Court File No. CV-14-10417-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

GLOBAL RESOURCE FUND

Applicant

- and -

TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

Respondents

APPLICATION UNDER section 243 of Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended and section 101 of the Courts of Justice Act, RSO 1990, c C.43

BOOK OF AUTHORITIES OF THE APPLICANT

January 28, 2014

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INDEX

INDEX

LIST OF AUTHORITIES

Tab

TAB 1

CITATION: Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONSC 1911
COURT FILE NO.: CV-13-9991-00CL
DATE: 20130402

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: BUSINESS DEVELOPMENT BANK OF CANADA, Applicant

A N D:

PINE TREE RESORTS INC. and 1212360 ONTARIO LIMITED, Respondents

BEFORE: MESBUR J.

COUNSEL: *George Benchetrit*, for the Applicant

Milton Davis, for the Respondents

David Preger, for Romspen Investment Corporation

HEARD: March 27, 3013

E N D O R S E M E N T

The application:

[1] Business Development Bank of Canada (BDC) applies for the appointment of a Receiver over the assets of the respondents. The respondents own and operate the Delawana Inn in Honey Harbour Ontario. The Inn has experienced financial difficulties over the years, particularly since the economic downturn of 2008.

[2] BDC has lent the respondents just over $3.3 million advanced in two loans, the first for $3 million and the second for $325,000. The two loans are secured by first mortgages against the bulk of the properties forming the Inn's premises. In addition, BDC holds additional security by way of general security agreements granted by each of the respondents over all of their assets. Mr. Fischtein, the principal of the respondents, has also provided his personal guarantee of 15% of the outstanding balance on the larger loan. Both the mortgages and the GSAs give the bank the right to appoint a receiver if the respondents default.

[3] The respondents' ongoing financial difficulties resulted in their loans being transferred to the bank's special accounts department in April of 2011. The

respondents then failed to make the scheduled principal and interest payments due in July and August, 2011. They also failed to pay realty taxes. They were thus in default under their loan agreements and the mortgages.

[4] The bank demanded payment of the outstanding arrears in August 2011. The respondents failed to pay. In October of 2011, the bank demanded payment of the outstanding balances of the loan. The loan agreements and mortgages provide for acceleration of payment in the event of default. At the same time, the bank issued a notice of intention to enforce security (NITES) under s. 244 of the *Bankruptcy and Insolvency Act*.

[5] The respondents then asked BDC to postpone principal payments due under the loans, so they could put forward a turnaround proposal. The bank agreed, and the parties worked toward a forbearance agreement. They did not reach an agreement, but the respondents did pay all principal and interest arrears under the loans in January 2012.

[6] Under the loans, the respondents were required to make a large principal payment in July 2012. Just before the payment was due, the respondents advised BDC they would not make the payment. BDC then issued a demand for payment of the loan arrears.

[7] The respondents asked BDC to restructure the loan, since they were hoping to redevelop the Inn into a condominium/time-share resort.

[8] The respondents and BDC then entered into a letter agreement in September of 2012 amending the loan agreement. This amendment stretched principal payments, and the term of the loans, out to October of 2031. Even though the loan was restructured in this way, the respondents still did not pay. They requested further extensions.

[9] Finally, BDC reached the end of its patience. It issued a demand letter on November 23, 2012 declaring the balances of the loans were immediately due and payable. BDC also sent a NITES pursuant to the *BIA*.

[10] A few days later, BDC wrote the respondents advising that if and only if they paid all loan principal arrears together with all loan interest arrears and outstanding fees by January 7, 2013, BDC would withdraw the demand for payment and would then confirm that the repayment terms under the amendment letter would continue to apply.

[11] The respondents asked for more time, and sought an extension to January 31, 2013. BDC agreed to an extension to January 31 for principal payments,

but only if the respondents paid the outstanding interest arrears, fees and legal fees by January 11, 2013.

[12] On January 11 the respondents advised BDC the money would not be available until the following week. BDC then requested the payment be received on January 16, 2013.

[13] January 16 came and went. The respondents never paid. In sum, they have paid nothing on account of the BDC loans since June of last year, a period of over nine months. As of January 31, 2013 the respondents owed BDC a total of $2,583,257.45 for principal, interest, additional interest, costs, disbursements and expenses, being the total amount of the debt secured under the mortgages and GSAs.

[14] There is no question the respondents are in default under the BDC mortgages and GSAs. Both the mortgages and the GSAs give BDC the right to appoint a receiver pursuant to its security. It could appoint a private receiver if it wished. Instead, BDC moves for a court appointed receiver to sell the security. BDC takes the position this is the most transparent, cost effective and sensible way to proceed. While it could have pursued power of sale proceedings under the terms of its mortgages, it views a receivership as a better, more just and convenient way to maximize value for all stakeholders.

[15] Both the respondents and second mortgagee, Romspen Investment Corporation oppose the application. Romspen holds the second mortgage on the property secured by BDC's first mortgage. It also holds additional security on some of the respondents' other properties. Romspen is owed about $4.3 million. The respondents are also in default under the Romspen mortgages. Romspen wishes to pay the current arrears under the BDC mortgages, along with arrears of taxes and costs, and then take control of the sale of the Inn under the notices of sale it has already delivered pursuant to its mortgages.

[16] Romspen takes the position that under s. 22 of the *Mortgages Act*[1] it is entitled to put the BDC mortgages into good standing, and relieve against acceleration of the full amounts due under the mortgages. This is what it proposes to do, while pursuing its rights to sell the properties under the power of sale provisions of its own mortgages.

[17] Romspen says that under these circumstances it would not be just or convenient to appoint a receiver. It suggests that a receivership will be a more expensive and time consuming process than simply letting it put BDC's mortgages into good standing and maintain them in good standing while it sells the properties.

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[1] R.S.O.1990, c. M.40, as amended

[18] The respondents support Romspen's position. They agree the Inn should be sold to satisfy the outstanding debts. Mr. Fischtein, the principal of the respondents, and guarantor, says he is at the greatest risk of loss, and has a particular interest in obtaining the highest and best price for all the properties as a whole. He says the entire property should be sold, not just the portion over which BDC holds security. He says with his many years of operating the Inn, he can assist in ensuring the sales process is operated effectively and efficiently. He goes even further and says that if Romspen sells the property (with his cooperation, presumably) he would have no objection to a Monitor, acceptable to both mortgagees, reporting to BDC on the progress of a sales process.

The law:

[19] BDC asks the court to appoint a receiver under both s. 101 of the *Courts of Justice Act* and s. 243(1) of the *Bankruptcy and Insolvency Act.* Both statutes provide the court may do so if it is "just or convenient".

[20] In general the parties do not disagree on the appropriate legal principles to apply here. All agree that the overarching criterion in considering whether to appoint a receiver is whether it is "just and convenient" to do so.[2]

[21] While appointing a receiver is generally viewed as an "extraordinary remedy", it is less so when, as is the case here, a debtor has expressly agreed to the appointment of a receiver in the event of default.[3]

[22] In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.[4] In order to answer the question the court must consider all the circumstances of the case, particularly:

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

b) The parties' conduct; and

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[2] S. 101, *Courts of Justice Act*

[3] See, for example, *United Savings Credit Union v. F&R Brokers Inc.* (2003) 15 B.C.L.R. (4th) 347 (B.C.S.C.); *Chung v. MTCC 1067,* 2011 ONSCC 3187 (S.C.J.)

[4] *Bank of Nova Scotia v. Freure Village on Clair Creek,* 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (S.C.J.)

c) The nature of the property and the rights and interests of all parties in relation to it.[5]

[23] The *Mortgages Act* also has an impact on this case. Romspen wishes to avail itself of the provisions of section 22(1) of the *Mortgages Act* which says:

> Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> a) At any time before sale under the mortgage; or
>
> b) Before the commencement of an action for the enforcement of the rights of
>
> the mortgagee or of any person claiming through or under the mortgagee, the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

[24] Section 1 of the *Mortgages Act* defines "mortgagor" as including "any person deriving title under the original mortgagor or entitled to redeem a mortgage." Thus Romspen, as second mortgagee is, by definition, a "mortgagor" entitled to the benefits of section 22(1).

[25] Simply put, Romspen says that since BDC has not brought an action to enforce its mortgage within the meaning of the *Mortgages Act* it has an unequivocal right to put the BDC mortgage into good standing under s. 22.

[26] It is against this legal framework I turn to the facts of the case to decide whether in these circumstances it would be just and equitable to appoint a receiver, or whether, if Romspen exercises its rights under s. 22 of the *Mortgages Act,* it would not be just and equitable to do so.

Discussion:

[27] What is unusual about this application is that all the interested parties before the court support an immediate sale of the property. Each, particularly Mr.

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[5] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007 (CanLII)

Fischtein, has an interest in obtaining the highest and best price for the property. They disagree, however, on who should manage the process, and what the process should be.

[28] With that in mind, I will consider each party's plan, and determine what would be most just and convenient in all the circumstances, having regard to the criteria set out above.

BDC's plan

[29] BDC proposes to appoint Ernst & Young (E&Y) as receiver. The rates E&Y quotes for its services range from $200 or $225 per hour for support staff, to $350 per hour for managers, up to $475 per hour for the partner who will manage the file. BDC says E&Y would market the property itself, without using a real estate agent. The receiver does not propose to open and operate the Inn, but rather to attempt to sell it before it would otherwise open in June. Because BDC holds security over the real estate and the respondents' personal property, all the Inn's non-real estate assets could also be sold in the receivership.

[30] The respondents and Romspen suggest BDC's plan is flawed because BDC does not hold mortgage security over the entire property and could therefore not sell it *en bloc*. BDC's mortgage covers all but Royal Island (which Mr. Fischtein is already marketing separately as a residential family property), and three very small cottages. With the respondents' consent, these properties could be included in a sale. Even without these properties, the receiver would still be able to sell what appears to be more than 90% of the Inn's holdings.

[31] BDC also points out that a receivership would provide the added benefits of a stay of proceedings, as well a vesting order in favour of any purchaser. It also suggests this is a case where the court's overall supervision of the process, coupled with the receiver's obligations as the court's officer, would be in the best interests of all stakeholders.

Romspen's plan

[32] Romspen tells me that pursuant to s. 22 of the *Mortgages Act,* it will pay the principal arrears under the BDC mortgage forthwith, (i.e., within a day), and will bring all interest payments up to date, including interest on interest, together with BDC's costs and expenses, and outstanding realty taxes. It undertakes to continue to make all payments of principal and interest due under the mortgage as amended by the September 2012 agreement between the respondents and BDC. It does not, however, propose to pay outstanding HST.

[33] Romspen says it will market the whole of the property quickly with a view to selling all of it, within a reasonable period of time. It is prepared to keep BDC apprised of its efforts on an ongoing basis. It also agrees that if I dismiss the receivership application, it could be without prejudice to BDC's renewing the application at a later date.

[34] Romspen is quite candid that by using s. 22 of the *Mortgages Act* it can reap the benefit of the very favourable terms of the respondents' mortgages with BDC, and particularly the terms of the September 2012 amending agreement. It says BDC will not be prejudiced, because it will have received exactly what it bargained for in its agreements with the respondents, particularly the letter agreement amending the mortgage terms in September of 2012.

[35] Romspen argues that under its plan, BDC will be in the same position it would have been had the respondents' not defaulted. Under those circumstances, it argues it would not be just and convenient to appoint a receiver.

The respondents' plan

[36] The respondents prefer the Romspen plan. That said, they acknowledge the Inn must be sold, and Mr. Fischtein says he is "prepared to cooperate with the secured lenders in having the Delawana marketed and sold in an orderly fashion, through the appointment of an agreed upon agent, and, if necessary, with the supervision of a monitor who is acceptable to both lenders."[6] He says he can assist in ensuring that the sale process is operated effectively and efficiently.

[37] From these statements I infer that Mr. Fischtein, and thus the respondents, would cooperate with either mortgagee on a sale, and would do his utmost to see that value is maximized.

The risks and benefits of the proposed plans.

[38] Everyone agrees the Inn must be sold. They simply disagree on how the sale should be accomplished.

[39] The respondents suggest that this is a case like *Chung v. MTCC 1067* [7] where I denied a mortgagee's application for the appointment of a receiver. In my view, this is not a case like *Chung.* There, the real estate was a simple parking garage, without cross collateralized debt from different creditors. There, unlike here, there was no specific provision for a receiver in any security document.

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[6] Debtors' factum at paragraph 32
[7] 2011 ONSC 3187 (S.C.J.)

[40] The respondents argue that appointing a receiver now will affect the 165 reservations that have been made for the Inn this summer. They say this represents 830 room nights. Fifteen family reunions have been booked. The Inn provides 110 summer jobs, which the respondents say will be imperilled if a receiver is appointed.

[41] The respondents want the Inn to open in June, and be listed for sale without the "stigma" of a receivership. It seems to me that selling the property under power of sale is just as much of a stigma as having a receivership sale. If Romspen is candid in its stated intention to sell the property immediately, I fail to see how opening in June bears on the issue one way or the other. BDC suggests that since the Inn does not operate in the winter months, a receiver would be in a good position to conduct a quick sales process now that could result in a going concern sale. That outcome would provide the respondents' existing employees with employment with the Inn's purchaser in time for the 2013 season.[8]

[42] If the property can be sold quickly, new owners may honour the reservations and take on the employees. If the property is put on the market now, but not sold quickly, those who have reservations can be advised so they can make other arrangements, since the receiver has no plans to open and operate the Inn this season.

[43] With a power of sale (Romspen's plan), the properties will be sold. I am told there is sufficient equity to pay out BDC regardless of who sells it. The difficulty with Romspen's plan, however, is that its interests may run contrary to those of BDC and other creditors and stakeholders. For example, a sale that other stakeholders might support could be unacceptable to Romspen for any number of reasons. The advantage of a receivership is that the process will be subject to the court's supervision, coupled with the receiver's obligations to act in the interests of all creditors and stakeholders.

[44] I must consider the interests of all stakeholders. Although Romspen's plan could put the BDC mortgage into good standing, it does not remedy the default under the GSAs. For example, Romspen has no intention of paying the HST arrears. These alone come to about $250,000 for 2011 and 2012. The existence of those arrears constitutes a default under the GSA. The respondents are in default under the Romspen mortgages. That, too, constitutes default under the BDC GSAs.

[45] BDC points out that since Romspen holds security over more of the properties than does BDC, it is not unlikely that if Romspen sold the properties, there could be conflicts over allocation of the purchase price among the properties. BDC is not the only other creditor. There are third party equipment lessors, arrears of realty

[8] See paragraph 46 of the affidavit of Ruth Thomson, Senior Account Manager, Special Accounts, with BDC, sworn February 4, 2013, filed in support of the application

taxes, outstanding HST obligations, and the usual unsecured creditors. Mr. Fischtein himself, through companies he controls, also holds mortgages over all the properties. All have an interest in maximizing value, and having some input in the allocation of any global purchase price.

[46] I recognize that as a mortgagee, Romspen has an obligation in power of sale proceedings to sell at market value. I am not satisfied that that obligation alone is sufficient to protect the interests of all stakeholders.

[47] What about cost? Romspen and the respondents suggest that a receivership will be much more costly and cumbersome than a simple sale with an agent. They also say that only Romspen is in a position to sell all the land *en bloc.* I am not persuaded these considerations are sufficient to carry the day.

[48] I do not know how or when Romspen actually intends to market the Inn. I do not know how it will arrive at a listing price, nor do I know what rate of commission it will incur, or what the listing terms might be. I also have no idea of the likely time frame for soliciting offers. All I know is that Romspen intends to sell the property using a commercial agent, with whom I assume there would be the usual commission arrangement.

[49] Mr. Fischtein already has the island portion of the property, Royal Island, up for sale, along with a couple of the cottage properties. Royal Island is being marketed as a "family property", rather than as part of the Inn. It is listed on MLS as a residential property with commission payable at 5%. Although I have no real indicator of value for the property covered by the BDC mortgage, its MPAC value is stated to be more than $4 million. If it sold at this price, a commission of $200,000 or more would likely be payable.

[50] When I look at Romspen's plan as a whole, they would propose to incur immediate costs to put the BDC mortgage into good standing,[9] and then spend another $200,000 on commission and other expenses. Their plan is hardly inexpensive.

[51] I am told the receiver would market the property itself, without the interposition of an agent. BDC's counsel suggests that any marketing process would be court approved prior to the receiver embarking on it. In this way, the court could monitor the cost issue. The court would also have to approve any proposed sale, thus providing an open and transparent forum to protect the interests of all stakeholders.

[52] I find it interesting that Mr. Fischtein suggests the supervision of a monitor as an alternative to appointing a receiver. I do not see that as providing any

[9] Romspen has offered to pay $164,634.94 to BDC to put the mortgage into good standing. BDC takes the position that payment would not represent all the money BDC is owed.

cost savings. The advantage of a receiver, of course, is that the receiver is the court's officer, with duties and obligations to both the court and to all the stakeholders. If stakeholders disagree about the appropriate marketing process, the court can determine what is in the interests of all of them. Similarly, if allocation issues arise concerning how sales proceeds should be allocated among assets, each with different security against them, this is something a receiver can explore, and on which it can make recommendations to the court. Ultimately, the court can decide the issue if necessary.

[53] Other advantages of a receiver's sale include both a stay of proceedings, and the fact that any purchaser will obtain a vesting order, thus protecting it against any potential claims from other creditors. In a receivership, the receiver can also sell the other assets over which BDC holds security. This includes all the contents and equipment in the Inn.

[54] Courts have held that in circumstances where there was disagreement among stakeholders about how the property should be marketed, it was appropriate to appoint a receiver.[10] The same concern arises here.

[55] BDC has the right under both its GSAs and mortgages to appoint a receiver. Even if Romspen were to invoke the provisions of s. 22 of the *Mortgages Act* the respondents would still be in default under the BDC GSAs. They are in arrears of HST, which Romspen does not propose to pay. They are also in default under the Romspen mortgage and Romspen is pursuing a power of sale. All of these constitute default under the BDC security. Under those circumstances, BDC is still contractually entitled to the appointment of a receiver.

[56] If I appoint a receiver, Romspen will not be put to the immediate expense of paying the arrears of principal, interest and other costs (as well as the ongoing obligations) under the BDC mortgages. As I see it, a receivership will benefit Romspen overall.

[57] A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all. I therefore exercise my discretion and grant the application to appoint a receiver.

[58] I note that the proposed receivership order has a borrowing power for the receiver of up to $250,000. First, I am not obliged to approve borrowings at that level, and second, I do not know what the receiver will really need in order to conduct its duties. I am not prepared to approve the borrowing provisions in the draft order BDC has provided. This receivership should be conducted efficiently and quickly. For that

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[10] *Bank of Nova Scotia v. Freure Village on Clair Creek,* (1996), 40 C.B.R. (3d) 274 (S.C.J.)

reason, I will reduce the receiver's borrowing powers to $175,000 without further order. Given the receiver's hourly rates for the partner, managers and support staff it would assign (none of which exceed $475 per hour), this amount should be ample. If it is not, the receiver can return to court to seek an increase. If it does, it will have to justify an increase to the court's satisfaction.

[59] In that regard, if the receiver moves to increase the receiver's borrowings, the court hearing the motion should be made aware that one of the reasons I have made the receivership order is because of the submissions BDC has made that the receiver can accomplish the sale quickly, efficiently, and without the need to incur the cost of commission that would be attendant to a listing arrangement for the properties.

Conclusion:

[60] The application is therefore granted, and a receivership order will issue in terms of the draft order submitted, with the exception of the amount of $250,000 referred to in paragraph 20 of the draft order. The figure of $250,000 will be replaced with the figure of $175,000.

[61] Given my disposition of the application, I assume there is no necessity to deal with any issue of costs, other than as set out in the draft receivership order. If I am incorrect, I invite counsel to provide me with brief written costs submissions (no more than 2 pages long), within two weeks of the release of these reasons, failing which there will be no further order as to costs.

MESBUR J.

Released: 20130402

TAB 2

CITATION: Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007
COURT FILE NO.: CV-10-9029-00CL
DATE: 20110215

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BANK OF MONTREAL, Applicant

AND:

CARNIVAL NATIONAL LEASING LIMITED and CARNIVAL AUTOMOBILES LIMITED, Respondents

BEFORE: Newbould J.

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

HEARD: February 11, 2011

ENDORSEMENT

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

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

of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

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

Events leading to demand for payment

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

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

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

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

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

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

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

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

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

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

Issues

(a) Right to enforce payment

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

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

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

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

justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

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

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

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

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

on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

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

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

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

(b) Court appointed receiver

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

[24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that

permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

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

[26] *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in

Anderson v. Hunking 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.* 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

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

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

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

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

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

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

[30] This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997) 32 O.R. (3d0 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create

a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

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

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

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

[34] It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold

out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

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

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

consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

[37] While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

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

Newbould J.

DATE: February 15, 2011

TAB 3

CITATION: Canadian Tire Corporation, Ltd v Mark Healy et al, 2011 ONSC 4616
COURT FILE NO.: CV-119250-00CL
DATE: 20110729

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN TIRE CORPORATION, LIMITED

Applicant

- and -

MARK HEALY and MARK V. HEALY SALES & DISTRIBUTION INC.

Respondents

BEFORE: Newbould J.

COUNSEL: William J. Burden and John N. Birch, for the Applicant
William C. McDowell and Trent Morris, for the Respondents
Daniel Murdoch, for Franchise Trust and CIBC
Kenneth Rosenberg, for Ernst & Young Inc.

HEARD: July 28, 2011

Newbould J.

[1] In this application, Canadian Tire Corporation, Limited ("Canadian Tire") seeks the appointment of Ernst & Young Inc. as a fully-empowered receiver of Mark V. Healy Sales & Distribution Inc. ("Healy Inc.") for the purpose of taking control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. Franchise Trust and CIBC, creditors of Healy Inc., support the application.

[2] The application was heard on July 38, 2011, and at the conclusion of the hearing I ordered the appointment of Ernst & Young Inc. as receiver of Healy Inc. for reasons to follow. These are my reasons.

[3] Healy Inc. is an Associate Dealer of Canadian Tire and operates Canadian Tire Store 152 located in Mississauga, Ontario. The relationship between Healy Inc. and Canada is the subject of a Dealer Contract, initially signed by Mr. Healy and then assigned to Healy Inc.

[4] Canadian Tire acts as the primary supplier of inventory to dealers. It also leases store sites to dealers. Canadian Tire's relationship with dealers is governed by a Dealer Contract which each dealer executes in favour of Canadian Tire.

[5] Mark Healy has been a Canadian Tire dealer since October 4, 1992. He executed various Dealer Contracts, each of which was assigned to Healy Inc., the corporation that operates Store 152. In or around, July 1995, Mr. Healy commenced operating the Canadian Tire store in Alliston, Ontario where he remained until July 13, 2000. In July 2000, Mr. Healy then became the dealer at Store 429 in Oakville, Ontario. He remained at Store 429 until August 2, 2006. On August 10, 2006, Mr. Healy became the dealer at Store 152 in Mississauga and he remains the dealer of Store 152 today, although Canadian Tire delivered a notice on June 1, 2011 terminating the Dealer Contract. Healy Inc. has delivered a notice of arbitration to have the termination declared invalid.

[6] In December 2007, Healy Inc. commenced an arbitral proceeding in accordance with the Dealer Contract. The arbitral proceeding related only to alleged damages suffered by Healy Inc. in relation to Store 429, the Oakville store that Healy Inc. operated from 2000 to 2006. No claim was made in respect of Healy Inc.'s current Store 152. The trial of that proceeding before the arbitrator, Graeme Mew, began on May 26, 2010 and ran for 42 days to December 17, 2010. Healy Inc. claimed damages of $40 million. The arbitrator released his award on March 23, 2011 in which he dismissed all of the claims except one claim in which he held Canadian Tire liable for $250,000 for breach of a duty of good faith. Mr. Healy and Healy Inc. have appealed the

award, which is to be heard on September 15 and 16, 2011. Mr. McDowell says that if entirely successful, Healy Inc. could realistically be entitled to an award of between $3 and $5 million.

[7] On October 22, 2010, during the course of the arbitration, the arbitrator appointed Ernst & Young Inc. as receiver of Healy Inc., with the power to, inter alia,

(i) attend at the store premises;

(ii) review receipts, disbursements, revenue and expenses;

(iii) exercise control over certain financial transactions such as manual sales and returns and inventory adjustments;

(iv) complete a store inventory count; and

(v) otherwise monitor the business.

[8] In his reasons appointing E&Y as a monitoring receiver, the arbitrator noted that "CTC's proposal is for a soft receivership to review, assess, monitor and preserve the assets of the store pending the outcome of the arbitral trial".

[9] Canadian Tire now says that since the appointment of E&Y as a monitoring receiver on October 22, 2010, there has been a significant change in circumstances which now require a receiver with full powers to take control of the business and assets of Healy Inc. and to operate the store.

[10] In order to run his business, Healy Inc., like other dealers, obtains credit from the following three main lenders, all of which are secured creditors, and each of which provides credit to Healy Inc. for different purposes:

(i) Franchise Trust, guaranteed by Canadian Tire;

(ii) CIBC as the operating lender, guaranteed by Canadian Tire; and

(iii) Canadian Tire.

[11] Canadian Tire holds security from Healy Inc., including a general security agreement, which gives it the right to demand payment upon a default.

[12] Because of the losses suffered at Store 152, Healy Inc. has, since 2006, had a bulge facility in place with CIBC over and above the CIBC operating credit line. That bulge facility is currently $3.9 million. Canadian Tire has guaranteed this bulge facility.

[13] Healy Inc. generates more than $23 million in annual retail sales. It has had substantial losses over the past 10 years, both at Healy Inc.'s previous store in Oakville and at its current Store 152. Overall, from the time that Healy Inc. assumed Store 429 until August 31, 2006, shortly after moving to Store 152, it experienced total net losses of $1,702,198. Since the time that Healy Inc. took over its current Store 152, operational losses have been $3,363,775. This sustained history of losses has caused Healy Inc. to accumulate an ever-increasing dealer equity deficit (i.e., negative retained earnings).

[14] On April 20, 2011, Canadian Tire demanded payment by May 2, 2011 of $1,692,218.68 for outstanding flex payments owed by Healy Inc. for inventory purchases which were in default. Payment has not been made. That outstanding amount for overdue inventory payments owed to Canadian Tire is now $2.3 million.

[15] The letter also demanded that $741,442 be re-injected into Healy Inc by May 2, 2011. These amounts represented a cumulative overdraw by Mr. Healy from the business as of the end of fiscal 2010 over and above the amounts permitted under the Dealer Contract. That money has not been injected into Healy Inc.

[16] As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over $12.9 million, consisting of the following items:

(a) Canadian Tire's guarantee of the current CIBC $3.9 million bulge excess credit facility, which is not supported by inventory, fixed assets, or any other security;

(b) Healy's defaulted debt (as of July 12) to Canadian Tire for inventory, rent, and other flex charges in the amount of $3,228,629; and

(c) Canadian Tire's exposure of $5,831,331 in respect of the Franchise Trust Loan, which Canadian Tire is required to purchase from the Franchise Trust if such loan becomes a Defaulted Loan.

[17] The GSA held by Canadian Tire entitles it upon the occurrence of a demand that has not been cured to appoint a receiver or to apply to a court for the appointment of a receiver. Although more than three months have passed since demand was made, Healy Inc. has not cured the defaults and has committed four further payment defaults. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments totalling $612,769.92 when its bank dishonoured payment because of insufficient funds.

[18] The appointment of a receiver under section 101 of the *Courts of Justice Act* or section 243 of the *BIA* is a matter of discretion. This is not a case such as *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 or *Anderson v. Hunking*, 2010 ONSC 4008 in which an applicant for an interim receiving order had no security to enforce and was effectively seeking execution before any right to any payment was established. I discussed this in *Bank of Montreal v. Carnival National Leasing Limited* (2011), 74 C.B.R. (5th) 300 and distinguished such a situation from *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274. In that case Blair J., as he then was, stated:

> 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.

[19] Healy Inc.'s primary argument is that if it is successful on the appeal from the arbitrator's award, it stands to collect somewhere between $3 and $5 million. It is said that this would be sufficient to pay off what had been demanded and Mr. Healy would be in a better position to

build up the business and improve its balance sheet. Mr. McDowell put it that the prospect of the appeal being successful was not remote.

[20] It is not for me to determine whether the appeal will succeed. It is to be noted, however, that the arbitration agreement provides for an appeal on a question of law only. There are two bows to the quiver of Healy Inc. The first is an allegation that a finding that Canadian Tire was not liable for negligent misrepresentation was made on an incorrect test, and an allegation that the amount of damages that the arbitrator said he would have awarded had he found liability for misrepresentation, being $1.6 million, was based on a misapprehension of the evidence.

[21] Normally, when a demand for payment has not been made, some reasonable time for payment is permitted before a receiver will be appointed by a court, and hopes of future financing falling into place will not be sufficient beyond what that reasonable time is. I dealt with this in *Bank of Montreal v. Carnival National Leasing Limited, supra,*:

> 13. On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. Ct.) per Farley J.:
>
> > 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

[22] If difficulties in obtaining replacement financing do not permit an open ended time for repayment beyond days, not weeks, I fail to see how the hopes of winning an arbitration appeal can put a debtor on any stronger basis. The amounts demanded have been outstanding for 3 months.

[23] As things now stand, Healy Inc. has been unable to pay inventory, defaulting on payments when its bank dishonoured cheques because of insufficient funds. On his cross-

examination, Mr. Healy said that if the bank would not let him draw on his credit line, he would not be ordering any more inventory but would operate his business until he ran out of inventory. This is not a satisfactory situation. In spite of the $2.3 million owed to Canadian Tire for inventory which is in default, there is a further $1.5 that will become due for inventory based on May 30, 2011 figures.

[24] Canadian Tire contends that if Healy Inc. is unable to pay for inventory when due, Canadian Tire will face the untenable choice between continuing to ship inventory to the store without any reasonable likelihood of payment and insisting on C.O.D. terms for inventory. In the first case, Canadian Tire would be significantly increasing its financial exposure. In the second case, Healy Inc. would likely stop ordering inventory, stock would be depleted, customer needs for products would go unfulfilled, and the Canadian Tire brand and reputation would suffer. I accept the concern of Canadian Tire as valid.

[25] For a number of reasons, I do not view Mr. Healy as a strong candidate for equitable consideration.

[26] Pursuant to an agreement dated February 8, 2010 between Mr. Healy, Healy Inc. and Canadian Tire, it was agreed that Canadian Tire would pre-approve and co-sign all cheques or other bank disbursement of any kind. The purpose of such control was to ensure that Healy Inc.'s funds were used only for proper business purposes relating to the store and to prevent further unauthorized transactions, including dealer over-draws. In April 2010, Mr. Healy breached the February 8 agreement by transferring $82,425.83 from the Healy Inc. business account to the personal credit card accounts of Mr. Healy and his family members. He circumvented the February 8 agreement by making such payments through internet banking, rather than issuing a cheque which Canadian Tire would have to review and sign. This was raised in the arbitration and Mr. Healy replaced the funds. Mr. Healy also undertook transactions involving his family trust during fiscal 2010 when he made payments from Store 152 in the amount of $178,215 allegedly on account of his children's educational expenses.

[27] It appears that in 2011 Mr. Healy again breached the February 8 agreement when he took $60,000 of money collected from daily sales for Store 152 on April 21 and 23, 2011 and used them to pay for legal fees, which required the approval of Canadian Tire. This came to light when Store 152 provided Canadian Tire with daily sales reports and bank deposit receipts. The missing $60,000 appeared in Healy Inc.'s bank account on April 27, 2011 after Canadian Tire's counsel wrote to Healy's counsel to seek a full explanation about the $60,000 cash diversion.

[28] It appears that Mr. Healy has breached the Dealer Contract by the intentional overstatement of invested equity through a temporary injection of funds. In his award, the arbitrator made the following findings of fact:

> (a) "Healy repeatedly breached his contractual obligations under Policy 26.";
>
> (b) "Pursuant to Policy 26, the intentional overstatement of invested equity by a dealer through temporary injection is considered to be a non-curable event of default under section 20.1 of the Dealer Contract. Healy not only breached this obligation on several occasions, but also took excessive draws out of his business, when the business could ill afford for him to do so. As submitted by CTC, during his career as a dealer, Mr. Healy has been consistently overdrawn throughout the year";
>
> (c) In 2009, Healy obtained loans totalling $554,990 so that he could re-inject into the business the amount of his overdraws prior to year end, and then draw out the same money after year end to re-pay to loans.

[29] Actions such as these leave little confidence that Mr. Healy can be trusted to run the business properly. It is quite apparent that the relationship between Canadian Tire and Mr. Healy has broken down. The instances outlined in Mr. Lamanna's affidavit of Mr. Healy's behaviour during and after the arbitration are of obvious concern.

[30] One reason that the business is losing money may be a lack of planning. In the first report of the receiver appointed by the arbitrator, the receiver reported that it asked Mr. Healy to provide copies of any and all cash flow statements with which to determine Healy Inc.'s ability to pay existing and accruing debts over the coming months. Mr. Healy advised the receiver that Healy Inc. does not prepare cash flow projections.

[31] Mr. Healy has resisted attempts by Canadian Tire to assist him with store operations and to work out a viable plan to deal with the ongoing losses and substantial outstanding debts. In August 2009, Canadian Tire offered to put Mr. Healy into a Performance Support Initiative Program which is designed to help dealers improve their financial performance, and financial and operations experts were sent to the store to help. Mr. Healy ordered them out of the store and said he did not want help. On April 4, 2011, following the arbitral award, Canadian Tire encouraged Mr. Healy to provide two senior executives with a plan to resolve his financial situation on an urgent basis. Mr. Healy's response was that he would meet with one of them at a bar in Port Credit at 6 p.m. In spite of further requests that he meet with the executives to discuss plans to resolve his financial situation, Mr. Healy has refused to meet with them.

[32] Canadian Tire has prepared a series of realistic and optimistic projections to determine whether Healy Inc. will be able to pay off its indebtedness over a matter of years. No matter which scenario Canadian Tire chose, the conclusion reached was that Healy would still have substantial negative equity even at the end of fiscal 2015. The negative equity ranges from $9.4 million to $3.3 million, the latter being the most optimistic with the store ranking in the top quartile of Canadian Tire dealers (it is in the bottom quartile at present). All of these projections assume that Healy Inc. will not expend any amount on legal fees, which appears unlikely as Mr. Healy and Healy Inc. have started at least four new arbitration proceedings apart from the appeal of the award of arbitrator Mew.

[33] In all of the circumstances, I ordered that Ernst & Young Inc. be appointed receiver of Healy Inc. with the usual powers of a receiver, including the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator is successful, it will be open to Healy Inc. to apply to vary or rescind the order.

_____

Newbould J.

Released: July 29, 2011

CITATION: Canadian Tire Corporation, Ltd v Mark Healy et al, 2011 ONSC 4616
COURT FILE NO.: CV-119250-00CL
DATE: 20110729

ONTARIO
SUPERIOR COURT OF
JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN TIRE
CORPORATION, LIMITED

Applicant

- and -

MARK HEALY and MARK V.
HEALY SALES &
DISTRIBUTION INC.

Respondents

REASONS FOR JUDGMENT

Newbould J.

Released: July 29, 2011

TAB 4

2013-2014

The 2013-2014 Annotated Bankruptcy and Insolvency Act

Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra

CARSWELL®

The *BIA* applies to receivers of the estates of insolvent persons or bankrupts whether appointed with or without court order: s. 243(2).

A receiver is a person who has been appointed to take, or has taken, possession or control, pursuant to a security agreement or a court order, of all or substantially all of the inventory, accounts receivable or other property of the debtor: s. 243(2). A person who has never had control of the debtor's business, did not have a key or pass to the debtor's premises, has had no involvement with the banking activities of the debtor, has had no signing authority and whose activities have been observed by a representative of a secured creditor, is not a receiver: *MGI Packers Inc. v. Livestock Financial Protection Board* (2001), 27 C.B.R. (4th) 101, 2001 CarswellOnt 2540 (Ont. S.C.J. [Commercial List]).

A receiver is appointed to receive rents and profits, to receive and preserve property and to realize property. If the receiver is required to carry on and superintend a trade or business, the receiver is also appointed as a manager. Where both functions are required, the court appoints a receiver and manager: *Wahl v. Wahl (No. 2)* (1972), 16 C.B.R. (N.S.) 272 (Ont. H.C.).

To obtain the appointment of a receiver and manager by the court, a creditor does not have to show that it will suffer irreparable harm if the appointment is not made: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div.).

There is a distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity: it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the court and acts in a fiduciary capacity with respect to all interested parties: *Ostrander v. Niagara Helicopters Ltd.* (1973), 19 C.B.R. (N.S.) 5 (Ont. S.C.); *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.* (2004), 2004 CarswellBC 52, 1 C.B.R. (5th) 1 (B.C. S.C.).

A court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed or of anyone, except the court which appointed it: *Royal Trust Co. v. Montex Apparel Industries Ltd.* (1972), 17 C.B.R. (N.S.) 45 (Ont. C.A.).

Factors to consider in the determination of whether it is appropriate to appoint a receiver include: (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed; (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; (c) the nature of the property; (d) the apprehended or actual waste of the debtor's assets; (e) the preservation and protection of the property pending judicial resolution; (f) the balance of convenience to the parties; (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others; (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; (k) the effect of the order on the parties; (l) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver. The court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. Here, it was just and convenient to grant a receiver-

ship order. The receiver would be authorized to engage only in such sales as would occur in the ordinary course of business, and the order appointing the receiver did not authorize the receiver to have conduct of the sale of the business, although the creditor could renew the application for sale in the event of a material change of circumstances: *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 2010 CarswellBC 855, 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]); *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 58 D.L.R. (4th) 447, 98 A.R. 250 (Q.B.); *Pirbhai Estate v. Pirbhai* (1988), 70 C.B.R. (N.S.) 175 (B.C. S.C.).

The court will not permit a collateral attack in some other proceeding to be made on the appointment of a receiver. The only exception to the principle is where the original proceeding in which the receiver was appointed has been resolved in favour of the plaintiff; the original proceeding was commenced without reasonable and probable cause; and was motivated by fraud, malice or bad faith, and the plaintiff has suffered damage as a result of the initiation of the earlier proceeding or as a result of a judgment subsequently set aside as fraudulently obtained: *Nash v. CIBC Trust Corp.* (1996), 7 C.P.C. (4th) 263 (Ont. Gen. Div.).

Where a defendant debtor moved to set aside an *ex parte* order appointing an interim receiver on the basis of an error in principle and the plaintiff creditor moved to appoint a receiver over the debtor, the Ontario Superior Court of Justice dismissed the debtor's motion and appointed a receiver. The court held that the question of appearance of lack of impartiality must be approached from the perspective of a reasonable and intelligent person who is objective and in possession of the relevant facts. Here, the evidence was that the receivers in Canada and the U.K. were members of the same franchise, but there was no overlapping ownership and no profit sharing between them, they were not the same entity, and there was no evidence of actual lack of impartiality: *Westernbank Puerto Rico v. Inyx Canada Inc.* (2007), 2007 CarswellOnt 5470, 36 C.B.R. (5th) 133 (Ont. S.C.J.).

The Ontario Superior Court of Justice reviewed the basis for the appointment of a receiver under s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (*CJA*). Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days, referencing *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 1989 CarswellOnt 191, 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1 (Ont. C.A.); and *Toronto Dominion Bank v. Pritchard* (1997), 1997 CarswellOnt 4277, 154 D.L.R. (4th) 141 (Ont. Div. Ct.); leave to appeal refused (1998), 1998 CarswellOnt 641 (Ont. C.A.). Under the loan agreements, the credits were on demand and the creditor also had the right to cancel the credits at any time at its sole discretion and over 70 days had passed since demand for payment was made. Under s. 243 of the *BIA* and s. 101 of the *CJA*, a court may appoint a receiver if it is "just and convenient to do so", having regard to all the circumstances and, in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed. Here, it was preferable to have a court-appointed receiver rather than privately appointed receiver: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 2011 CarswellOnt 896, 74 C.B.R. (5th) 300 (Ont. S.C.J.).

The Alberta Court of Queen's Bench granted a motion by investors to appoint a receiver, based on a securities commission decision that the principals of the debtor companies were responsible for false or misleading statements in offering materials and had engaged in conduct that amounted to fraud on the shareholders. There was a real risk of irreparable harm in the wasting of the debtor companies' assets. The receiver would be able to preserve assets and investigate the whereabouts of any other assets. There was no evidence of harm to the debtor companies by placement of the receiver: *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.); affirmed (2010), 2010 CarswellAlta 1049, 69 C.B.R. (5th) 42 (Alta. C.A.).

Section 129 of the Ontario *Securities Act* permits the Ontario Securities Commission (OSC) to apply to the court for an order appointing a receiver. Such an order may be made where the court is satisfied that the appointment is in the best interest of the company's creditors or the security holders or if it is appropriate for the due administration of Ontario securities law. The criteria should take into consideration all the circumstances and whether in the context of the circumstances it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders, the court citing *Ontario (Securities Commission) v. Factorcorp Inc.* (2007), 2007 CarswellOnt 7515 (Ont. S.C.J.), and *Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.* (2009), 2009 CarswellOnt 4241 (Ont. S.C.J. [Commercial List]). Where there is a history of mismanagement, no evidence of an alternative resolution, evidence that investors' interests will not be served by maintaining the *status quo* and evidence that the company is not in a better position than a receiver to protect investors' interest, it is appropriate to appoint a receiver. In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of the assets purchased with investor funds had been compromised, it is in the investors' best interest that a receiver be appointed. Morawetz J. held that an assessment of whether the appointment of a receiver is appropriate for the due administration of Ontario securities law must take into consideration the purposes of the *Act*, specifically, whether such an appointment is consistent with the goals of protecting investors and protecting the integrity of the capital markets. Pursuant to s. 122 of the *Act*, it is an offence to mislead staff of the OSC during the course of an examination taken as part of an investigation. Justice Morawetz observed that the remedy of an appointment of a receiver takes into account the importance of a neutral court officer to oversee the claims process, the evaluation process and to provide appropriate recommendations as the administration of the estate: *Ontario Securities Commission v. Peter Sbaraglia, Mandy Sbaraglia, CO Capital Growth Corp. and 91 Days Hygiene Services Inc.* (December 23, 2010), Morawetz J. (Ont. S.C.J.).

The practice of a secured creditor and court-appointed receiver jointly retaining counsel should be discouraged because of the potential for a conflict of interest. A joint retainer was permitted by the appointment order, and the normal principles of privilege attaching to a joint retainer should apply, specifically, as against others, communication is privileged. However, as between them, each party is expected to share in and be privy to all communications between either of them and their solicitor. At the same time, a court-appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under control of the receiver; however, the fact of the receiver's fiduciary relationship does not give creditors the right to access all documents that come into the receiver's hands: *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.* (2011), 2011 CarswellOnt 5613, 79 C.B.R. (5th) 229; additional reasons at (2011), 2011 CarswellOnt 8154, 81 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

The Ontario Divisional Court dismissed a motion for leave to appeal an order appointing an investigative receiver. The motions judge had concluded that the respondents had not been

completely forthcoming to the trustee about the financial transactions; there were serious concerns about the flow of funds between the bankrupt respondents and use of those funds; misrepresentations were made to the trustee and the court about the true state of certain proceeds from the retirement residences; and there were serious questions whether the debtor's investment in the retirement residences was by way of debt or equity. On review, Justice Lederman held that the appointment of an investigative receiver in the circumstances was just and convenient to assist the trustee in fulfilling its mandate to ascertain the true state of affairs. The motion was dismissed: *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 81 C.B.R. (5th) 265, 2011 ONSC 4704; additional reasons at (2011), 2011 CarswellOnt 10661, 90 C.B.R. (5th) 342, 2011 ONSC 5699 (Ont. Div. Ct.).

The Ontario Superior Court of Justice granted a receivership order. There had been ongoing default by the debtors in respect of their obligations to the secured creditors; and at the time of one advance, the debtors were in breach of their representations in a credit facility agreement. Justice Mesbur noted that a forbearance agreement contained a promise from the debtors not to commence any restructuring or reorganization proceedings under the *BIA* or *CCAA*. Since the forbearance agreement, the debtors' financial position had deteriorated further, and the creditor terminated the forbearance agreement and advised that it would apply to court to have a receiver appointed. In determining whether a receiver should be appointed, the court will consider all the circumstances of the case, particularly, the effect on the parties of appointing the receiver, including potential costs and the likelihood of maximizing return on and preserving the subject property; the parties' conduct; and the nature of the property and the rights and interests of all parties in relation to it. The fact that the creditor has a right to appoint a receiver under its security is an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets: *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

The contractual remedy provided for in a mortgage that contemplated the appointment of receiver was such that the relief could not be seen to be extraordinary in nature: *Business Development Bank of Canada v. 2197333 Ontario Inc.* (2012), 2012 CarswellOnt 2062, 94 C.B.R. (5th) 28, 2012 ONSC 965 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench appointed a receiver over two properties, and subsequently, amended and expanded the receivership order to include a related entity that was discovered to have operations intrinsically involved with the entities in receivership: *Romspen Investment Corp. v. Hargate Properties Inc.* (2011), 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.).

Where there were serious concerns about the accuracy of information a shareholder company had provided and a serious question to be tried of whether payments to the shareholder by the bankrupt companies were a preference, the court granted an order appointing an investigative receiver over the shareholder company to examine the transactions and to ascertain the state of disbursement of proceeds of sale. The principles to consider in making such an appointment under the Ontario *Courts of Justice Act* include that the relief is intrusive and should be granted sparingly; there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy; the court will consider the conduct of the parties, the nature of their rights and interests, the effect of such an appointment, and all the circumstances of the case: *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259; additional reasons at (2011), 2011

CarswellOnt 10375, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]); leave to appeal refused (2011), 2011 CarswellOnt 8054, 81 C.B.R. (5th) 265, 2011 ONSC 4704; additional reasons at (2011), 2011 CarswellOnt 10661, 90 C.B.R. (5th) 342, 2011 ONSC 5699 (Ont. Div. Ct.).

The Alberta Court of Queen's Bench, in the context of an oppression application, reviewed the considerations to be taken into account on an application to appoint an inspector and interim receiver. Section 231 of the Alberta *Business Corporations Act* grants the court the authority to appoint an inspector to conduct an investigation of a corporation. Justice Lee held that in order to have an inspector appointed, there must be an appearance of behaviour that is oppressive, unfairly prejudicial, or unfairly disregarding to the applicants' interests, or an appearance of fraud or dishonesty in connection with the formation, business or affairs of the corporation. Oppression and fraud do not have to be proven, but must appear as a distinct possibility, the judge citing *Kowch v. Gibraltar Mortgage Ltd.*, 2010 CarswellAlta 2780, 90 C.B.R. (5th) 84 (Alta. Q.B.). Lee J. held that the standard of proof is one of "appearance, an outward show" of oppressive or fraudulent behaviour, citing *Western Canadian Oil Management Services Inc. v. Arlyn Enterprises Ltd.*, 2008 CarswellAlta 1173, 2008 ABQB 521 (Alta. Q.B.). With respect to the appointment of an inspector, Lee J. noted that it was an extraordinary remedy and the following factors should be considered: whether the applicants still need access to important information; whether there are better routes, such as litigation, which could be used to acquire that information; and whether an investigation is prohibitively expensive, in light of the corporation's resources. The primary purpose of an investigation is to bring to light facts that otherwise might be inaccessible to shareholders and security holders. Justice Lee also held that the appointment of receiver-manager is an extraordinary remedy, which should be used sparingly, having regard to all of the circumstances. The test for the appointment of a receiver-manager is comparable to that of the test for injunctive relief: there must be a serious issue to be tried; it must be determined that the applicant would suffer "irreparable harm" if its application was refused; and an assessment must be made to determine which of the parties would suffer greater harm on the granting or the refusal of the appointment of a receiver-manager pending a decision on the merits, the "balance of convenience" test. In this case, while there was a serious issue to be tried, the applicant had not established irreparable harm necessitating the appointment of a receiver-manager. This case did not involve the need to preserve or protect the property of the companies: *Murphy v. Cahill*, 2012 CarswellAlta 1198, 95 C.B.R. (5th) 116, 2012 ABQB 446 (Alta. Q.B.).

The Alberta Court of Queen's Bench reviewed the appointment of a receiver, as well as the scope of a general security agreement in terms of whether it was enforceable against oil and gas under the ground, once the oil and gas came out of the ground. Justice Lee noted that the Alberta Court of Appeal in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 2009 ABCA 127 stated that a remedial order to appoint a receiver "should not be lightly granted" and the judge should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; carefully balance the rights of both the applicant and the respondent; and consider the effect of granting the receivership order, and if possible use a remedy short of receivership. Here, Lee J. concluded that a remedial order to appoint a receiver and manager was just, convenient and appropriate in the circumstances. Justice Lee also held that the oil and gas lease, which granted a right or licence to access, drill for and extract the resource or substance from the ground, was a proprietary interest within the purposive contemplation of Alberta's *PPSA*. The receivership order was granted; however, the receiver was to have no power of sale, except as further ordered by the court, until a specified date:

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd., 2013 CarswellAlta 153, 99 C.B.R. (5th) 178, 2013 ABQB 63 (Alta. Q.B.).

L§4 — Effect of Bankruptcy on the Appointment of Receiver and Manager

Section 13.4 deals with a trustee in bankruptcy acting on behalf of a secured creditor. By s. 13.4, a trustee in bankruptcy cannot also act as receiver and manager of the property of the bankrupt unless it obtains an independent legal opinion that the security under which it will be acting as receiver and manager is valid and enforceable, and the trustee has notified the Superintendent and the creditors of the bankrupt estate or the inspectors: (a) that it is acting as receiver and manager; (b) the basis of its remuneration as receiver and manager; and (c) the legal opinion that the trustee has received concerning the validity of the security. Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA*, to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver.

There are cases that have held that, if a court-appointed receiver-manager makes an assignment in bankruptcy on behalf of the company, its authority to act as receiver-manager ceases: see *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.). In *C.I.B.C. v. King Truck Engineering Can. Ltd.* (1987), 63 C.B.R. (N.S.) 1, the Ontario Court of Appeal refused to follow the *Prairie Palace* case.

L§5 — Effect of Appointment of a Receiver

When a receiver and manager is appointed, the company continues to exist and the board of directors remains in office. The receiver is only given exclusive control over the assets that are the subject-matter of the receivership order: *T.D. Bank v. Fortin*, 26 C.B.R. (N.S.) 165, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111 (B.C. S.C.); *Moss Steamship Co. Ltd. v. Whinney*, [1912] A.C. 254; *Del Zotto v. International Chemalloy Corp.* (1976), 22 C.B.R. (N.S.) 268, 14 O.R. (2d) 71, 2 C.P.C. 198 (H.C.). However, in *Bull v. Klaptchuk* (2004), 2004 CarswellSask 413, 2 C.B.R. (5th) 92 (Sask. Q.B.), the court held that the appointment of a receiver-manager without a court order constituted a change in management that relieved the directors of the debtor corporation of joint and several liability for unpaid wages imposed by s. 63 of the *Labour Standards Act* of Saskatchewan. The change was effective as of the date of appointment.

Trading contracts are not terminated when the court appoints a receiver-manager. The receiver can continue such contracts or repudiate them. If the receiver continues a trading contract and then repudiates it, the customer will be entitled to damages, and the damages can be set off against any moneys due to the receiver-manager: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160.

An interim receiver appointed under s. 47(1) does not constitute a person who represents the creditors of a debtor company, including an assignee for the benefit of creditors and a trustee in bankruptcy, for the purposes of s. 20(1)(b) of the *Personal Property Security Act* (Ontario). The court held that a trustee in bankruptcy that also acted as the interim receiver of a debtor company does not become a representative of the creditors of the debtor company until it is appointed as trustee, and that a security interest that is unperfected at the time of such appointment will be ineffective as against the trustee: *Re 1231640 Ontario Inc.* (2006), 2006 CarswellOnt 4406, 23 C.B.R. (5th) 92 (Ont. S.C.J.).

GLOBAL RESOURCE FUND
Applicant

and

TAMERLANE VENTURES INC. et al.
Respondents

Court File No. CV-14-10417-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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