Court File No. CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TWO SHORES CAPITAL CORP.

Applicant

- and -

PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP, and PRODUCTIVITY MEDIA LENDING CORP. I

Respondents

AND IN THE MATTER OF AN APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c C. 43, as amended

BOOK OF AUTHORITIES
(MOTION FOR DIRECTIONS)

February 19, 2025

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1.	Halsbury's Laws of Canada, Receivers and Other Court Officers (Kevin P. McGuinness)
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TAB 1

HRC-58 Statutory obligations.

Halsbury's Laws of Canada - Receivers and Other Court Officers (2021 Reissue)

Kevin P. McGuinness (Main Title Contributor)

HRC-58

I. Receivers

13. Court-Appointed Receiver as Officer of the Court

Statutory obligations.

A court-appointed receiver is subject to the same statutory obligations as a privately appointed receiver.[1]

Court-appointed receiver is an officer of the court. The authority of a court-appointed receiver is derived from the court appointment and from the directions given to the receiver by the court. The receiver is an officer of the court and acts in a fiduciary capacity to all stakeholders.[2] The essential duty of a court-appointed receiver as an officer of the court is to discharge those duties prescribed by the order appointing the receiver and to exercise reasonable care in the management and operation of the business.[3] A court-appointed receiver has a duty to the court to act in accordance with the terms of the order and the applicable legislation.[4] A court-appointed receiver's duties are to be approached not as the agent of the secured creditor on whose application it was appointed, but as trustee for all parties interested in the fund of which he stands possessed.[5] The receiver is accountable to the court and to all stakeholders in the receivership appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities.[6]

Obligations of court-appointed receiver. The obligations of a court-appointed receiver have been described as follows:

(a) comply with the powers granted in the order of appointment and any applicable legislation;[7]

(b) to act with utmost good faith, complete disclosure and scrupulous avoidance of conflict of interest toward all parties to a receivership or bankruptcy;[8]

(c) to exercise its obligations with prudence, diligence, due care and skill;[9]

(d) to consider the interests of all creditors and then act for the benefit of the general body of creditors;[10]

(e) to act with meticulous correctness, but not to a standard of perfection;[11] and

(f) to maintain an independent position between such parties and represent and report upon what is in the best interest of all creditors and the debtor.[12]

Court-appointed receiver's duty of neutrality. Any actions by a court-appointed receiver favouring one

claimant over another are inconsistent with the receiver's duty of neutrality as between claimants and the court cannot approve the actions of a receiver as the Court's officer which have the effect of changing the rights of competing creditors.[13] However, a court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership[14] and it is not a contravention of the receiver's obligation to be neutral as between creditors to take appropriate steps to have a creditor's rights determined, including taking proceedings adverse to a creditor.[15]

Footnote(s)

1 See ***HRC-56*** ("Duties Owed by Receiver").

2 *York (Regional Municipality) v. Thornhill Green Co-operative Homes Inc.*, [2010] O.J. No. 2294 at para. 21, 68 C.B.R. (5th) 73 (Ont. C.A.) where the court held that

> [t]he "standard criteria that are to be applied when considering the approval of a sale recommended by a receiver are well established. Commonly referred to as "the Soundair principles", they were set out in this Court's decision in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) and re-affirmed in *Regal Constellation* [*Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355, at paras. 22-23 (Ont. C.A.)].

3 *Bayhold Financial Corp. v. Clarkson Co.*,[1991] N.S.J. No. 488, 10 C.B.R. (3d) 159 (N.S.C.A.).

4 *Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488, 10 C.B.R. (3d) 159 (N.S.C.A.); *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*, [1992] S.J. No. 90, 10 C.B.R. (3d) 61 (Sask. C.A.).

5 *Fotti v. 777 Management Inc.*, [1981] M.J. No. 317 at para. 16, [1981] 5 W.W.R. 48 (Man. Q.B.); *Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.*, [2002] M.J. No. 353, 36 C.B.R. (4th) 19 (Man. C.A.); *Liftlock Coach Lines Ltd. v. 902609 Ontario Ltd.*, [1999] O.J. No. 4821 (Ont. S.C.J.); *Panamericana de Bienes y Servicios S.A. (Receiver of) v. Northern Badger Oil & Gas Ltd.*, [1991] A.J. No. 1134 (Alta. C.A.). See also *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.); *Arthur Andersen Inc. v. Merit Energy Ltd.*, [2002] S.J. No. 535, 220 D.L.R. (4th) 351 (Sask. C.A.), leave to appeal refused [2002] S.C.C.A. No. 468 (S.C.C.).

6 *Royal Bank of Canada v. 1231640 Ontario Inc. (Trustee of)*, [2007] O.J. No. 4561 at para. 126, 37 C.B.R. (5th) 185 (Ont. C.A.), leave to appeal granted [2008] S.C.C.A. No. 34 (S.C.C.); *Romspen Investment Corp. v. 6176666 Canada Ltée*, [2009] O.J. No. 5031 (Ont. S.C.J.).

7 See *Re D'Angelo Estate*, [2010] O.J. No. 5674 at para. 35, 2010 ONSC 7244 (Ont. S.C.J.).

8 *Re YBM Magnex International Inc.*, [2000] A.J. No. 1118 at para. 33, 9 B.L.R. (3d) 296 (Alta. Q.B.), affd [2001] A.J. No. 1593, 23 B.L.R. (3d) 293 (Alta. C.A.). In *Jaycap Financial Ltd. v. Snowdon Block Inc.*, [2019] A.J. No. 134, 2019 ABCA 47 (Alta. C.A.), a court-appointed receiver was not transparent in its dealings and failed to disclose relevant and material documents relating to the sale of assets.

9 *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.*, [1992] O.J. No. 729, 12 C.B.R. (3d) 220 (Ont. Gen. Div.); *Re YBM Magnex International Inc.*, [2000] A.J. No. 1118, 9 B.L.R. (3d) 296 (Alta. Q.B.), affd [2001] A.J. No. 1593, 23 B.L.R. (3d) 293 (Alta. C.A.).

10 *Re Scanwood Canada Ltd.*, [2011] N.S.J. No. 447 at para. 26, 84 C.B.R. (5th) 57 (N.S.S.C.).

11 *Romspen Investment Corp. v. 1514904 Ontario Ltd.*, [2010] O.J. No. 1965 at para. 21, 67 C.B.R. (5th) 231 (Ont. S.C.J.).

12 *Romspen Investment Corp. v. 1514904 Ontario Ltd.*, [2010] O.J. No. 1965 at para. 19, 67 C.B.R. (5th) 231 (Ont. S.C.J.). See also *Regal Constellation Hotel Ltd. (Re)*, [2004] O.J. No. 2744 at paras. 22, 23, 71 O.R. (3d) 355 (Ont. C.A.).

13 *Arthur Andersen Inc. v. Merit Energy Ltd.*, [2002] S.J. No. 535 at paras. 35 and 36, 220 D.L.R. (4th) 351 (Sask. C.A.), leave to appeal refused [2002] S.C.C.A. No. 468 (S.C.C.).

14 *Canadian Cooperative Leasing Services v. Price Waterhouse Ltd.*, [1992] N.B.J. No. 399, 128 N.B.R. (2d) 1 (N.B.T.D.).

15 *Arthur Andersen Inc. v. Merit Energy Ltd.*, *[2002] S.J. No. 535*, *220 D.L.R. (4th) 351* (Sask. C.A.), leave to appeal refused *[2002] S.C.C.A. No. 468* (S.C.C.). Courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances: *Regal Constellation Hotel Ltd. (Re)*, *[2004] O.J. No. 2744* at para. 23, *71 O.R. (3d) 355* (Ont. C.A.); *B&M Handelman Investments Ltd. v. Drotos*, *[2018] O.J. No. 3406* at para. 43, *2018 ONCA 581* (Ont. C.A.).

End of Document

TAB 2

(viii) Funding of the Receivership

Commercial Insolvency in Canada, 4th Ed.

Kevin P. McElcheran

4 : RIGHTS AND REMEDIES OF SECURED CREDITORS

5. RECEIVERSHIP

(e) Risks of Receivership

(viii) Funding of the Receivership

¶4.158 In the initial stages of the receivership, it may be necessary for the privately-appointed receiver who is operating the debtor's business to fund critical expenses such as payroll. Where the cash flow from receivables is not sufficient to fund these critical obligations, the receiver may be forced to borrow by way of temporary overdraft from the appointing creditor.

¶4.159 In the context of a private appointment of the receiver, advances to the receiver to fund the activities of the receivership are only recoverable from proceeds of realization if permitted by the security agreement and PPSA legislation. Most security agreements contemplate the funding of the receivership expenses and provide that such funding is secured by the collateral in the same way and at the same level of priority as are advances under the secured obligation. Additionally, PPSA legislation expressly permits the recovery of the reasonable expenses of the secured creditor (including a receiver) incurred in the seizure, care and realization of the collateral.

¶4.160 Court-appointed receivers and interim receivers have no contractual rights in respect to the debtor. Court-appointed receivers and interim receivers must rely on the exercise of the court's discretion to permit them to borrow and to secure such borrowings by the assets of the debtor. Courts in Canada have long exercised such powers, in appropriate circumstances, even if the effect is to subordinate the security rights of existing secured creditors against their wishes.[1] In the interests of balancing potential prejudices, courts carefully weigh the purpose and benefit of the proposed funding against the property rights of subordinated secured creditors. In the balancing of potential prejudices, courts limit the amount of priority funding that the receiver/interim receiver can obtain and often restrain the activities of the receiver/interim receiver so as to minimize utilization.[2]

¶4.161 Receivers appointed under section 243(1) of the BIA may be granted a charge on the assets of the debtor that ranks in priority to the secured claims of creditors for their fees and disbursements. The court may not make such an order unless it is satisfied that the secured creditors who would be materially affected by the charge have been given reasonable notice and an opportunity to make representations to the court.[3] Disbursements included in any such charge must not include payments made by the receiver in operating the business of the debtor.[4]

(viii) Funding of the Receivership

Footnote(s)

1 *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, [1975] O.J. No. 2363, 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201 (Ont. C.A.).

2 See, *e.g.*, *Re Royal Oak Mines Inc.*, [2001] O.J. No. 562 (Ont. C.A.).

3 BIA, s. 243(6).

4 BIA, s. 243(7).

End of Document

(iii) Duties of Court-appointed Receivers as Officers of the Court

Commercial Insolvency in Canada, 4th Ed.

Kevin P. McElcheran

4 : RIGHTS AND REMEDIES OF SECURED CREDITORS

5. RECEIVERSHIP

(c) Court-appointed Receivers

(iii) Duties of Court-appointed Receivers as Officers of the Court

¶4.104 Court receivership is a flexible judicial tool. It is a mechanism designed to permit the orderly realization of the assets of the debtor for the benefit of all affected parties. Any application to the court for the appointment of a receiver is a surrender of control of the realization process by the creditor applying for relief to the court. The receiver appointed by the court is not the agent of the appointing creditor. Such a receiver is the instrument of the court.

¶4.105 As a court officer, the court-appointed receiver has a duty to take a broad perspective in the exercise of its duties. It cannot favour the interests of one party over another. It has a duty of even-handedness. That is not to say that a court-appointed receiver should ignore the priority of interests of creditors in the realization process. Rather, in the balancing of interests of various stakeholders, it has a duty to give the rights of parties affected by its activities, and its decisions, the appropriate weight.

¶4.106 Because of this duty to balance rights and interests and as a reflection of the parallel concerns of the court, court receivership is often sought by creditors seeking to stay the uncontrolled exercise of private security rights by individual creditors in order to preserve an opportunity for the receiver to pursue a going concern sale of the business of the insolvent debtor. Often, a fundamental requirement of the pursuit of the going concern sale is the imposition of restraints on the exercise of contractual and security rights of individual stakeholders through the imposition of a stay of proceedings by such creditors. Through a stay of individual secured creditor rights, including those of the moving party, the court-appointed receiver is provided with the necessary tools to manage the business of the debtor and to seek offers to purchase the business as a going concern. At the same time, all affected parties have access to the court to seek the recovery of their collateral or to seek fair compensation for the use or disposition of their collateral through the orderly realization process.

TAB 3

2002 CarswellOnt 3454
Ontario Superior Court of Justice [Commercial List and In Bankruptcy]

Sullivan v. Letnik

2002 CarswellOnt 3454, [2002] O.J. No. 4037, 117 A.C.W.S. (3d) 680, 38 C.B.R. (4th) 284

Jeannine Sullivan, Applicant and John Letnik and Captain Normac's Riverboat Inn Limited, Respondents

In the Matter of the Proposal of Captain Normac's Riverboat Inn Limited of the City of Toronto, in the Province of Ontario

In the Matter of the Sale of Security of Duca Financial Services Credit Union Ltd.

Cameron J.

Heard: October 11, 2002
Judgment: October 21, 2002
Docket: 02-CL-4566, 31-399588

Counsel: *David Jackson*, for Applicant, Jeannine Sullivan, Julia Jamroz, shareholder and creditors of Captain Normac's Riverboat Inn Limited
Patrick Shea, *Michael Harpur*, for Respondent, John Letnik
William J. Meyer, Q.C., for Duca, Wasserman Mathew Limited

Subject: Corporate and Commercial; Insolvency

Headnote

Personal property security --- Remedies — Sale or realization — Miscellaneous issues

Secured creditor gave notice of its intention to sell business and assets of debtor, which operated restaurant and catering business, to enforce security — Secured creditor appointed agent which issued terms and conditions of sale on October 2, 2002, offering debtor's business and assets for sale to one unsecured creditor and to owner of shares of debtor, with bids closing 13 days later — Prior to October 2, 2002 notice unsecured creditor had indicated that she could not purchase business but had provided names of four possible purchasers in restaurant business — No evidence existed that agent approached these possible purchasers or anyone else in effort to sell business — Unsecured creditors brought motion for injunction preventing secured creditor and agent from conducting sale of business and assets of debtor except in commercially reasonable manner — Motion granted — Sale was not being conducted in commercially reasonable manner — No evidence existed of any need to sell quickly — Period of 13 days was wholly insufficient period in which to obtain bids, particularly when only two people were notified, one of whom was not able to purchase — Sale in commercially reasonable manner required reasonable effort to find competing offers to purchase with view to obtaining fair price, including discussions with people familiar with restaurant business to identify potential buyers and provide them with information packages — Damages as remedy for improvident sale could not be measured without benchmark of value consistent with commercial reasonability — Balance of convenience favoured issuing of injunction now rather than waiting until after sale and incurring costs and delay of action for damages.

Receivers --- Conduct and liability of receiver — Duties

Secured creditor gave notice of its intention to sell business and assets of debtor, which operated restaurant and catering business, to enforce security — Secured creditor appointed agent which issued terms and conditions of sale on October 2, 2002, offering debtor's business and assets for sale to one unsecured creditor and to owner of shares of debtor, with bids closing 13 days later — Prior to October 2, 2002 notice unsecured creditor had indicated that she could not purchase business but had provided names of four possible purchasers in restaurant business — No evidence existed that agent approached these possible purchasers or anyone else in effort to sell business — Unsecured creditors brought motion for injunction preventing secured creditor and agent from conducting sale of business and assets of debtor except in commercially reasonable manner — Motion granted — Sale was

not being conducted in commercially reasonable manner — No evidence existed of any need to sell quickly — Period of 13 days was wholly insufficient period in which to obtain bids, particularly when only two people were notified, one of whom was not able to purchase — Sale in commercially reasonable manner required reasonable effort to find competing offers to purchase with view to obtaining fair price, including discussions with people familiar with restaurant business to identify potential buyers and provide them with information packages — Damages as remedy for improvident sale could not be measured without benchmark of value consistent with commercial reasonability — Balance of convenience favoured issuing of injunction now rather than waiting until after sale and incurring costs and delay of action for damages.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 147 — referred to

s. 244 — referred to

ss. 244-247 — referred to

s. 248 — considered

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — pursuant to

s. 248 — considered

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

s. 101 — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 63 — referred to

MOTION by unsecured creditors of debtor for injunction preventing secured creditor and its agent from conducting sale of business and assets of debtor except in commercially reasonable manner.

***Cameron J.*:**

1 Jeannine Sullivan ("Ms. Sullivan") and Julia Jamroz ("Ms. Jamroz") move on short notice for:

> (a) an order that Duca Financial Services Credit Union Ltd. ("Duca") and its agent Wasserman Mathew Limited (the "Agent") be directed to sell the assets of Captain Normac's Riverboat Inn Ltd. (the "Debtor") in a commercially reasonable manner; or
>
> (b) an order restraining Duca and its Agent from realizing on the property of the Debtor until it has taken the steps in (a);
>
> (c) an order removing any stay that may exist with respect to Ms. Sullivan and Ms. Jamroz bringing this motion for the purpose of bringing the motion;
>
> (d) an order in the existing application under the *Ontario Business Corporations Act ("OBCA")* that the Debtor be wound down and a Receiver and Manager be appointed to sell the Debtor's assets;
>
> (e) the Agent be appointed interim receiver of the Debtor and be directed and authorized to sell the business and related assets of the Debtor in a commercially reasonable manner; and

(f) abridging the time for service.

2 The respondents did not seek an opportunity to file responding material or to cross-examine Ms. Sullivan or Ms. Jamroz.

3 The parties agreed to take no action respecting the sale by Duca and the Agent until the issuing of these reasons.

Facts

The Parties and the Business

4 The Debtor operates a restaurant and catering business in a 295-ft. motor yacht docked on the Toronto waterfront. Ms. Sullivan and Ms. Jamroz are unsecured creditors of the Debtor.

5 John Letnik owned all the shares of the Debtor in his own name when he pledged them to Duca in 1998 as collateral security for a guarantee of the Debtor's indebtedness to Duca secured by a first charge on the Debtor's assets under the *Personal Property Security Act ("PPSA")* in the early 1990s. That debt stands at about $395,000 on a fixed loan and $120,000 on a line of credit. Mr. Letnik has been operating the Debtor's business for the past 10 years.

6 Ms. Sullivan and Mr. Letnik were common law spouses until 1992. In 1999 she obtained an order that 50% of the shares of the Debtor are beneficially owned by her. This was, of course, subject to the prior pledge to Duca.

7 Ms. Sullivan is an unsecured creditor of the Debtor for about $295,000. Ms. Jamroz, Ms. Sullivan's mother, is an unsecured creditor for about $55,000.

8 Ms. Sullivan is the applicant in the application for relief from oppression under the *OBCA*.

9 Ms. Sullivan is now married to the principal shareholder of 1454495, a judgment creditor of the Debtor by way of an assignment of a judgment in 2001. It moved for seizure and sale of the shares held by Duca in January 2002.

The Proposal

10 Following notice of the motion by 145 Inc. the Debtor filed notice of a proposal under the *Bankruptcy and Insolvency Act ("BIA")*. In February 2002 the Debtor filed a proposal to its unsecured creditors (the "Proposal") providing for a sale of the Debtor's business and assets to "a company to be incorporated and who will purchase the Debtor's assets ... save and except for Accounts Receivable" defined to mean "the outstanding advances made by the Debtor to Jeannine Sullivan, or an entity controlled or related to [her] which are estimated to be valued at $250,000.

11 Under the Proposal the "secured creditors shall be paid in accordance with the present arrangements existing between Captain Normac's and the holder of the secured claim, or such other terms as may be mutually agreed between them..."

12 The Proposal states that the Debtor's books show the claims of the secured creditors were $200,000 and unsecured creditors were $3.4 million, including $900,000 claimed by related parties, excluding a claim by Ms. Sullivan.

13 Under the Proposal after payment of $15,000 to the Trustee, $15,000 would be available for unsecured creditors. The purchaser would assume claims up to $5,000 not paid by the $15,000 distribution. The balance of the unsecured claims would be paid out of sale proceeds after payment of Trustee fees, preferred creditors, Crown claims and employees. The claims of related creditors are subordinate; those creditors will receive no dividend under the Proposal.

14 The Proposal contemplated assumption of certain unsecured claims by the purchaser and a distribution to unsecured creditors greater than that available from a bankruptcy.

15 The Proposal uses an estimate of the value of the Debtor's assets at $200,000. Other valuations suggest its assets may be worth over $1 million.

16 The Proposal excluded any claims for fraudulent or reviewable transactions by the Debtor.

17 The books of the Debtor lack any credibility. I find it difficult to believe that Duca would permit its loans to remain outstanding for so long without fuller financial reporting by the Debtor. The evidence before me by Mr. Letnik acknowledged, in spite of the Proposal disclosure, secured indebtedness to Duca of about $515,000, the same as in January, 2002 and outstanding municipal taxes of $43,000, having been reduced from $66,000 in February, 2002. The Debtor's operations, monitored by Duca, have produced some operating profit.

18 Ms. Sullivan alleges the Debtor is solvent. The Debtor and Mr. Letnik dispute it. In June 2002 Mr. Justice Cullity stayed the *OBCA* and bankruptcy proceedings pending a hearing of the issue of the Debtor's solvency set for April, 2003. That order did not interfere with the rights of a secured creditor.

Proposal Sale by Duca

19 On October 2, 2002, following several months informal notice of its intention to sell the business and assets and service of Notice of Intention under *BIA* s.244, Duca appointed the Agent which issued Terms and Conditions of Sale offering the Debtor's assets only to Ms. Sullivan and Mr. Letnik or their nominees, with bids closing October 15, 2002. Prior to the October 2 notice Ms. Sullivan indicated she could not purchase the business but had provided the solicitors for Mr. Letnik and Duca with the names of four possible purchasers in the restaurant business. There is no suggestion in the evidence that the Agent has approached these people or anyone else in an effort to sell the Debtor's assets and business.

20 There is no evidence of any need to sell quickly.

21 The circumstances suggest that this Proposal was effectively a "done deal" before the Terms and Conditions of Sale were issued for Mr. Letnik to acquire the assets.

22 Mr. Letnik has testified that articles in the *Toronto Star* in May 2002 and in June 2002 in a magazine published to the hospitality trade publicized the Debtor's financial problems which he thinks affected the business adversely and that if those problems are further publicized by an advertisement for sale he might just as well shut down the business. Mr. Letnik could provide no information respecting the profitability of the Debtor in 2002, let alone any comparison with 2001 operations. He did say that he had paid down the municipal taxes by $23,000 in 2002 and had painted about one quarter of the hull of the boat during the summer of 2002 himself. These suggest to me that the business is profitable notwithstanding the alleged adverse publicity and that Mr. Letnik anticipates a continuing involvement in the ownership of the purchaser contemplated in the Proposal.

23 Duca and the Agent argue that the value does not warrant a marketing effort and any further publicity of the sale under Duca's security would adversely affect the goodwill of the business and the price a purchaser would pay.

24 Mr. Letnik acknowledged that he authorized the filing of the Proposal with its necessary notice to suppliers and other creditors. He should reasonably have anticipated that the news would spread in the food supply and hospitality business.

Discussion

25 Duca has an obligation under *BIA* s.147 and *PPSA* s.63 to exercise its power of sale in a commercially reasonable manner. It also has an obligation to Ms. Sullivan under s.12 of a Settlement Agreement made in March, 2001 respecting her claim to 50% of the shares held in trust for her by Mr. Letnik, a claim by Duca against her and a lawsuit by Ms. Sullivan against Duca.

26 *BIA* s.248 provides that if a secured creditor or a receiver of an insolvent person is failing to carry out a duty imposed by s.244 to s.247 the court may order them to carry out that duty or restrain them from dealing with the property of the insolvent person until that duty has been carried out.

27 *OBCA* s.248 provides a broad range of remedies for conduct which is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any security holder or creditor.

28 The *Courts of Justice Act,* s.101, also authorizes this court to issue an injunction.

29 The issue is whether the Terms and Conditions of Sale by the Agent are commercially reasonable.

30 In my opinion in the circumstances of this sale, the sale is not being conducted in commercially reasonable manner. A period of 13 days is a wholly insufficient period in which to obtain bids, particularly when only 2 people are notified, one of whom, Mr. Letnik, wants to purchase and there is evidence the other cannot purchase and there is no evidence that she has the ability to market the business.

31 There is clearly a serious issue to be tried. While damages may be the remedy in an action for improvident sale, following disposal those damages cannot be measured without a benchmark of value consistent with commercial reasonability. Accordingly if there is no sale on a commercially reasonable basis irreparable harm will result if such a benchmark is not available.

32 The balance of convenience favours the issuing of an injunction now rather than waiting until after the sale and incurring the costs and delay of a lawsuit for damages.

33 A sale in a commercially reasonable manner requires marketing the sale to more than two people, if one of them is not likely to purchase. It requires a reasonable effort to find competing offers to purchase with a view to obtaining a fair price. This requires discussions with people familiar with the hospitality industry to identify potential buyers or groups which would include potential buyers. This should be followed by contacting those people to obtain expressions of interest and providing to those interested a package of information sufficient to encourage bids. This normally takes more than 13 days.

34 I enjoin the opening of bids by Duca or Wasserman under the Terms and Conditions of Sale dated October 2, 2002 until:

> (a) 30 days after the sale of the business and assets has been advertised once in the national editions of each of the *Globe and Mail* and the *National Post* and in a recognized national hospitality trade publication noting the essence of the business and sale conditions and the availability of bid documents with the Terms of Sale and a reasonable information package, including a list of assets and profit and loss statements for the business for the last completed fiscal year and the current year to date is given, on a confidential basis, with an opportunity to inspect, to each person seeking such information; or
>
> (b) Duca or the Agent produces a marketing plan directed to obtaining competing bids which is reasonable in the circumstances and approved either by Ms. Sullivan and Mr. Letnik or by this court and which contains a schedule to effect the following steps, by not later than 21 days before the bid opening date:
>
> > i) identification of potential purchasers and groups containing potential purchasers;
> >
> > ii) notifying and obtaining expressions of interest from potential purchasers and groups with potential purchasers;
> >
> > iii) providing on a confidential basis, bid documents with the terms of sale, a reasonable information package and a reasonable opportunity to inspect the business and assets to those who request them.

35 In my opinion these are minimum requirements for a sale in a commercially reasonable manner in these circumstances and I direct Duca and the Agent to comply with them.

36 Costs may be spoken to.

37 Leave is given for short notice.

38 While there is no motion, the style of cause should be amended to reflect the true nature of this motion and the parties to it. To the extent necessary, the stay order of Cullity, J. is lifted to permit the bringing of this motion and any amendment to the oppression application.

Motion granted.

End of Document

TWO SHORES CAPITAL CORP.
Applicant

-and-

PRODUCTIVITY MEDIA INC. et al.
Respondents

Court File No. CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at
Toronto

BOOK OF AUTHORITIES
(MOTION FOR DIRECTIONS)

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