfied on the evidence provided by Cogent that it would likely be able to make a viable proposal if the extension being applied for were granted.

10 I say this principally of the basis of the vague, somewhat vacuous, affidavit evidence of Mr. Montrop filed in support of the Cogent motion and in response to the NS United motion.

11 His evidence amounts to this:

(a) Cogent has engaged in settlement discussions with NYK with a view to making a proposal to NYK;

(b) Cogent has offered to meet with NS United;

(c) Cogent is working towards a proposal; and

(d) Cogent requires additional time to continue discussions with NYK and NS United.

12 There is not a hint of what Cogent has to offer NYK and not a hint of what kind of proposal Cogent has in mind. Counsel for Cogent argues that because the settlement discussions are without prejudice, it cannot disclose them. I do not find that argument persuasive. Nothing prevents Cogent from describing its plan or what it hopes to achieve in a proposal.

13 Although Cogent has offered to meet with NS United, NS United has no interest in meeting with Cogent and has not done so.

14 Cogent says it is working towards a proposal but, in the face of this motion, has not provided even a hint of what that proposal might look like. At its highest, it involves talking to the two shipping companies and hoping to make a deal. Counsel made submissions about possible tax losses which may have value but there was not a mote of evidence to this effect.

15 In this case, the 30-day stay expires at midnight on August 14, 2015. Cogent has taken the position, on these motions, that if its request for an extension is denied, it will file a proposal of some kind on Monday, August 17, 2015. That, it suggests, would automatically extend the stay for another 21 days.

16 I find it difficult to understand how Cogent could plan to file a proposal on Monday, August 17 but was unable to provide at least the outline of this proposal on Wednesday, August 12. There was no explanation given for this apparent contradiction.

17 In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

18 In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position

and the supporting law. Creditors often, for strategic reasons, say they will never agree.

19 Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

20 The 30-day stay (or any extension thereof) is meant to give the debtor time to deal with multiple parties, many moving pieces and potentially complex business and financial arrangements. Here, there is no active business. There are no complex financial arrangements. There are no assets. There are only two material creditors, at least one of which, NS United, has a veto over any proposal. There are, in effect, almost no moving pieces. In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions.

21 It is this failure to give even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time is needed to further negotiations (particularly where it is unclear that there are any negotiations), which leads me to the conclusion that Cogent has not met its onus of proving, on a balance of probabilities, that it has acted in good faith and with due diligence and that it is likely to be able to make a viable proposal if only it is given more time.

22 I am also driven to the conclusion that Cogent's emphasis on so-called "rehabilitation" is empty rhetoric in this case. The evidence filed by Cogent in the New York bankruptcy court makes it clear that there is no ongoing effort to "rehabilitate" this company. Management had already decided to wind down its operations before the NS United arbitration award was granted. The summary balance sheets filed by the proposal trustee indicate that Cogent is already well under way with its "wind-down." It went from $3.27 million in assets in 2013 to $5.024 million in 2014 to $261,476 in 2015.

23 Counsel for the debtor submitted in oral argument that perhaps the company could be restarted. There is no evidence whatsoever to support such a contention - indeed, all of the evidence is very much to the contrary.

24 For these reasons the debtor's motion to extend the stay under s. 50.4(9) is dismissed.

The NS United Motion to Terminate

25 Section 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (iii) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or
>
> (iv) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.

26 NS United took the position that Cogent had not discharged its onus of proving it was acting in good faith and with due diligence on the motion to extend but did not positively assert this ground on the motion to terminate. NS United relies on the second and third grounds of s. 50.4(11).

27 It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to

terminate the 30-day stay where the statutory conditions for doing so are met.

28 With respect to the probability of filing a viable proposal at all, I again refer to the paucity of evidence about what a proposal might look like. The debtor has utterly failed to provide even a hint of its plan for a proposal. The facts before the court, from Cogent management's own sworn statement, are that Cogent was already being "wound down" before the arbitral award prompted its filing of a NOI. The evidence before the court, therefore, is that management's plan is not to "rehabilitate" this company.

29 As mentioned earlier, Cogent's stated intention to file a proposal of some sort on the last day, in order to buy another 21 days, seems to me not only disingenuous but to highlight the lack of any concrete proposal. There is simply no evidence to suggest there is any plan in the offing at all, much less one that would probably appear reasonable to a reasonable creditor.

30 Cogent's gambit boils down to this: its proposal depends on negotiating a compromise with its only material, non-contingent creditor. That creditor, however, will not, and is under no obligation to, negotiate any compromise with Cogent.

31 On the second ground, likely to be acceptable to creditors, I agree with Cogent that the mere fact that NS United has a veto power over any proposal is not dispositive on a motion to terminate under s. 50.4(11). It is, however, one factor to be taken into account.

32 What adds credibility to NS United's position that it will, under no circumstances, agree to any proposal is the complete paucity of evidence that any plan is even possible, much less viable and likely to be accepted by creditors.

33 Counsel for Cogent sought to distinguish between the "harsher" line taken by the Ontario courts in cases such as *Cumberland Trading Inc., Re* [1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List])] and the more "liberal" approach taken in B.C. and other provinces in cases like *Cantrail Coach Lines Ltd., Re* [2005 CarswellBC 581 (B.C. Master)] and *Enirgi Group Corp. v. Andover Mining Corp.* [2013 CarswellBC 3026 (B.C. S.C.)] Counsel argued that the more liberal approach is more in keeping with the rehabilitative purpose of the proposal sections of the BIA and current views of how these provisions should be applied.

34 I am not convinced these cases are in conflict. The exercise of the discretion under ss. 50.4(9) and (11) of the BIA is highly fact dependent. *Cumberland*, for example, was a case where a proposal had already been filed; the issue was whether to terminate the 21-day stay. The facts of *Cantrail* and *Enirgi* can also be readily distinguished from the present case. In *Cantrail*, the debtor presented evidence of a pending proposal under which the objecting creditor might be paid out in full. In *Enirgi*, likewise, there was evidence that the debtor had significant assets - in other words, the debtor had something to work with.

35 Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. Cogent has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.

36 Lax J. said in *Janodee Investments Ltd. v. Pellegrini* [2001 CarswellOnt 1232 (Ont. S.C.J.)] (April 12, 2001), "the proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors."

37 Cogent admits that its only hope for a proposal is to negotiate a compromise with NS United; yet NS United has no interest, and no obligation to engage, in that negotiation.

38 Even applying what counsel for Cogent describes as the more "liberal" or debtor-friendly approach, on the evidence, NS United has discharged its burden under s. 50.4(11). NS United has, I find, proven on a balance of probabilities that it is not likely that Cogent will be able to make a viable proposal and, even if that were likely, the proposal will not likely be accepted by the requisite level of creditor support.

39 For these reasons, NS United's motion to terminate the 30-day stay is granted.

40 No order as to costs.

Motion by creditor granted, motion by debtor dismissed.

TAB 2

Quality Carpets Ltd. (Re)

British Columbia Judgments

British Columbia Supreme Court (In Bankruptcy)

Vancouver, British Columbia

(In Chambers)

Esson C.J.S.C.

Heard: May 30 and June 8, 1995.

Judgment: filed October 4, 1995.

Vancouver Registry No. 157140/VA95

[1995] B.C.J. No. 2063 | 36 C.B.R. (3d) 143 | 58 A.C.W.S. (3d) 183

IN THE MATTER OF the proposal of Quality Carpets Ltd.

(9 pp.)

Case Summary

Bankruptcy — Proposals — Effect of proposal — Stay of proceedings, when proceedings stayed.

Plaintiff DW applied under section 69.4 of the Bankruptcy and Insolvency Act to remove a stay in an action against the bankrupt QC. The stay arose as a result of the defendant giving notice of intention to file a proposal. The plaintiff supplied a large amount of carpet to the defendant, a retail carpet business. The action alleged a balance owing of over half a million dollars. In November, 1984, the plaintiff made an application requiring the carpet to be returned. The order required the defendant to deliver back all goods supplied by the plaintiff. There was correspondence between the parties, wherein the defendant promised to segregate the plaintiff's carpet but never made any delivery back to the plaintiff. There was evidence that the defendant had been selling the plaintiff's carpet after the November, 1994 order. In March, 1995, the defendant filed a notice of intention to file a proposal. In May, 1995, the defendant applied to set aside the November, 1994 order and for a declaration staying the order. In June, 1995, the plaintiff was allowed onto the defendant's property to make an inventory and there was hardly any of the carpet left. The plaintiff then applied to set aside the stay.
HELD: Stay of action set aside and plaintiff free to pursue whatever remedies it had.

There were no facts alleged supporting a claim that the action was anything other than one to recover an unsecured debt. The November, 1994 order was a prejudgment execution or attachment proceeding, along the lines of a Mareva injunction. It resulted in no change in title, nor would delivery of the goods to the plaintiff have created a transfer of title. The action was subject to the automatic stay. However, the stay could be removed for a number of reasons. It was uncertain whether there would be material prejudice since there was hardly any carpet left and the benefit of the action was unclear. It was nevertheless equitable to make the declaration in favour of the plaintiff. The defendant made no reasonable effort to comply with the order and appeared to have disposed of the carpet in defiance of the order. The plaintiff was free to pursue whatever remedies it had.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 69(1), 69.4. British Columbia Supreme Court Rules, s. 30. Law and Equity Act, s. 52.
Counsel for the Plaintiff: D.J. Kennedy. Counsel for the Defendant: S.P. Grey.

ESSON C.J.S.C.

1 The plaintiff applies under s.69.4 of the Bankruptcy and Insolvency Act to remove a stay in an action in this court, the style of cause of which is:

NO. C946199 VANCOUVER REGISTRY IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBBIE WHITE doing business as TERZA CARPETS PLAINTIFF

AND:

QUALITY CARPETS LTD.

DEFENDANT

The stay arose under s.69(1) upon the defendant giving notice of intention to file a proposal.

2 The factual background of the present application is as follows: the plaintiff is local agent for Terza, a Mexican carpet manufacturer which supplied large amounts of carpet to the defendant which is in the retail carpet business. The action, begun on November 17, 1994, alleges a balance owing of some $553,000. There appears to be an issue as to the amount but not as to the existence of a substantial debt. In an affidavit filed at an early stage, the plaintiff swore that the defendant had admitted owing at least $375,000.

3 On November 18, 1984, at the outset of the action the plaintiff applied for and was granted an ex parte order restraining the defendant from parting with any of the inventory of Terza Carpet in its possession. That order was to expire on November 25, 1994, if the plaintiff did not in the meantime apply for a mandatory injunction directing the defendant to return to the plaintiff all the Terza carpet remaining in the possession of the defendant.

4 The application requiring the carpet to be returned was heard on November 25. The defendant was given notice but did not appear. It had sought to retain solicitors but could not at that time provide a retainer. The operative provisions of the November 25 order are these:

> THIS COURT ORDERS THAT the Defendant deliver all goods supplied to it by the Plaintiff;
>
> AND THIS COURT FURTHER ORDERS THAT the Plaintiff pay into her solicitor's trust account any sums realized from the sale of the above goods in excess of $375,000.00 pending the outcome of this action.

5 The notice of motion served on the defendant had given notice of an application "for an Order granting an Interim Injunction requiring the Defendant to deliver all goods supplied to it by the Plaintiff forthwith pursuant to Section 52 of the Law & Equity Act and Rule 30 of the Rules of Court". The term of the order providing for payment into the trust account of any sums realized for sale in excess of $375,000 was not included in the notice of motion but apparently was suggested by the chambers judge.

6 After November 25, the defendant was represented by lawyers. There was considerable correspondence and discussions between the law firms. The defendant, through its lawyers, promised to segregate the Terza carpets and deliver the inventory to the plaintiff but no carpets were delivered. On March 27, 1994, the defendant filed a notice of intention to file a proposal. Various reasons were put forward by the defendant and its lawyers for not delivering the carpets. One was that the order of November 25 does not specify to whom the carpets were to be delivered and set no deadline for the delivery. For a time at least, the defendant seemed to take the position that it would deliver the carpets only if given dollar for dollar credit on the original sales price, a condition which was not acceptable to the plaintiff.

7 On May 23, 1995, the defendant applied before the judge who made the November 25 order to set it aside and for a declaration staying that order under s.69 of the Act. The judge declined to set aside the order or to make any order in the nature of a stay but, I am advised by Counsel, did express the view that the action was already subject to a stay under s.69.1 of the Act.

8 The plaintiff then applied, again in the action, for an order setting aside the stay or declaring that the claim was one not subject to a stay. That application first came before me on May 30. On that day, I declined to make any order other than to direct that the defendant give the plaintiff access to its premises to enable an inventory to be made of the Terza carpet in its possession. The plaintiff had adduced evidence tending to prove that the defendant had been selling the Terza carpet after the order of November 25 was made and that the inventory of such carpet, which had been very large in October 1994, appeared to have dwindled greatly. The defendant's material did not concede any of that but was not helpful in establishing the facts. The hearing before me was resumed on June 8 on which day both parties filed further affidavits. The affidavit from Janet Khouw of the defendant says in part:

> That as a result of being served with the Order of Mr. Justice Cohen pronounced November 25, 1994, we segregated and piled in one area of our store all Terza carpet and ceased offering it for sale until March 27, 1995, when it was reintegrated with other carpet in our store and offered for sale to our customers.
>
> That while I believe there has been some sales of Terza carpet remnants by Quality Carpets between November 25, 1994 and March 27, 1995, I do not believe these sales involve any more than a minimal amount of carpet.

9 In para. 8, Ms.Khouw deposes that, in the week prior to March 27, 1995, all carpet on Quality's premises was seized by "court bailiffs or their agents" but that, after the filing of the notice of intention on March 27, the "court bailiffs" returned the seized carpet. She then goes on to say that there appears to be a significant quantity of carpet that has not been returned but that Quality does not know what quantity remains missing, and to what extent it involves Terza carpet. She concludes by saying that Quality has in its possession approximately 64 part rolls of Terza carpet having an approximate value at cost price of $20,000 to $25,000.

10 The plaintiff's affidavit states that, in October 1994, she conducted an inventory of the Terza carpets in the defendant's possession and found over 200 rolls of Terza carpets of which well in excess of 100 were full rolls which had not been cut and were still in their wrappers. On June 5, 1995, when she was allowed into the defendant's premises, she found only one unwrapped roll of Terza carpet and approximately 68 partial rolls, the majority of which had little carpet left. The remaining carpet, other than the one roll, in her view, can be disposed of only as remnants. She estimates that 90 per cent or more of the inventory present in October 1994 was missing by June 5.

11 During June, the proposal was filed and voted upon. The defendant company is now operating under the proposal. Disposition of this application was delayed while the parties took the steps necessary tp convert this proceeding from an application in the action to one to this court in bankruptcy.

12 I turn then to the merits of the application. The applicant argues first that the stay under the Act does not apply to the November 25 order because:

(a) the carpet is not the property of the defendant;

(b) the plaintiff is not seeking to continue with a claim "provable in bankruptcy".

13 These appear to be two different ways of stating the same proposition, i.e., that the November 25 order had the effect of vesting title to the carpet in the plaintiff. That position in my view is not tenable. The action prays for this relief:

(a) debt in the amount of $553,971.83;

(b) in the alternative, damages for breach of contract;

(c) a temporary and permanent injunction restraining the Defendant from selling any further inventory or products supplied to the Defendant by the Plaintiff;

(d) a temporary and permanent injunction requiring the Defendant to return all of the Plaintiff's products currently in its possession to the Plaintiff forthwith;

(e) special damages;

(f) interest;

(g) costs; and

(h) such further and other relief as this Honourable Court may deem just.

14 No facts are alleged which could support a claim that the action is anything other than one to recover an unsecured debt.

15 I agree with counsel for the defendant that, insofar as the order of November 25 can be placed in any recognized category, it is a kind of prejudgment execution or attachment proceeding, along the lines of a Mareva injunction. While the second operative paragraph of the order seems to contemplate a power of sale in the plaintiff, nothing in the order confers such a power. Such a power might have arisen in the action had the plaintiff's claim been reduced to judgment, whereupon the plaintiff might have gained a substantial advantage had possession of the goods been delivered to it before judgment. But the mere fact of the order being made resulted in no change in title. Nor would delivery of the goods to the plaintiff under the order have created a transfer of title. I therefore refuse the declaration that the action is not subject to the automatic stay under the Bankruptcy Act.

16 The next question then is whether the stay should be removed under s.69.4 which reads:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

17 The first issue is whether there is a likelihood of material prejudice flowing from the stay. Because of the uncertainty whether there is any significant amount of Terza carpet remaining in the defendant's possession, and because one cannot know what other benefit the plaintiff may get from pursuing the action, the answer is not clear. But the removal of the stay may be a source of benefit, even on the question of the amount of the debt. In any event, I have no doubt that it is equitable to make such a declaration in favour of the plaintiff. The evidence establishes, not only that the defendant made no reasonable effort to comply with the order, but that it appears to have disposed of the carpet in defiance of the order. The defendant and its principals may be in contempt of the order. I do not say they are; that is not the issue before me and the evidence is insufficient to support such a conclusion. But it is sufficient to lead me to conclude that the plaintiff should be free to pursue whatever remedies it may have, and that it would not be equitable to prevent it from doing so. However, I emphasize that, except as to the question whether the November 25 order effected a transfer of title, a question which necessarily arose because of the plaintiff's position on this application, it is not my place to determine any issue in the action.

18 I therefore grant a declaration in the words of s.69.4 to the effect that ss.69-69.3 no longer operate in respect of the creditor Debbie White doing business as Terza Carpets or in respect of Terza, S.A. should its joinder be thought necessary.

ESSON C.J.S.C.

End of Document

TAB 3

2020 MBQB 58
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2020 CarswellMan 174, 2020 MBQB 58, 317 A.C.W.S. (3d) 238, 79 C.B.R. (6th) 44

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 26, 2020
Docket: Winnipeg Centre CI 20-01-26627

Counsel: Marc Wasserman, Jeremy Dacks, Catherine Howden, Eric Blouw, for Applicant
Wayne Onchulenko, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere (articling student), for Richter Advisory Group Inc.
David Jackson, Shayne Kukulowicz, Hylton Levy, for proposal trustee, A. Farber & Partners Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
WC LLC, lender, advanced funds to N Group to fund their payroll — Funding was advanced by WC LLC because N Group had not confirmed that sufficient funds were deposited in corporate account — N Group did not deposit necessary payroll funds, and WC LLC funded payroll to ensure that employee payroll was not interrupted during crucial time frame — New evidence was received, which included that N Group provided no indication of how they intended to fund payroll, that WC LLC had responded to N Groups funding request, but that N Group did not respond to WWC LLC's proposal — WC LLC brought application for R LLP to be appointed as receiver — Application granted — Further evidence satisfactorily showed that N Group had not been acting in good faith and with due diligence — As result of N Group failing to provide accurate and timely information to proposal trustee and WC LLC, proposal proceedings were untenable — Further, N Group had no plan to continue to fund its operations and no other lender had stepped up to provide necessary financing to pay out WC LLC — It was fundamental, for purpose of proposal process to continue, that N Group cooperate with proposal trustee and this had not occurred — Unilateral closing of its retail stores, distribution centres and website, without consulting with WC LLC or proposal trustee, was in breach of Credit Agreement and court order.

Table of Authorities

Cases considered by *Edmond J.*:

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

Callidus Capital Corp. v. Carcap Inc. (2012), 2012 ONSC 163, 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — followed

Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 95, 2019 CarswellMan 772 (Man. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — pursuant to

s. 243(1) — considered

s. 244(1) — referred to

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 55(1) — considered

APPLICATION by WC LLC for R LLP to be appointed as receiver.

***Edmond J.*:**

Introduction

1 The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*") and s. 55(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as amended

("*QB Act*") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

2 By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

3 The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

4 The respondents filed an affidavit of Greg Fenske, affirmed March 11, 2020 and a supplemental brief for the hearing that proceeded on March 12, 2020. After hearing submissions from all parties, the court reserved its decision on whether Richter should be appointed as a receiver and ordered the Nygård Group to continue to fully comply with the terms of the Credit Agreement entered into with Lenders, Second Avenue Capital Partners LLC and White Oak Commercial Finance, LLC ("Lenders") dated December 30, 2019 ("Credit Agreement") and that no Collateral (as defined in the Credit Agreement) would be disposed of outside of the ordinary course of business without the prior written consent of the applicant and the proposal trustee, A. Farber & Partners Inc.

5 During the course of the hearing on March 12, 2020, the court was advised that the Lenders advanced funds to the Nygård Group to fund their payroll due on March 12, 2020. The payroll funding was advanced by the Lenders because the Nygård Group had not confirmed that sufficient funds were deposited in the Nygård corporate account, by way of cash injection, to fund the payroll which was to be paid out by electronic fund transfer to employees. The Nygård Group had confirmed before the March 12, 2020 hearing that the payroll would be funded by way of a cash injection. Paragraph 10(a) of the proposal trustee's first report states:

> the Proposal Trustee attended on a call with representatives of the Nygard Group where the Proposal Trustee was advised that (i) funds sufficient to satisfy the payroll obligation had been deposited with the Nygard Group and evidence of such funding had been provided to Osler as required by the Winnipeg Court; (ii) the short term primary focus of the Nygard Group was to obtain funds to repay the Lenders in full so as to permit the Nygard Group to focus on a restructuring and rationalization of its business.

6 Contrary to the representations made to the proposal trustee, the Nygård Group did not deposit the necessary payroll funds. The Lenders therefore funded the payroll to ensure that the employee payroll was not interrupted during this crucial time frame. During the course of the hearing on March 12, 2020, counsel for the Nygård Group advised that an advance of payroll funding had been received and the Lenders' advance of payroll would be reimbursed from those funds.

7 The court was further advised later in the afternoon during the same hearing held March 12, 2020 that the payroll advance had been transferred from the Nygård Group bank account to a bank account of Edson's Investments Inc. The supplementary affidavit of Robert L. Dean affirmed March 17, 2020, states that Edson's Investment Inc. is an entity controlled by Mr. Nygård which is not part of the Nygård Group named as respondents in this proceeding and is not a party to the Credit Agreement.

8 The primary submission advanced by the respondents at the March 12, 2020 hearing was that the Canadian entities had filed Notices of Intention to make a Proposal in Bankruptcy ("NOIs") pursuant to s. 50.4 of the *BIA*, the stay of proceedings pursuant to s. 69(1) of the *BIA* applied and accordingly, the court should permit the proposal process to continue and stay the applicant's proceeding. Further, Nygård Group submitted that they had more than sufficient equity to pay out the Lenders in full and intended to have a proposal to do so by March 20, 2020.

9 On March 13, 2020, the court provided oral reasons for decision regarding the application and the motion made by the applicant to lift or terminate any stay of proceedings granted regarding the proposal process. To summarize, the court ordered:

a) The proper jurisdiction to hear the application and the NOI proceedings is Manitoba;

b) The NOI proceedings are not invalid or a nullity and the proposal proceedings should proceed in this court;

c) The draft cash flow statements prepared by the Nygård Group and provided to the proposal trustee must be provided to counsel for the applicant;

d) The application by the Lenders for the appointment of Richter as the receiver was adjourned until Friday, March 20, 2020;

e) The respondents were directed to continue to fully and promptly comply with all terms and provisions of the Credit Agreement and all documents ancillary thereto, and, without limitation, comply with s. 6.10 of the Credit Agreement;

f) Until further of the court, no steps would be taken by the respondents to dispense with or dispose of Collateral, as that term is defined in the Credit Agreement, other than:

i. by way of the sale of Collateral at the respondents' retail outlets in the ordinary course of business of such retail outlets; or

ii. with the advance written consent of the applicant and the proposal trustee;

g) All additional responding affidavit material must be filed in court by no later than 2:00 p.m. on Thursday, March 19, 2020;

h) In accordance with the undertaking given by counsel for the Nygård Group, the court directed the Nygård Group to return the payroll funds that were earmarked for payroll, which funds were transferred or removed from the Nygård Group corporate bank account on March 12, 2020;

i) The application was adjourned and the motion by the applicant to terminate or lift the stay of proceedings in effect pursuant to s. 69(1) of the *BIA* was denied at that time, although the court stated that the imminent necessity for appointing a receiver may change if reasonable steps were not taken by the Nygård Group to pay the outstanding indebtedness to the applicant and/or further evidence established that the Nygård Group failed to comply with the Credit Agreement during the period of the stay;

j) The respondents were given one week to cooperate with the proposal trustee in the proposal process in accordance with the *BIA* and act in good faith and with due diligence, including take reasonable steps as noted above.

New Evidence Received since March 13, 2020

10 A further affidavit affirmed by Robert L. Dean on March 17, 2020, confirmed, among other things:

a) The funds that the Nygård Group was supposed to have deposited in the Nygård Group bank account sufficient to satisfy the payroll obligation was not deposited. Funds were deposited, but then were removed or transferred out as noted above.

b) The proposal trustee forwarded a cash flow forecast to applicant's counsel during the March 12, 2020 hearing and the cash flow forecast contemplated continued funding by the Lenders despite the termination of the funding commitment.

c) A funding request from the Nygård Group included approximately $1.032 million Canadian for payroll, source deductions and rent. The Nygård Group provided no indication of how they intended to fund the payroll for the week of March 15, 2020.

d) On March 15, 2020, the Lenders responded to the Nygård Group's funding request advising they were prepared to provide funding on the following terms:

(a) The Lenders will fund the advance request (subject to review by Richter);

(b) The Nygard Group will engage a third-party liquidator to negotiate with Perry Ellis and liquidate US wholesale (and other assets immediately available for sale);

(c) The Nygard Group will confirm that the Lenders are authorized to speak to wholesale customers and Perry Ellis;

(d) The proceeds of any wholesale sale shall be immediately repaid to the Lenders;

(e) White Oak will receive a release from the Loan Parties and Peter Nygard on the same terms as White Oak previously communicated in the pay-off letter it previously provided, which shall be effective immediately;

(f) The Nygard Group will agree to remove the $20 million cap on the real estate Collateral;

(g) The Nygard Group will sign up a stalking horse (sic) bidder (with an approximately 10% deposit) with respect to the sale of the Toronto real estate, with any deal to close in 30 days (subject to a higher and better bid at auction);

(h) The Nygard Group will pay a $500,000 accommodation fee if the amounts owed to the Lenders are not repaid in full on or before March 20, 2020;

(i) The Nygard Group will agree to consent to the appointment of a receiver if the amounts owed to the Lenders are not repaid in full by March 20, 2020.

The Nygård Group did not respond to the Lenders' proposal.

e) On March 16, 2020, counsel for the applicant wrote to the proposal trustee regarding the payroll advance. On the same day, Richter wrote to the proposal trustee making inquiries about the continuing erosion of the Collateral requesting numerous updates, including:

(a) The status of discussions with Perry Ellis with respect to the U.S. wholesale inventory;

(b) The status of discussions with Great American on the potential refinancing of the Lenders' secured debt;

(c) The status of discussions with the party interested in the Toronto real property located at 1 Niagara St.;

(d) The Nygard Group's funding requirements for the current week and its plans on meeting its obligations on a go-forward basis.

(e) The return of the Late Transfer Funds that Mr. Nygard transferred out of the Nygard Group's bank account;

(f) The timing on receipt of a realistic cash flow forecast given the Nygard Group's current circumstances;

(g) The Nygard Group's plans to continue normal course operations given the closure of its Winnipeg and Toronto offices, including the potential layoff of corporate staff; and

(h) The Nygard Group's plans to curtail expenditures in the coming weeks in response to the significant decrease in retail sales.

f) The Nygård Group closed all of its distribution centres effective the evening of March 13, 2020, after courier and transportation companies refused to provide go forward service without guarantee of payment.

g) On March 17, 2020, the applicant received a copy of an e-mail from the Nygård Group indicating that the Nygård Group would be immediately shutting down its retail stores and website due to the recent COVID-19 outbreak. The e-mail made numerous additional representations about the Lenders' actions, which the Lenders submit are false and materially impact the Lenders' ability to realize on their Collateral.

h) The Nygård Group did not consult with the applicant, Richter or the proposal trustee regarding the potential closure of the retail stores and their business operations.

i) The Lenders have no faith that proper procedures to protect their Collateral will be undertaken by the Nygård Group.

11 On March 17, 2020, the proposal trustee issued its second report. The report confirms the following:

a) The proposal trustee requested that Nygård Group and management provide the proposal trustee with information respecting:

> (a) the status of the reimbursement of the Payroll Funding;
>
> (b) the status of funding for ongoing operations during for the week ending March 20, 2020;
>
> (c) the cash flows and the underlying assumptions., drafts of which were prepared by each of the members of the Nygard Group and provided to the Proposal Trustee on the evening of Wednesday, March 11, 2020 and the four wall forecasts provided on Sunday March 16, 2020;
>
> (d) the status of operations of the Nygard Group including measures being taken in response to the Covid-19 crisis (i.e. whether or not the stores and/ or distribution centres are to remain open);
>
> (e) financial information relating to the Nygard Group's operations;
>
> (f) electronic contact information for all employees of the Nygard Group (or access to internal email system) to provide the statutory required notices of the NOI proceedings; and
>
> (g) the status of refinancing efforts of the Nygard Group.

b) Despite repeated requests for information, limited information was provided to the proposal trustee as established in the e-mails sent by the proposal trustee attached as Exhibits B and C to the second report.

c) The proposal trustee received information from the Nygård Group regarding efforts to sell real property located at 1 Niagara Street in Toronto, Ontario (the "Toronto Property"). The potential purchaser indicated that the offer to purchase is confidential. The proposal trustee advised the Nygård Group that it is not in a position to advise the court or stakeholders that the offer is fair or reasonable.

d) The proposal trustee received a copy of a notice entitled "Nygård closing 180 retail stores". The proposal trustee was not consulted in advance of the notice.

e) The second report concludes:

> 20. Based on the foregoing, the Proposal Trustee is not in a position to advise that the Nygard Group is acting with good faith or due diligence at this time.
>
> 21. The Proposal Trustee also notes that each of the members of the Nygard Group are required under the BIA to file cash flows by no later than Thursday, March 19, 2020 and such cash flows must be submitted to the OSB with a report from the Proposal Trustee on the reasonableness of the assumptions contained therein. The Proposal Trustee has not been provided with sufficient information to assess the draft cash flows provided and is of the view that it will not be in a position to file the required report on the reasonableness of the assumptions as required by

the BIA.

12 Two affidavits affirmed by Greg Fenske, on March 18, 2020, were received by the court. The second affidavit is a confidential affidavit regarding the potential sale of the Toronto Property and the sale of certain inventory.

13 The first affidavit responds to the affidavit of Mr. Dean affirmed March 17, 2020 and can be summarized as follows:

a) An explanation is provided as to why the Nygård Group was unable to fund payroll. The Nygård Group requisitioned $1 million U.S. from an account at Stifel and the funds never made it into Nygård's Canadian bank accounts.

b) Nygård Group obtained a loan from Edson's Investments Inc. in the amount of $500,000 U.S. to fund payroll. These funds were returned or transferred back to Edson's Investments Inc. when the applicant provided the funds for payroll on March 12, 2020. While Mr. Fenske states the Nygård Group will receive funds from Stifel, as at March 18, 2020, no funds were received.

c) Nygård Group did advise the Lenders of the funds that were required to pay bills in accordance with the Credit Agreement.

d) The estimated payroll for the week of March 15, 2020, is $900,000 Canadian and "that will be funded by the Nygård Group resources". (it is unclear what that term refers to and if it is an entity, it is not a named respondent)

e) The Nygård Group received a verbal offer from Perry Ellis to purchase one-half of the inventory in the U.S. The amount is disclosed in the confidential affidavit.

f) While a proposal to pay out the Lenders was to be received from Great American Capital, no proposal was received and the Nygård Group has moved on to having discussions with other Lenders to pay out the secured debt. No concrete proposal was presented.

g) The offer to purchase the Toronto Property dated March 16, 2020 from New York Brand Studio Inc., in Trust, was attached as Exhibit B to Mr. Fenske's affidavit and the purchase price is redacted. The confidential affidavit discloses the purchase price and the amount is substantially different from the purchase price that was included in the earlier affidavit affirmed by Mr. Fenske on March 12, 2020.

h) Nygård Group states that cash will be coming in from the sale of assets until the stores are reopened.

i) Nygård Group unilaterally laid off 1370 employees and provides reasons for closing the offices and stores for the safety of the employees and customers as a result of the COVID-19 virus. Nygård Group confirms that the Lenders and the proposal trustee were not consulted prior to making the decisions.

j) The Nygård Group plans to sell real property and generate $25.4 million and pay $20 million to the applicant pursuant to the Lenders' security.

k) Mr. Nygård will divest ownership and all Nygård Group of companies will continue under different ownership allowing the purchasers to move forward with the current employees of the Nygård Group.

l) The affidavit provides information regarding the steps taken by Nygård Group to market the sale of assets. Mr. Fenske states that the consideration to be paid under the purchase and sale agreement of the Toronto Property "... is reasonable and fair and is substantially higher than a liquidation value of the Nygård Group of companies assets in a Bankruptcy or Receivership." (See para. 29 of the affidavit of Greg Fenske affirmed March 18, 2020)

m) The proceeds from the sale of the Toronto Property and sale of inventory is to be paid to the applicant with the remainder of the monies, if any, to go to the proposal trustee to make a proposal to pay the remaining creditors.

n) The respondents seek an administrative charge to pay the proposal trustee and counsel for the proposal trustee.

o) Although no motion was filed, the respondents seek an extension of time of 30 days for the Nygård Group to make a proposal in bankruptcy.

p) Mr. Fenske states "... the Nygård Group of companies has acted, and is acting, in good faith and with due diligence in the proposal proceedings to date." (See para. 38 of the affidavit of Greg Fenske affirmed March 18, 2020)

Analysis and Decision

14 The starting point for analysis is to determine whether the applicant has met the test for appointing a receiver pursuant to s. 243 of the *BIA*. Section 243(1) of the *BIA* and s. 55(1) of the *QB Act* provide that a receiver may be appointed on application by a secured creditor, where it is "just or convenient" to do so. Such an order may authorize the receiver to:

243(1)

. . . . .

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

15 On February 26, 2020, the applicant sent a notice of intention to enforce security as required pursuant to s. 244(1) of the *BIA*.

16 I am satisfied on the basis of my review of all of the evidence, that it is just and convenient to appoint a receiver in the circumstances. I considered the factors outlined in the various authorities including:

a) Whether irreparable harm may be caused if no order is made, although such a requirement is not essential where, as in this case, the appointment of a receiver is authorized by the security documentation including the Credit Agreement. In this case, I am satisfied that irreparable harm may be caused if no order is made due to the various steps that have been taken by the Nygård Group as I will outline below;

b) The risk to the Lenders taking into consideration the Nygård Group equity in the assets and the need for protection or safeguarding of the assets;

c) The nature of the property, including real property and inventory and the potential that the value of the inventory is being materially impacted by steps taken by the Nygård Group.

d) The balance of convenience to the parties which, in my view, favours the appointment of the receiver to ensure the assets are protected, marketed in an appropriate manner to secure the highest market value and to take reasonable steps to ensure that employees of the Nygård Group are protected.

e) The fact that the applicant has the right to appoint a receiver under the Credit Agreement.

f) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly. The evidence satisfies me that the appointment of a receiver is necessary, just and convenient in the circumstances.

g) I also considered the effect of the order on the parties, the conduct of the parties, the length of time that the receiver may be in place, the cost to the parties and the likelihood of maximizing return to the parties. All of these factors favour

appointing a receiver in the circumstances. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]); *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, [2012] O.J. No. 62 (Ont. S.C.J. [Commercial List]); *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, [2014] O.J. No. 2146 (Ont. S.C.J. [Commercial List]); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]); and *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 95, [2019] M.J. No. 246 (Man. C.A.) (QL))

17 I previously found, as outlined in my reasons for decision given March 13, 2020, that the evidence filed presented a "... strong basis and rationale for the applicant to be concerned about the stability of the Nygård Group and in my view justifies the applicant taking steps to enforce its security and seek immediate repayment of the outstanding indebtedness. The Dean affidavit outlines in considerable detail the breaches of the Credit Agreement. (Exhibit D to Mr. Dean's affidavit) and the reason why the applicant has lost all confidence and faith in the Nygård Group complying with the governing Credit Agreement."

18 Had the Canadian Nygård entities not filed the NOIs, I would have had no hesitation in granting the receivership order last week. As explained in my reasons for decision delivered March 13, 2020:

> The proposal provisions of the *BIA* permit insolvent persons to avoid or postpone bankruptcy by complying with the provisions by appointing a proposal trustee and making a proposal to all creditors, including secured creditors. The proposal trustee must review Nygård Group cashflow statements and the proposal for their reasonableness and file reports in court. The proposal trustee monitors the debtors and must report regarding any material adverse change to creditors without delay after receiving information regarding any changes, which adds transparency to the proposal process.
>
> The proposal trustee is an officer of the court and must impartially represent the interests of creditors. If the proposal trustee knows of dispositions, transfers of property or steps taken by the debtor that are material, the proposal trustee must disclose that information to creditors so that they may take such action as they deem appropriate.
>
> It is necessary for the court to weigh the interests of all creditors in the proposal process and the interests of the primary secured party, the applicant. I am satisfied that it is in the best interests of all of the creditors to permit the respondents to restructure and make a viable proposal to the creditors pursuant to the proposal process.
>
> That said, I am not satisfied that Nygård Group has been dealing with its lenders in good faith and the appropriate action to take is to impose deadlines on the Nygård Group to satisfy the statements made in the Fenske affidavit and made orally by the respondents' counsel in court yesterday.
>
> In my view, it is premature to terminate or lift the 30 day stay period, particularly in light of the representations that the Nygård Group has made to this court. I am not satisfied that there is no viable proposal that can be made by the respondents as submitted by the applicant.
>
> The evidence filed by the respondents suggests that a viable proposal may be made to creditors and to the applicant. While there is evidence that the respondents have not acted in good faith and with due diligence in their dealings with the applicant, I direct that the respondents must continue to comply with the terms and conditions of the credit agreement and ancillary documents pending receipt of the outcome of the negotiations that are presently being undertaken to pay out the indebtedness of the applicant by March 20, 2020.
>
> I am not satisfied that the applicant will be materially prejudiced by the continuing operation of the stay of proceedings, so long as the respondents are making good faith efforts to continue to operate the Nygård Group business in the best interests of all stakeholders, including making arrangements to continue to meet the payroll and pay its employees and taking immediate steps to finalize financing to pay the outstanding indebtedness of the applicant by March 20, 2020.
>
> In the meantime, over the course of the next week, the respondents are ordered and directed to provide RAG ongoing access to financial information by virtue of the inspection rights under the credit agreement. The Nygård Group must not dispose of any assets or transfer shares or transfer funds deposited in the corporate bank accounts to other bank accounts other than in the ordinary course of business without consent of the proposal trustee, the applicant and RAG.

If necessary, the court will make a determination if there is a dispute about a step proposed to be taken by the Nygård Group. In other words, all business of the Nygård Group, including transactions, shall continue in the ordinary course of business and in accordance with the strict terms of the credit agreement.

19 The further evidence that has been filed since March 13, 2020, satisfies me that the Nygård Group has not been acting in good faith and with due diligence. I am also satisfied that the Nygård Group cannot be left as a debtor in possession and the proposal process cannot continue. The second report from the proposal trustee states that the proposal trustee is not in a position to advise that the Nygård Group is acting with good faith or due diligence at this time. Further, the proposal trustee was not provided with sufficient information to assess the draft cash flows provided and is not in a position to file the required report on the reasonableness of the assumptions as required by the *BIA*.

20 As a result of the Nygård Group failing to provide accurate and timely information to the proposal trustee and the Lenders, the proposal proceedings are untenable. Further, the Nygård Group has no plan to continue to fund its operations and no other lender has stepped up to provide the necessary financing to pay out the Lenders.

21 The closure of the retail stores, distribution centres and website without consulting the Lenders and the proposal trustee is a serious concern that directly affects the ability of the Nygård Group to continue to operate and for the applicant to realize on the Collateral.

22 I agree with the applicant that the Nygård Group has provided no information to the Lenders about:

a) What has happened to the employees and specifically how they have been dealt with;

b) How the retail stores are being secured and locked down;

c) How the inventory located in the stores is being dealt with, if at all;

d) What is happening with the Nygård Group wholesale customers; or

e) How the Nygård Group is planning to sell its inventory other than the reference to the Perry Ellis potential offer.

23 It is fundamental for the proposal process to continue that the Nygård Group cooperate with the proposal trustee and that the proposal trustee be in a position to state specifically that the parties subject to the proposal proceeding have been acting in good faith and with due diligence. As noted above, that has not occurred.

24 In addition to the foregoing, the Nygård Group has failed to comply with orders made by this court and undertakings given by their counsel. Specifically, and contrary to their counsel's representations in court on March 12, 2020, the Nygård Group has failed to return the payroll funds to the Nygård Group's bank account and repay the applicant the payroll advance. The explanation provided in the affidavit of Mr. Fenske affirmed March 18, 2020 is inconsistent with what the court was advised on March 12, 2020.

25 The Nygård Group was directed pursuant to orders made by the court on March 12 and 13, 2020, to continue to comply with the Credit Agreement. The unilateral closing of its retail stores, distribution centres and website without consulting with the Lenders or the proposal trustee is in breach of the Credit Agreement and the court order. I also find that it is a material adverse change to the creditors which placed the proposal trustee in the position of not being able to comply with its duties under the *BIA*.

26 I agree with the applicant that in light of the events that have occurred since March 12, 2020, the appointment of Richter was urgently required and Richter was appointed as receiver effective March 18, 2020.

27 Richter is in the best position to assess the reasonableness of the offers to purchase the real estate and make a motion to court with evidence seeking approval. The evidence filed by the Nygård Group is insufficient to assess the reasonableness of the sale of the Toronto Property and the real estate located in Winnipeg. The proposal trustee stated at para. 15 of the

second report that it is not in a position to advise the court or stakeholders that the offer respecting the Toronto Property is fair and reasonable.

28 The events that occurred since orders were made on March 12 and 13, 2020, are material developments that have caused or had the potential to cause a material prejudice to the Lenders and to the Nygård Group's business, creditors and stakeholders.

29 The adjournment of the receivership application on March 13, 2020 and allowing the proposal proceedings to continue with the oversight of the proposal trustee was not granting the Nygård Group a licence to operate with impunity. The court's decision on March 13, 2020, was to allow the respondents a limited period of time to make good faith efforts to repay the debt owing to the Lenders and to fully cooperate with the proposal trustee.

30 I am satisfied that the appropriate course of action is to lift the stay of proceedings that was granted pursuant to s. 69(1) of the *BIA*. The court has jurisdiction pursuant to s. 69.4 of the *BIA* to lift the stay in circumstances in which the court is satisfied:

> **69.4**
>
> . . . . .
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

31 In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee and the Lenders require the ability to oversee the preservation of the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

32 Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the *BIA* under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

33 While the court has the authority pursuant to s. 50.4(11) of the *BIA* to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

34 Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

35 A similar approach was taken by the Ontario Superior court in *Dondeb Inc., Re*, 2012 ONSC 6087, [2012] O.J. No. 5853 (Ont. S.C.J. [Commercial List]) and, in my view, that approach is equally applicable in this case.

Conclusion

36 The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court

also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

37 Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

Application granted.

TAB 4

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Applicant Australian company lent funds to respondent Ontario company under Facility Agreement (FA) — Parties to FA included mining company in Colombia owned by respondent — All amounts under FA became payable upon default — Applicant and respondent entered into general security agreement under which respondent charged all its assets — Parties and mining company entered into share pledge agreement which provided that, in event of default under FA, applicant had right to appoint receiver — In June 2014, respondent had insufficient funds to make interest payment, triggering default — Applicant demanded payment of outstanding amounts under FA, gave notice of intention to enforce security, began enforcing its pledge of shares in mining company, and replaced mining company's board of directors — Mining company's ousted CEO refused to relinquish control and sought creditor protection in Colombia — Applicant applied to appoint receiver over respondent's assets — Application granted — It was just and convenient to appoint receiver — In accordance with FA, respondent's default granted applicant right to seek appointment of receiver — Appointment of receiver was necessary to stabilize corporate governance of mining company, as respondent's wholly-owned subsidiary and its major asset — Failure to obtain additional financing for respondent and mining company might result in significant deterioration in value — Applicant was prepared to advance funds to receiver to fund receivership and mining company's liability, thereby preserving mining company's enterprise value.

Table of Authorities

Cases considered by *Newbould J.*:

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

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 243(1) — considered

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

s. 101 — considered

APPLICATION to appoint receiver over respondent company's assets.

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to

hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather,

> the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

End of Document

TAB 5

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm

Headnote

Receivers --- Appointment — Application for appointment — Grounds
Plaintiffs mortgaged construction project of defendants — With permission of plaintiffs, defendants used rent proceeds to finance continued construction — Total claims against project amounted to $250 million and efforts of defendants to sell project were unsuccessful — Major tenant of project disputed obligations under lease — Defendants sued tenant and proceeds of litigation were assigned to plaintiff — Plaintiffs held veto over settlement and were to be kept informed — Defendants did not inform plaintiffs of several settlement meetings — Mortgages matured and plaintiffs demanded payment made — Months later, defendants made no principal payment — Plaintiffs brought motion for appointment of receiver — Motion allowed — Plaintiffs extended great latitude to defendants and were under no obligation to continue doing so — In context of matured loan and continued failure to complete project, receiver should be appointed — Defendants failed to show irreparable harm that was not compensable in damages — Plaintiffs would suffer prejudice if project continued in limbo — Receiver restricted to dealing only with project.

MOTION by plaintiffs for appointment of receiver.

***Farley J.*:**

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum.

However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a $20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of

a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> **Appointment to Enforce Rights**
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note*: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

TAB 6

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

Confederation Trust Co. v. Dentbram Developments Ltd.

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

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

Borins J.

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

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

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

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

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor

Headnote

Receivers --- Appointment — Application for appointment — General

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

Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.

Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.

Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.

Held:

The motion was granted.

Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

***Borins J.*:**

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

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

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

Motion granted.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLAIREVILLE PROPERTY HOLDINGS INC. A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT

Estate/Court File No. 31-2749576

ONTARIO
SUPERIOR COURT OF JUSTICE
[IN BANKRUPTCY AND INSOLVENCY]
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE DIP LENDER, CANNECT MORTGAGE INVESTMENT CORPORATION
(Returnable December 14, 2021)

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