2020 01G 2883

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

BETWEEN

SPROTT PRIVATE RESOURCE LENDING (COLLECTOR), LP

APPLICANT

AND:

THE KAMI MINE LIMITED PARTNERSHIP

FIRST RESPONDENT

AND:

KAMI GENERAL PARTNER LIMITED

SECOND RESPONDENT

AND:

ALDERON IRON ORE CORP.

THIRD RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE RECEIVER

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2020 01G 2883
Date of Filing Document:	May 20 , 2022
Name of Party Filing or Person:	Deloitte Restructuring Inc., in its capacity as court-appointed receiver (the **"Receiver")** of the First, Second and Third Respondents (the "**Companies**")
Applications to which Document being filed relates:	Interlocutory Application of the Receiver for an Order, *inter alia*, approving the distribution of funds
Statement of Purpose in Filing:	Memorandum of Fact & Law in support of the Receiver's Application
Court Sub-File Number, if any:	N/A

FACTS

1. On June 17, 2020 (the "**Date of Receivership**") the Receiver was appointed by Order of this Court (the "**Receivership Order**") as the receiver of all of the assets, undertakings, and property (the "**Property**") of Alderon Iron Ore Corp. ("**Alderon**"), The Kami Mine Limited Partnership ("**Kami LP**"), and Kami General Partner Limited ("**Kami GP**") (collectively the "**Companies**") acquired for, or used in relation to the business carried on by the Companies.

2. On November 13, 2020, a Sale Approval and Vesting Order was issued by this Court approving the sale of certain assets of the Companies (the "**Assets**") to Quebec Iron Ore Inc. and 12364042 Canada Inc. (collectively, the "**Purchaser**").

3. On April 1, 2021, the sale of the Assets was concluded and the sale proceeds for the Assets (the "**Sale Proceeds**") were paid to the Receiver.

4. On August 13, 2021, a Claims Process Order was issued by this Court directing the Receiver to solicit claims from all creditors and shareholders in respect of the Companies (the "**Claims Process Order**").

5. The sale of the Assets resulted in the following consideration:

   (a) The extinguishment of the Companies' indebtedness to Sprott Private Resource Lending (Collector), LP of $19.4 million;

   (b) $15 million in cash; and

   (c) An undertaking in favour of the Receiver to make a finite production payment on a fixed amount of future iron ore concentrate production from the Kami Project.

Disallowance of Claim of Metso Minerals Canada Inc. ("**Metso**")

6. The Receiver is seeking Court approval of the disallowance of Metso's claims against the Companies. Such disallowance is appropriate as the Assets relate to a Purchase Order between Kami LP and Metso, of which Kami LP has already advanced payments totaling approximately USD $14.5 million of the USD $18.4 million purchase price (79% of the total Purchase Order).

7. Metso has asserted ownership of the Assets in its possession. On June 2, 2021 the Receiver advised Metso that it did not oppose Metso's efforts to resell the Assets provided that:

   (a) Metso shall make commercially reasonable efforts to maximize the value of the Assets;
   (b) Metso shall seek the Receiver's consent to any proposed sale of the Assets;
   (c) Metso shall provide the Receiver with a full accounting of any sale of the Assets; and
   (d) Metso shall forward to the Receiver any surplus funds from the sale proceeds following payment of the Metso payable

8. The Receiver is seeking a disallowance of Metso's claims for the following reasons:

   (a) Kami LP has paid approximately USD$14.5 million of the Assets' purchase price of USD$18.4 million;
   (b) The total value of the Assets is greater than the amount owed to Metso; and
   (c) Metso has asserted ownership of the Assets in its possession and is not entitled to keep any surplus resulting from the sale of the Assets.

Distribution of Funds

9. The Receiver seeks a Distribution Order for the following reasons:

   (a) substantially all of the assets of the Companies have been sold and a fair and equitable distribution of the Sale Proceeds has been established through the Claims Process Order;

   (b) there are sufficient Sale Proceeds to fully address the Companies' creditor claims and there are funds available for distribution to the Companies' shareholders;

   (c) the Companies are no longer operating and there is no other use for the Sale Proceeds other than to distribute them to the Companies' creditors and shareholders;

   (d) the Companies cannot distribute the surplus Sale Proceeds to their shareholders in the ordinary course since all of the directors and officers of the Companies have resigned;

   (e) the proposed Distribution Order will allow for the most efficient, timely and cost-effective distribution of the funds to the creditors and shareholders of the Companies; and

   (f) no prejudice will result from approving the proposed Distribution Order.

10. The Receiver relies on the facts as set out in the Third Report of the Receiver dated April 26, 2022 (the "**Third Report**"). Capitalized terms used herein, where not defined, have the same meaning as ascribed to them in the Third Report.

11. The Receiver has agreed to schedule a hearing date for the Metso disallowance issue. This Memorandum shall therefore only deal with the requested distribution order. At the hearing on May 25, 2022, the Receiver shall only be seeking a distribution to the proven creditors of the Companies. The Receiver has agreed to postpone any distribution to shareholders pending the resolution of the Metso claim.

ISSUE:

1. Should this Court approve the distribution of funds?

LAW AND ARGUMENT

Approval of Distribution of Funds

1. The distribution of funds to the proven creditors of the Companies is set out in Appendix "C" to the Third Report.

2. The British Columbia Court of Appeal has noted the implicit power of the court to authorize a Receiver to make a distribution order under the *BIA* as a practical necessity to achieve the objectives of the *Act*:

> "I cannot accede to that argument. The original order appointing the Receiver was expressly made pursuant to both the BIA and the LEA. Neither Act expressly addresses the power of the court to make distribution orders. However, such orders are practically necessary for the accomplishment of the objectives of the legislation and may be considered to be granted by implication."

Reference: *Forjay Management Ltd v 625536 BC Ltd.,* 2019 BCCA 368 at para 26 (BCCA) [Tab 1]

3. In the *Forjay Management* decision, the Court explained that the implicit power to authorize a distribution order is incorporated in the initial order appointing the Receiver:

> "The order appointing the Receiver on October 4, 2017 included a provision, in para. 12, that funds collected by the Receiver would be "held by the Receiver to be paid in accordance with the terms of this Order or any further Order of the Court". The order, in para. 25, further authorized the Receiver to apply to the court for advice and directions in the discharge of its powers and duties.
>
> In my view, the distribution order was such an order, contemplated by para. 25 of the appointment order, directing how the Receiver should discharge his obligations. It was an order made by a court deriving its original jurisdiction from the BIA."

Reference: *Forjay Management Ltd v 625536 BC Ltd.,* 2019 BCCA 368 at paras 27-28 (BCCA) [Tab 1]

4. In the present case, the requested distribution order is contemplated in paragraphs 15 and 31 of the Receivership Order.

Reference: Receivership Order issued by Justice Stack with respect to the Companies dated June 17, 2020 [Tab 2]

5. The Ontario Superior Court of Justice has stated that funds held by a receiver may be paid out absent a serious issue to be tried regarding any competing claim to the funds:

> "There is no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by the receiver. 852 has the right to those proceeds. There may be a serious issue to be tried regarding the claim for damages by Sun Pac and Liquibrands against 852 and Bridging, although I make no such finding, but that is a different matter.
>
> The funds held by the receiver of Sun Pac may be paid out to 852."

Reference: *8527504 Canada Inc v Liquibrands Inc.*, 2014 ONSC 7015 at para 26-27 (ONSC) [Tab 3]

6. There are no serious issues to be tried with respect to the funds to be distributed to the proven creditors of the Companies. It is submitted that it is appropriate for the court to grant the requested distribution order at this time.

7. The Receiver has also requested that the court approve the activities, fees and disbursements of the Receiver as described in the Third Report. Courts will generally approve the activities of a court appointed Receiver if the Receiver meets the objective test of demonstrating that its activities are reasonable, prudent, and not arbitrary:

> "The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: Bank of America Canada v. Willann Investments Ltd., [1993] O.J. No. 1647 (Ct. J.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (C.A.); Lang Michener v. American Bullion Minerals Ltd., 2005 BCSC 684 at para. 21."

Reference: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855 at para 54 (BCSC) [Tab 4]

8. It is submitted that the activities of the Receiver, as outlined in the Third Report, have been carried out in a manner that is reasonable, prudent, and not arbitrary. The Receiver has acted in a fair and reasonable manner throughout these proceedings and has given due regard to the interests of all of the stakeholders in this matter.

9. The Receiver respectfully requests that this Honorable Court grant the relief requested, for the reasons set out in the Third Report and in this Memorandum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 20th day of May, 2022.

Geoffrey Spencer
McInnes Cooper
Solicitors for the Receiver
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

TO: **Supreme Court of Newfoundland & Labrador**
Trial Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: **The Service List attached as Schedule "A" to the Application**

List of Authorities:

1. *Forjay Management Ltd v 625536 BC Ltd.*, 2019 BCCA 368
2. Receivership Order issued by Justice Stack with respect to the Companies dated June 17, 2020
3. *8527504 Canada Inc v Liquibrands Inc.*, 2014 ONSC 7015
4. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855

TAB 1

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2019 BCCA 368

Date: 20190822
Docket: CA46209

Between:

Forjay Management Ltd.

Respondent
(Petitioner)

And

625536 B.C. Ltd.

Appellant
(Respondent)

And

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

Respondents
(Respondents)

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: an Order of the Supreme Court of British Columbia, dated June 11, 2019 (*Forjay Management Ltd. v. 0981478 BC Ltd.*, 2019 BCSC 1129, Vancouver Docket H170498).

Oral Reasons for Judgment

Counsel for the Appellant:	J.E. Shragge
Counsel for the Respondents, Forjay Management Ltd. and Reliable Mortgages Investment Corp.:	K.M. Jackson L.M. Hellrung
Counsel for the Respondents, HMF Home Mortgage Fund Corporation and Canadian Western Trust Company in trust:	G.G. Plottel
Place and Date of Hearing:	Vancouver, British Columbia August 20, 2019
Place and Date of Judgment:	Vancouver, British Columbia August 22, 2019

Summary:

The appellant filed a notice of appeal 24-days after a court order was pronounced authorizing a court-appointed Receiver to make distributions to the respondent. The respondent applies for an order quashing the appeal because it was not filed within the 10-day limit prescribed by s. 31(1) of the Bankruptcy and Insolvency Act (BIA). The appellant argues the jurisdictional basis for the order arose pursuant to the Supreme Court Civil Rules or the court's inherent jurisdiction, and therefore the 30-day limit under s. 14(1)(a) of the Court of Appeal Act governs. Alternatively, the appellant applies for an extension of the time within which an appeal may be brought pursuant to the BIA. Held: The power to authorize a receiver to make a distribution is implicit in the order appointing the receiver, which is expressly made pursuant to the BIA and the Law and Equity Act. The appeal provisions of the BIA are paramount. The 10-day limit for filing an appeal governs. Although the delay was brief and not prejudicial to the respondents, an extension of time is denied because the appeal has no reasonable prospect of success.

WILLCOCK J.A.:

Introduction

[1] There are three applications before me arising from an order made by Justice Fitzpatrick on June 11, 2019, for reasons indexed as 2019 BCSC 1129. That order authorized payment by the Bowra Group, a court-appointed receiver (the "Receiver"), of $7.5 million in proceeds from the sale of units in a condominium development in Langley to the Second Mortgagees, Forjay, Canadian Western Trust Company ("CWT") and HMF Home Mortgage Fund Corporation ("HMF").

[2] 625536 B.C. Ltd. ("625") is a corporation that now ranks third in priority but, in other related proceedings, contests an order determining priorities. 625 filed a notice of appeal on July 5, 2019, 24 days after pronouncement of the order. It does not take issue with a distribution to the Second Mortgagees but says the distribution should have been ordered on terms that secured its interests.

[3] Forjay says the notice of appeal was filed out of time and is a nullity. It seeks an order "pursuant to sections 14, 20, 24 and 28 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 as well as section 31 of the *Bankruptcy and Insolvency General Rules,* C.R.C., c. 368", quashing the appeal.

[4] Of those the most relevant provision is s. 28 which provides:

> If a party fails to comply with this Act or the rules, the court or a justice may
>
> (a) dismiss the appeal as abandoned if the party is the appellant,

[5] That provision is, in my view, applicable in bankruptcy appeals by virtue of s. 183(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]:

> (2) ... the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.
>
> [Emphasis added.]

[6] In the alternative, Forjay seeks an order for security for costs of the appeal.

[7] 625 says because its appeal is from the refusal to impose terms and conditions that might be ordered pursuant to the *Supreme Court Civil Rules* B.C. Reg. 168/2009 [*Civil Rules*] it is not an appeal referred to in the *BIA* and, accordingly, was filed in time.

[8] In the alternative, it seeks an order pursuant to the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368 [*BIA General Rules*] extending the time for bringing its appeal to July 5, 2019.

[9] The *BIA General Rules* provide:

> 31(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

[10] The relevant provision of the *BIA* reads:

> 183(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Background

[11] Some contextual background is necessary. There are three mortgages registered against the Lands:

a) a first mortgage registered May 28, 2014 in the amount of $4.2 million in favour of CWT and its co-mortgagee, Reliable Mortgages Investment Corp. ("RMIC");

b) a second mortgage registered January 23, 2015 in the amount of $10 million in favour of the Second Mortgagees; and

c) a third mortgage registered May 28, 2014 in the amount of $1.8 million in favour of 625.

[12] On January 21, 2015, 625 executed a priority agreement in favour of the Second Mortgagees which was filed in the Land Title Office on January 23, 2015. The owner of the condominium development paid 625 a $300,000 fee for executing the priority agreement.

[13] On October 4, 2017, the judge appointed the Receiver as receiver of the lands under s. 243(1) of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. Since that time, the Receiver has marketed and sold units in the development.

[14] On November 20, 2018, the judge granted an order for payment of approximately $6.8 million to the First Mortgagees from the sale proceeds held by the Receiver.

[15] Issues arose as to the validity, priority and enforceability of the first mortgage and the second mortgage. In particular, 625 raised the issue as to whether "over-advances", that is, advances made under the first mortgage and the second mortgage to the owner of the development beyond the face value of the mortgages, were subordinated to the third mortgage.

[16] Those questions were resolved largely in favour of the Second Mortgagees by Justice Fitzpatrick in February 2019. On March 14, 2019, 625 filed an application for leave to appeal that judgment (CA45942 and CA45958). On May 2, 2019, Frankel J.A. granted leave. That appeal is set for hearing on November 15, 2019.

[17] A ten-day hearing has been scheduled in the British Columbia Supreme Court commencing February 24, 2020 to address 625's argument that the priority agreement is not valid and enforceable, such that the third mortgage should be recognized as second in priority after the first mortgage.

[18] The order with which we are concerned was made, in that context, on the application of Forjay and RMIC for a direction to the Receiver to pay $7.5 million to the Second Mortgagees, from money on hand, on account of amounts owing under the second mortgage. 625 did not oppose the proposed payment, but sought terms that would protect its interests.

[19] The judge noted the Receiver estimated that approximately $7.629 million would be on hand as of the end of June 2019. Further, the Receiver estimated that, after deducting disbursements, $28.324 million would be on hand by March 2020.

[20] The judge held that 625's proposed terms were complex, unworkable and needless.

[21] She held that 625 remained secured against the remaining and substantial real estate in the form of unsold units in the development, with over $20 million in value in the development to secure 625's debt. The judge did not see any issue as to timing, as the terms of the third mortgage called for interest at 24% per annum.

[22] In the circumstances, the judge found no prejudice to 625 would result from the distribution. She ordered that the Receiver pay out $7.5 million to the Second Mortgagees.

Analysis

[23] The questions before me are:

a) whether this is an appeal from a court vested with original jurisdiction under the *BIA* and, thus, an appeal "referred to in subsection 183(2) of the Act", in which case it ought to have been brought within 10 days of its pronouncement or with an extension of time; if so,

b) whether an extension of time should be granted; and, finally,

c) if an extension is granted, whether security for costs should be ordered.

[24] For reasons that follow I am of the view that an extension of time is required but should not be granted and the appeal should be dismissed as abandoned, rather than quashed.

The order was made by a court vested with original jurisdiction under the *BIA*

[25] 625 says that the jurisdictional basis to grant or refuse the conditions arose pursuant to R. 13-1(19) of the *Civil Rules*, the court's inherent jurisdiction, or both, for two reasons. First, by applying under the *Civil Rules*, Forjay engaged the procedural mechanisms thereunder, including the jurisdiction of the judge to grant or refuse the relief sought on terms and conditions. Second, 625 says that the conditions did not concern the conduct of the Receiver, rather, it was a direction that the Second Mortgagees post acceptable security. As such, 625 contends that the 30-day limit to appeal under s. 14(1)(a) of the *Court of Appeal Act* governs.

[26] I cannot accede to that argument. The original order appointing the Receiver was expressly made pursuant to both the *BIA* and the *LEA*. Neither *Act* expressly addresses the power of the court to make distribution orders. However, such orders are practically necessary for the accomplishment of the objectives of the legislation and may be considered to be granted by implication. Where authority to make the distribution order may be found in both the *BIA* and the *LEA*, to use the words of

Zarnett J.A. in *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 at para. 5, "since the receiver was appointed under both statutes, the appeal is governed by the *BIA* as a matter of paramountcy".

[27] The order appointing the Receiver on October 4, 2017 included a provision, in para. 12, that funds collected by the Receiver would be "held by the Receiver to be paid in accordance with the terms of this Order or any further Order of the Court". The order, in para. 25, further authorized the Receiver to apply to the court for advice and directions in the discharge of its powers and duties.

[28] In my view, the distribution order was such an order, contemplated by para. 25 of the appointment order, directing how the Receiver should discharge his obligations. It was an order made by a court deriving its original jurisdiction from the *BIA*.

[29] The same would be said of any term imposed on the Receiver as a condition upon which the distribution could be made, regardless of who sought the term. I see no merit in 625's submission that by seeking to have terms imposed it invoked a jurisdiction other than that permitting the judge to make the distribution order.

[30] Here, it may fairly be said of the appointment of the Receiver, that the parties knew the proceedings were brought pursuant to the *BIA*: it is referred to in the model order by which the Receiver was appointed. The comments of Groberman J.A. at paras. 20–21 of *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCCA 283, are apposite:

> [20] No one suggests, in this case, that any filings were improper or calculated to mislead. The parties knew, at all times, that the proceeding was brought pursuant to the *Bankruptcy and Insolvency Act*, and that remedies were being sought in reliance on that statute. Where a party obtains remedies in reliance on the *Bankruptcy and Insolvency Act*, it is the appeal provisions of that statute that govern: see, for example, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48. To require special notations or words on the documents, would, in these circumstances, elevate form over substance.
>
> [21] I acknowledge that, in a case such as the present one, where relief is sought under both common law equitable principles and the *Law and Equity Act* as well as under the *Bankruptcy and Insolvency Act*, there can be some

> question as to whether the appeal provisions of the *Bankruptcy and Insolvency Act* are engaged. In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable.

[31] As I have noted, the power to authorize a receiver to make a distribution to creditors is implicit in the *BIA*. It is incorporated in the order appointing the Receiver, which is expressly made pursuant to the *BIA* and the *LEA*. The appeal provisions of the *BIA* are paramount. It matters not, in my view, that the provisions of the *Civil Rules* were referred to by Forjay in its notice of application for the distribution order.

[32] In my view, unless an extension of time is granted the notice of appeal is a nullity.

An extension of time for bringing an appeal should not be granted

[33] Section 10 of the *Court of Appeal Act* and R. 52 of the *Court of Appeal Rules*, B.C. Reg. 297/2001 allow a justice of this Court to grant extensions of time in a proceeding: *Hamilton v. F&M Management Ltd.*, 2018 BCCA 116 at para. 16 (Savage J.A. in Chambers). Subsection 31(1) and s. 187(11) of the *BIA General Rules* afford a similar discretionary power. The criteria that should be considered on such an application were recently described by Groberman J.A. at para. 30 of *Industrial Alliance*:

> [30] ...
>
> a) Was there an intention to apply for leave before the expiry of the time for doing so?
>
> b) Did the appellant communicate the intention to the respondents?
>
> c) Was the delay lengthy?
>
> d) Did the applicant act expeditiously to seek an extension of time?
>
> e) Is there an explanation for the delay?
>
> f) Is there prejudice to the respondents consequent on the delay?
>
> g) Is there merit to the application for leave?
>
> h) Is it in the interests of justice that the extension be granted?

[34] Here, as in that case, the answers to the first four questions weigh in the applicant's favour. The delay was not long. It suggests there was an intention to appeal the order soon after it was pronounced. There is no explanation proffered for the failure to file the notice of appeal within 10 days. Delay may perhaps be attributed to what is referred to in *Industrial Alliance* as "widespread unawareness of the abbreviated appeal period under the *Bankruptcy and Insolvency Act*". In any event, whether there is a good excuse for the delay or not, it is so short that this factor cannot weigh heavily.

[35] There cannot be prejudice to the respondents because most of the funds have been paid out. For reasons set out below, I consider this to make the appeal largely moot, rather than this being a case where the payment gives rise to prejudice.

[36] In my view, there is no reasonable prospect the appeal will succeed and it is not in the interests of justice to grant an extension of time.

[37] First, it must be borne in mind that the order was a discretionary one made in the course of management of a complicated commercial receivership. The judge's exercise of that discretion will be afforded considerable deference.

[38] 625 does not identify an error of law in the exercise of the discretion. It says "[i]n the absence of proper security, the Appellant faces the real possibility of a deficiency, even if only a temporary one". The judge did not accept that submission and found:

> [27] I have already referred to the evidence from Mr. Bowra concerning the Receiver's estimate in terms of sales of units in the future. Again, I accept that this is simply an estimate and not any guarantee. In my view, it is a reasonable estimate.
>
> [28] That said, based on this estimate, there is over $20 million in value in the Development to secure 625's debt, even estimating 625's debt at $7.5 million after about a year. As Forjay's counsel argues, even applying a very negative and conservative contingency to say that only half of that amount would be recovered (for example, if the bottom should fall out of the Langley real estate market), 625 still enjoys a sizable cushion in terms of being repaid on its debt if it succeeds in its arguments.

> [29] With respect to the timing, I also do not see that as posing any difficulty here. Timing is always an issue and time is money. It is interesting that, given how 625's mortgage is currently structured, time is very much a money-making exercise for it given that the interest rate being accrued is 24% per annum.

[39] There is, in the material before me, no arguable case that these conclusions were based on a palpable and overriding error.

[40] 625 says the "clawback" provision of the order is hollow security. That clause, para. 4 of the distribution order, reads as follows:

> 4. If, as a result of any distributions made pursuant to this Order, a party with a claim that is secured by an interest in the Lands that ranks, or is subsequently determined to rank, in priority to the Second Mortgagees' interests in the Lands (such claim, a "**Prior Ranking Claim**") does not receive payment in full of the amount of such claim, then the Second Mortgagees shall, upon written request by the Receiver, pay to the Receiver the amount necessary to satisfy such Prior Ranking Claim up to the total amount of all distributions received by the Second Mortgagees on a pro rata basis based upon the respective amounts received by the Second Mortgagees pursuant to this [O]rder.
>
> [Emphasis in original.]

[41] An appeal cannot be founded upon that proposition. First, it cannot be said that the judge misapprehended the value of the clawback provision. She did not expressly place any reliance upon it and referred to the "comfort" it provided to 625 in quotation marks.

[42] The rejection of the terms proposed by 625 did not hinge upon the efficacy of the clawback provision. The judge could not conceive of "any reasonable scenario in which 625 could be said to be prejudiced, let alone seriously prejudiced by the order sought" because of the value of imminently pending sales.

[43] Finally, although it is unnecessary to say anything further with respect to the prospects of success, I note that the order has not been stayed and the appeal of the distribution order may be moot. As of July 18, $6.85 million of the $7.5 million had been paid out, without conditions. The remainder was to be paid out on August 20 and may now have been paid out unconditionally (but for the clawback provision)

to the Second Mortgagees. What remains of the appellant's appeal is difficult to discern. It is no longer open to the court to direct the Receiver to pay out the funds on the terms sought by 625. By its notice of appeal, 625 seeks an order requiring the Second Mortgagees to provide security for funds they have already received. That is not an order giving directions to the Receiver, it is a different order from that sought below and it may not be open to an appellate court to make such an order on the evidentiary record that would be before it on appeal from the decision of the chambers judge.

[44] For those reasons, I dismiss the application to extend the time for filing the notice of appeal. The application will stand dismissed as abandoned pursuant to s. 10(2)(e) of the *Court of Appeal Act*.

[45] There is, in my view, no need to address the application for security for costs.

"The Honourable Mr. Justice Willcock"

TAB 2

2020 01G 2883
SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended

AND IN THE MATTER OF The Kami Mine Limited Partnership, Kami General Partner Limited, and Alderon Iron Ore Corp.

AND IN THE MATTER of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended

Estate No.
Court No. 2020 01G 2883

RECEIVERSHIP ORDER

BEFORE THE HONOURABLE JUSTICE STACK

UPON APPLICATION by Sprott Private Resource Lending (Collector), LP (the "**Applicant**") for an order pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") to appoint Deloitte Restructuring Inc. as receiver (the "**Receiver**") without security, of all of the assets, undertakings and property of The Kami Mine Limited Partnership, Kami General Partner Limited, and Alderon Iron Ore Corp. (collectively, the "**Respondents**", and each a "**Respondent**").;

AND UPON HEARING Darren O'Keefe and John Regush, of counsel for the Applicant, and other counsel appearing;

AND UPON READING the Application and the Affidavits of Narinder Nagra sworn May 26, 2020, June 3, 2020, and June 4, 2020, along with other supporting materials filed herein.

RGS

Filed June 22 2020

THIS COURT HEREBY ORDERS AS FOLLOWS:

Service

1. The time for service of the Application is hereby abridged and validated, and the service of the Application on the Respondents is hereby validated, so that this application is properly returnable today and further service of the Application is hereby dispensed with.

Appointment

2. Pursuant to Rule 25(1) of the *Rules of the Supreme Court, 1986* and section 243 of the *BIA*, the Receiver is hereby appointed receiver, without security, of all of the assets, undertakings, and property of the Respondents, acquired for, or used in relation to a business carried on by the Respondents, including any bank accounts/trust accounts in the name of the Respondents (or any of them) or in the name of the Receiver on behalf of the Respondents (or any of them), and including all proceeds thereof (the **"Property"**).

Receiver's Powers

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession and control of the Property and any proceeds or receipts arising from the Property but, while the Receiver is in possession of any of the Property, the Receiver must preserve and protect it;

   (b) to change locks and security codes, relocate the Property to safeguard it, engage independent security personnel, take physical inventories, and place insurance coverage;

   (c) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the

Receiver's powers and duties, including without limitation those conferred by this Order;

(d) to purchase or lease such machinery, equipment, inventories, supplies, premises, or other assets to fulfil its mandate under this Order, or any part or parts thereof;

(e) to receive and collect all monies and accounts now owed or hereafter owing to any one of the Respondents and to exercise all remedies of the Respondents (or any of them) in collecting such monies, including, without limitation, to enforce any security held by the Respondents (or any of them);

(f) to settle, extend, or compromise any indebtedness owing to any one of the Respondents;

(g) to execute, assign, issue, and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Respondents (or any of them), for any purpose pursuant to this Order;

(h) to undertake environmental or workers' health and safety assessments of the Property and operations of the Respondents (or any of them);

(i) to initiate, prosecute, and continue the prosecution of any proceedings and to defend proceedings now pending or hereafter instituted with respect to the Property or the Receiver, and to settle or compromise any such proceedings, which authority extends to appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to make payment of any and all costs, expenses, and other amounts that the Receiver determines, in its sole discretion, are necessary or advisable to preserve, protect, or maintain the Property, including, without limitation taxes, municipal taxes, insurance premiums, repair and maintenance costs, costs or

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charges related to security, management fees, and any costs and disbursements incurred by any manager appointed by the Receiver;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease, or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $250,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case the notice and sale provisions under the *Conveyancing Act* or under section 60 of the *Personal Property Security Act* shall not be required.

(m) to sell the right, title, interest, property, and demand of the Respondents (or any of them) in and to the Property at the time the Respondents (or any of them) granted a security interest or at any time since, free of all claims including the claims of subsequent encumbrancers;

(n) to report to, meet with, and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals, or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Respondents (or any of them);

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Respondents (or any of them) including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by any one of the Respondents (or any of them);

(r) to exercise any shareholder, partnership, joint venture, or other rights which the Respondents (or any of them) may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps it shall be authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Respondents, and without interference from any other Person.

Duty to Provide Access and Co-Operation to the Receiver

4. The Respondents, all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (collectively, **Persons**, and each a **Person**) shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control or of which they have knowledge of the existence thereof, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers,

records and information of any kind related to the business or affairs of the Respondents (or any of them), and any computer programs, tapes, disks, or other data storage media containing any such information (collectively, the **Records**) in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall, subject to their right to seek a variation of this Order, forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper, making copies of computer disks, or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase, or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

No Proceedings Against the Receiver

7. No proceeding or enforcement process in any court or tribunal (each, a **Proceeding**) shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Respondents or the Property

8. No Proceeding against or in respect of the Respondents (or any of them) or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Respondents (or any of them) or the Property are hereby stayed and suspended pending further order of this Court.

No Exercise of Rights or Remedies

9. All rights and remedies of any individual, firm, corporation, governmental body or agency or any other entities against the Respondents (or any of them), the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Respondents (or any of them) to carry on any business which the Respondents (or any of them) are not lawfully entitled to carry on; (ii) exempt the Receiver or the Respondents (or any of them) from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien and the related filing of an action to preserve the right of a lien holder, provided that the Applicant shall not be required to file a defence to same as the further prosecution of any such claim is stayed except with the written consent of the Applicant or the Receiver, or leave of this Court.

Personal Property Lessors

10. All rights and remedies of any Person pursuant to any arrangement or agreement to which the Respondents (or any of them) are a party for the lease or other rental of personal property of any nature or kind are hereby restrained except with consent of the Receiver in writing or leave of this Court. The Receiver is authorized to return any Property which is subject to a lease from a third party to such Person on such terms and conditions as the Receiver, acting reasonably, considers appropriate and upon the Receiver being satisfied as to the registered interest of such Person in the applicable Property. The return of any

item by the Receiver to a Person is without prejudice to the rights or claims of any other Person to the property returned or an interest therein.

No Interference with the Receiver

11. Subject to paragraph 16 of this Order related to the Respondents' employees, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Respondents (or any of them), without written consent of the Receiver or leave of this Court.

Continuation of Services

12. All Persons having oral or written agreements with the Respondents (or any of them), or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Respondents (or any of them), are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Respondents' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Respondents or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

13. The Receiver, in its sole discretion, may, but shall not be obligated to, establish accounts or payment on delivery arrangements with suppliers in its name on behalf of the Respondents (or any of them) for the supply of goods or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other

services to the, if the Receiver determines that the opening of such accounts is appropriate.

14. No creditor of the Respondents (or any of them) shall be under any obligation as a result this Order to advance or re-advance any monies or otherwise extend any credit to the Respondents (or any of them).

Receiver to Hold Funds

15. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from any source whatsoever on behalf of the Respondents, or any one of them (the "**Funds**"), including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts opened by the Receiver or to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court, and all Funds paid into the Post Receivership Accounts shall be recorded and documented by the Receiver as being Funds collected on behalf of each Respondent to ensure that all Funds can be accounted back to the realization of the Property of each Respondent that is the subject of this Order.

Employees

16. All employees of the Respondents (or any of them) shall remain employees until such time as the Receiver, on behalf of the Respondents (or any of them), may terminate the employment of such employees or they resign in accordance with their employment contract. The Receiver shall not be liable as a result of this Order for any employee-related liabilities, including any successor employer liabilities as provided for in subsection 14.06(1.2) of the BIA, wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under subsections 81.4(5) or

81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, such amounts as may be determined by a court or tribunal of competent jurisdiction.

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17. Pursuant to paragraph 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**") as permitted at law. Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. A prospective purchaser or bidder requesting the disclosure of personal information shall execute such documents to confirm the agreement of such Person to maintain the confidentiality of such information on terms acceptable to the Receiver. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Respondents (or any of them), and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

Limitation on Environmental Liabilities

18. Nothing herein contained shall require or obligate the Receiver to occupy or to take control, care, charge, occupation, possession, or management (separately or collectively, "**Possession**") of any of the Property that might, or any part thereof, which may be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release, or deposit of a substance contrary to any federal, provincial, or other legislation, statute, regulation or, rule of law or equity respecting the protection, conservation, enhancement, remediation, or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, *the Canadian Environmental Protection Act, 1999*, SC 1999 c. 33, as amended, the

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Environmental Protection Act, SNL 2002 c. E-14.2, as amended, the *Water Resources Act,* SNL 2002 c. W-4.01, as amended, or the *Occupational Health and Safety Act,* RSNL 1990 c. O.3, as amended, and any regulations made thereunder (collectively, the **"Environmental Legislation"**), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.

19. a. Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    i. before the Receiver's appointment; or

    ii. after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

b. Nothing in sub-paragraph a exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

c. Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph a hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

    i. if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause ii below, the Receiver:

        1. complies with the order, or

        2. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

ii. during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

1. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or
2. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

iii. if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

Limitation on Liability

20. The Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

Receiver's Accounts

21. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge to a maximum of $200,000.00 (the "**Administrative Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and the Administrative Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. The Receiver and its legal counsel shall pass its accounts from time to time before a judge of this Court or a referee appointed by a judge.

23. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees, expenses and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Receiver's Indemnity Charge

24. The Receiver shall be entitled to and is hereby granted a charge (the "Receiver's Indemnity Charge") upon all of the Property as security for all of the obligations incurred by the Receiver including obligations arising from or incident to the performance of its duties and functions under this Order, under the Bankruptcy and Insolvency Act, or otherwise, saving only liability arising from negligence or actionable misconduct of the Receiver.

25. The Receiver's Indemnity Charge shall form a second charge on the Property in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA and subordinate in priority to the Administrative Charge.

Allocation of Costs

26. The Receiver shall file with the Court for its approval a report setting out the costs, fees, expenses, and liabilities of the Receiver giving rise to the Administrative Charge, the Receiver's Indemnity Charge, and the Receiver's Borrowings Charge, as defined below, and, unless the Court orders otherwise, all such costs, fees, expenses, and liabilities shall be paid as agreed by the senior secured creditors, in the following manner:

    (a) Firstly, applying the costs incurred in the receivership proceedings specifically attributable to an individual asset or group of assets against the realizations from such asset or group of assets;

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(b) Secondly, applying the costs *pro rata* against all of the assets based on the net realization from such asset or group of assets; and

(c) Thirdly, applying non-specific costs incurred in the receivership proceedings *pro rata* against the assets based on the net realization from such asset or group of assets.

Funding of the Receivership

27. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $50,000.00, or such greater amount as this Court may by further order authorize, at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of making payments, including interim payments, required or permitted to be made by this Order, including, without limitation, payments of amounts secured by the Administrative Charge and the Receiver's Indemnity Charge. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the **"Receiver's Borrowings Charge"**) as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Indemnity Charge, the Administrative Charge and the charges as set out in subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

28. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court on seven days' notice to the Receiver and the Applicant.

29. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the **"Receiver's Certificates"**) for any amount borrowed by it pursuant to this Order.

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

General

31. The Receiver may from time to time make a motion for advice and directions in the discharge of its powers and duties hereunder.

32. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Respondents (or any of them).

33. The aid and recognition of any court, tribunal, or regulatory or administrative body having jurisdiction outside Newfoundland and Labrador is hereby requested to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, and regulatory or administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

34. The Receiver is hereby authorized and empowered to apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

35. The Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by

the Receiver from the Respondents' estate with such priority and at such time as this Court may determine.

36. Any interested party may make a motion to vary or amend this Order upon such notice required by the *Rules of the Supreme Court, 1986* or on such notice as this Court may order.

37. Any Person affected by this Order which did not receive notice in advance of the hearing may make a motion to vary or amend this Order within five days of such Person being served with a copy of this Order.

38. In addition to the reports to be filed by the Receiver under legislation, the Receiver shall file a report of its activities with the Court when the Receiver determines that a report should be made, when the Court orders the filing of a report on the motion of an interested party or on the Court's own motion, and at the conclusion of the receivership.

39. The Receiver shall not be discharged without notice to such secured creditors and other parties as the Court directs.

DATED AT St. John's, Newfoundland and Labrador this 17th day of June, 2020.

Barb Evans QC

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OFFICER

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TAB 3

2014 ONSC 7015
Ontario Superior Court of Justice [Commercial List]

8527504 Canada Inc. v. Liquibrands Inc.

2014 CarswellOnt 17188, 2014 ONSC 7015, 247 A.C.W.S. (3d) 365

8527504 Canada Inc., Applicant and Liquibrands Inc., Respondent

8527504 Canada Inc., Applicant and Sun Pac Foods Limited, Respondent

Newbould J.

Heard: November 28, 2014
Judgment: December 4, 2014
Docket: CV-14-10543-00CL, CV-13-10331-00CL

Counsel: Harvey Chaiton, Sam Rappos for Applicant
David E. Wires, Krista Bulmer for Respondents, Liquibrands Inc. and Sun Pac Foods Limited
Anthony J. O'Brien for BDO Canada Limited, receiver of Sun Pac Foods Limited

Related Abridgment Classifications
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V Bankruptcy and receiving orders
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Bankruptcy and insolvency
V Bankruptcy and receiving orders
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Headnote
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Effect of order
L Inc. and its wholly-owned subsidiary S Limited commenced action against creditors for alleged breach of forbearance agreement — Receivership order was made later that day with respect to S Limited — L Inc. brought application for order lifting stay of proceedings in receivership order to permit action by S Limited and L Inc. against creditors to proceed — Application dismissed — Receiver was entitled to continue action commenced by S Limited without necessity of obtaining leave to do so — Order gave receiver power to initiate, prosecute, and continue prosecution of any and all proceedings — Paragraph 7 of order dealt with actions against debtor or its property and did not apply to actions commenced by debtor.
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous
L Inc. and its wholly-owned subsidiary S Limited commenced action against creditors 8 Inc. and B Inc. on November 12, 2013 for alleged breach of forbearance agreement — Receivership order was made later that same day with respect to S Limited — L Inc. had loaned money to S Limited but its security ranked second after security held by creditor 8 Inc. — Receiver sold

assets of S Limited and proposed distribution of proceeds to 8 Inc. on account of its first-ranking security interest — L Inc. brought application for order directing receiver to pay funds into court pending completion of lawsuit against 8 Inc. and B Inc. — Application dismissed — Money in question resulted from proceeds of sale of assets of S Limited — L Inc.'s security was second to security of 8 Inc. — There was no question that security of 8 Inc. was valid — L Inc. was attempting to secure its claim for damages before judgment — On day that receivership order was made S Limited and L Inc. were represented in court by experienced counsel and could not now contend that money was not owing to 8 Inc. — There was no serious issue to be tried with respect to L Inc.'s claim to proceeds as 8 Inc. clearly had right to them.

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient

8 Inc. brought application for appointment of receiver of assets of L Inc. under security granted by L Inc. to B Inc. and assigned to 8 Inc. — Application granted — Under general security agreement 8 Inc. could appoint receiver over all property of L Inc. in event of default — Demand was made under guarantee given by L Inc. and no payment was made and thus there was event of default — L Inc. was represented by counsel at time it signed guarantee and there was no reason why its terms were not enforceable — Terms of guarantee precluded L Inc. from contending that guarantee might be unenforceable if L Inc. were to succeed in action against 8 Inc. — Furthermore, in subordination agreement made at same time as guarantee, L Inc. agreed not to take any steps to delay or defeat priority or rights of 8 Inc. — It was just and convenient that receiver of L Inc. be appointed.

Debtors and creditors --- Receivers — Actions involving receiver — Actions by debtor in receivership

L Inc. and its wholly-owned subsidiary S Limited commenced action against creditors for alleged breach of forbearance agreement — Receivership order was made later that day with respect to S Limited — L Inc. brought application for order lifting stay of proceedings in receivership order to permit action by S Limited and L Inc. against creditors to proceed — Application dismissed — Receiver was entitled to continue action commenced by S Limited without necessity of obtaining leave to do so — Order gave receiver power to initiate, prosecute, and continue prosecution of any and all proceedings — Paragraph 7 of order dealt with actions against debtor or its property and did not apply to actions commenced by debtor.

Table of Authorities

Cases considered by *Newbould J.*:

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

Bank of Montreal v. Wilder (1986), 1986 CarswellBC 370, 1986 CarswellBC 763, [1986] 2 S.C.R. 551, 32 D.L.R. (4th) 9, 70 N.R. 341, [1987] 1 W.W.R. 289, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290 (S.C.C.) — distinguished

Bauer v. Bank of Montreal (1980), 1980 CarswellOnt 141, 33 C.B.R. (N.S.) 291, 1980 CarswellOnt 638, [1980] 2 S.C.R. 102, 32 N.R. 191, 10 B.L.R. 209, 110 D.L.R. (3d) 424 (S.C.C.) — referred to

Central 1 Credit Union v. UM Financial Inc. (2012), 2012 ONSC 1893, 2012 CarswellOnt 4068, 19 P.P.S.A.C. (3d) 242 (Ont. S.C.J. [Commercial List]) — considered

DIRECTV Inc. v. Gillott (2007), 2007 CarswellOnt 883, 39 C.P.C. (6th) 227, 84 O.R. (3d) 595 (Ont. S.C.J.) — referred to

Statutes considered:

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

s. 243(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 45.02 — considered

***Newbould J.*:**

1 The applicant 8527504 Canada Inc.("852") applies for the appointment of a receiver of the assets of the respondent Liquibrands Inc. ("Liquibrands") under security granted by Liquibrands to Bridging Canada Inc. ("Bridging") and assigned to 852.

2 Liquibrands applies for an order lifting a stay of proceedings in the receivership order of Sun Pac Foods Limited ("Sun Pac") to permit an action commenced by Sun Pac and Liquibrands against 852 and Bridging to proceed and to appoint a receiver of the remaining assets of Sun Pac for the purpose of advancing the litigation. Liquibrands is a secured creditor of Sun Pac in second place after 852 and requests an order directing the receiver to pay into court the balance of funds held by the receiver

of Sun Pac from the sale of its assets pending the completion of the law suit. The receiver applies for an order to pay the funds it holds to 852.

3 Sun Pac was a Canadian manufacturer of private label and branded beverage products, and a manufacturer of croutons and bread crumbs and other private label brands (the "Breadcrumbs Division").

4 Sun Pac was acquired by Liquibrands in November 2011. Liquibrands is the sole shareholder of Sun Pac. Mr. Csaba Reider is the sole shareholder, officer and director of Liquibrands. He was also the sole officer and director of Sun Pac.

5 Bridging provides middle-market commercial customers with alternative financing solutions to borrowers who are unable to obtain financing from traditional lenders. 852 is a company related to Bridging and took an assignment of the loans and security for loans made by Bridging to Sun Pac.

6 On October 1, 2012, Bridging advanced a revolving loan of up to $5 million based on a lending formula under Facility A, $500,000.00 (before facility fees) on January 18, 2013 under a Facility B term loan on equipment, and the balance of the facility B loan, $1,182,524.00 (before facility fees), was advanced on January 31, 2013. The loans were secured on the assets of Sun Pac. Liquibrands guaranteed $1 million of the Sun Pac Facility A loan and provided security over all of its assets to support the guarantee.

7 Mr. Reider was in discussion with Loblaws to produce private label drinks for Loblaws. However Sun Pac was running short of working capital and in August 2013 was in default of its loan obligations to 852. He decided to sell the Breadcrumbs Division for $3.1 million and he requested additional funding to continue operating.

8 On September 11, 2013 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement dated September 11, 2013. The Forbearance Agreement was entered into to provide Sun Pac with a temporary bridge loan in the hopes of obtaining equity and debt financing for the anticipated Loblaws contract and to complete a sale of the Breadcrumbs Division to repay the bridge loan. In the Forbearance Agreement, Sun Pac acknowledged that it was in default of the terms of its loans.

9 Notwithstanding the default, 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.

10 In the Forbearance Agreement, 852 agreed to extend a temporary bridge loan to Sun Pac in two tranches. Facility C was a demand non-revolving loan in the amount of $500,000 less fees. Facility C was advanced to Sun Pac in the amount of $475,000 on or about September 13, 2013.

11 Facility D was a demand non-revolving loan in the maximum amount of 2 times EBITDA of the Breadcrumbs Division as determined by a report from BDO Canada Limited, less the amount advanced under Facility C. Paragraph 13 of the Forbearance Agreement provided:

> Provided that 852 has received and is satisfied with the report to be prepared by BDO at the expense of Sun Pac, 852 shall, promptly following the execution of this Agreement, advance to Sun Pac as a Facility D Loan advance a single advance in an amount equal to 2 times EBITDA of the Breadcrumbs Division (as defined below) (as determined by BDO in its report to Sun Pac and 852 in its sole discretion), less the Facility C Principal Amount...Each advance shall be conditional on there being no Event of Default under this Agreement and the Loan Agreement.

12 One event of default contained in the Forbearance Agreement was if Sun Pac failed to have a binding agreement for the sale of the Breadcrumbs Division by November 6, 2013 that was acceptable to 852 in its sole and absolute discretion and failed to close it by December 6, 2013.

13 BDO prepared a report dated September 25, 2013, which it delivered to Sun Pac and 852 on September 30, 2013. Based on the report, the Facility D loan was to be approximately $1.15 million. 852 took no issue with the amount of the EBITDA as reported by BDO.

14 852 did not advance the Facility D loan. There is a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan. I do not intend to get into that issue, although was invited to do so.

15 On October 4, 2013, 852 informed Mr. Reider that it was not prepared to advance Facility D without certain matters being addressed. According to 852, they were not addressed.

16 On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced an urgent receivership application heard on November 12, 2013. Sun Pac and Liquibrands had counsel attend the hearing but did not oppose the receivership application. BDO was appointed as receiver of Sun Pac on November 12, 2013.

17 On the morning of November 12, 2013, Liquibrands and Sun Pac commenced an action against 852 and Bridging seeking, *inter alia*, general damages of $100 million for breach of the Forbearance Agreement by not advancing Facility D in the amount of approximately $1.15 million. Sun Pac had signed an agreement with Loblaws made as of September 18, 2013 containing terms regarding the sale of drink products by Sun Pac to Loblaws, and the damage claim is for alleged lost profits that would have been earned under that agreement.

Issues and analysis

(a) Need for leave to continue the action by Sun Pac

18 Sun Pac and Liquibrands say that the receivership order of November 12, 2013 in which BDO was appointed receiver of Sun Pac has stayed the action commenced that day by Liquibrands and Sun Pac against 852 and Bridging, and asks leave to proceed with that action. This request is based on a misreading of the receivership order, which followed the standard form used in the Commercial List and approved by the Commercial List Users Committee.

19 Mr. Wires said that he reads paragraph 7 of the order as staying the action. However, paragraph 7 deals with actions against the debtor or its property and states that "no proceeding against or in respect of the debtor or its property shall be commenced or continued" without the consent of the receiver or leave of the court. To read a proceeding "in respect of the debtor or its property" as applying to an action commenced by the debtor would be to ignore the heading in the order for paragraph 7 "NO PROCEEDING AGAINST THE DEBTOR OR THE PROPERTY". It would also ignore paragraph 3(j) of the order which gives the receiver the power "to initiate, prosecute and continue the prosecution of any and all proceedings...now pending or hereafter instituted".

20 The receiver of Sun Pac is quite entitled to continue the action commenced by Sun Pac against 852 and Liquibrands without the necessity of obtaining leave to do so.

(b) Proceeds of the sale of Sun Pac's assets

21 The receiver has realized on the assets of Sun Pac and has proposed an interim distribution of $383,381 from the proceeds of Sun Pac's assets to 852 on account of its first ranking security interest. 852 is owed approximately $4.0 million and will suffer a substantial shortfall on its loans to Sun Pac.

22 Liquibrands holds security from its wholly owned subsidiary Sun Pac to secure $2.54 million loaned to Sun Pac. Its security ranks second after the security held by 852. Liquibrands asserts that the proceeds held by the receiver of Sun Pac should be paid into court pending the determination of the action by Sun Pac and Liquibrands against 852 and Bridging. It claims that based on the claims in the action, there is a serious issue to be tried regarding 852's claim to the fund. It relies on rule 45.02 that provides:

> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

23 I do not see that the rule assists Liquibrands. The test for granting an order preserving a specific fund is threefold: (1) the plaintiff claims a right to the specific fund; (2) there is a serious issue to be tried regarding the plaintiff's claim to the fund; and (3) the balance of convenience favours granting the relief sought. The plaintiff must have a proprietary claim against the specific funds beyond the funds utility to satisfy the plaintiff's claim against the defendant. See *DIRECTV Inc. v. Gillott* (2007), 84 O.R. (3d) 595 (Ont. S.C.J.) at paras. 44 and 59.

24 Liquibrands cannot meet this test. The money in question results from the proceeds of the sale of the assets of Sun Pac. Liquibrands as a second creditor has security over the assets of Sun Pac second to the security of 852. There is no question that the security of 852 is valid and what Liquibrands is essentially doing is attempting to secure before judgment its claim for damages against 852 and Bridging.

25 The law suit was started on the morning of November 12, 2013 before the receivership order was made later that day. The court had to be satisfied that the loan to Sun Pac was owed in order to make the receivership order. Sun Pac and Liquibrands were represented in court that day by experienced insolvency counsel and no objection was made to the request for the receivership order. Sun Pac and Liquibrands cannot now contend that the money is not owing to 852 and that Liquibrands has a claim to it. That would amount to a collateral attack on the order.

26 There is no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by the receiver. 852 has the right to those proceeds. There may be a serious issue to be tried regarding the claim for damages by Sun Pac and Liquibrands against 852 and Bridging, although I make no such finding, but that is a different matter.

27 The funds held by the receiver of Sun Pac may be paid out to 852.

(c) Should a receiver of Liquibrands be appointed?

28 Under the GSA security from Liquibrands to 852, Liquibrands may appoint a receiver over all of the property of Liquibrands upon an event of default. Demand under the guarantee of Liquibrands was made in April, 2014 and no payment was made. Thus there has been an event of default. There is no issue as to the validity of the security.

29 A receiver may be appointed under section 243(1) of the BIA if it is considered just or convenient to do so. The principles applicable are referred to in *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J.).

30 Liquibrands contends that there should be no receiver appointed pending the outcome of its lawsuit against 852 and Bridging, and relies on *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551 (S.C.C.). In that case the bank breached an agreement not to call the loan for a period of time if guarantees were provided and an injection of capital was made into the customer company, which happened. The guarantors were relieved of liability because of the wrong doing of the Bank. The bank relied on a provision in the guarantee that it could deal with the customer "as the Bank may see fit". It was held that this did provision did not protect the bank. Wilson J. for the Court stated:

> The Bank under the umbrella agreement could have decided to make the business decision to stop financing the Company at any time prior to the June agreement. After that agreement this option was closed to it. It agreed with the Company and with the guarantors that it would continue to finance the Company at least until it had completed the Alberta road projects. It failed to do so despite the fact that the Wilders kept their part of the bargain. The Bank's breach not only increased the guarantors' risk in a way which was "not plainly unsubstantial" and impaired their security; it put the principal debtor out of business and into bankruptcy. Such conduct on the part of the Bank cannot, in my opinion, be viewed as within the purview of the clause in the guarantee contracts permitting the Bank to deal with the Company and the guarantors as it "may see fit". I agree with Lambert J.A. that such a clause must be construed as extending to lawful dealings only.

31 In this case, however, the guarantee given by Liquibrands was much broader than in *Bank of Montreal v. Wilder*. Section 2 of the guarantee provided:

2. **Guarantee Unconditional**. The obligations of the guarantor under this guarantee are continuing, unconditional and absolute and...will not be released, discharged, diminished, limited or otherwise affected by (and the Guarantor hereby waives, to the fullest extent permitted by applicable law) *inter alia*:

(e) the existence of any claim, set-off or other rights which the Guarantor may have at any time against the Debtor, the Creditor, or any other person, whether in connection herewith or any unrelated transactions;

(p) any dealing whatsoever with the Debtor or other person or any security, whether negligently or not, or any failure to do so; ...

(r) any other act or omission to act or delay of any kind by the Debtor, the Creditor, or any other person or any other circumstances whatsoever, whether similar or dissimilar to the foregoing, which might, but for the provisions of this Section 2, constitute a legal or equitable discharge, limitation or reduction of the Guarantor's obligations hereunder (other than the payment or extinguishment in full of all of the Obligations).

The foregoing provisions apply (and the foregoing waivers will be effective) even if the effect of any action (or failure to take action) by the Creditor is to destroy or diminish the Guarantor's subrogation rights, the Guarantor's right to proceed against the Debtor for reimbursement, the Guarantor's right to recover contribution from any other guarantor or any other right or remedy.

32 A party may contract out of an equitable rule regarding guarantees. See *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.). Liquibrands was represented by counsel at the time it signed the guarantee and there is no reason why the terms are not enforceable. The terms of the guarantee preclude Liquibrands from contending that the guarantee may be unenforceable if it succeeds in its action against 852.

33 Moreover, in a Subordination, Assignment, Postponement and Standstill Agreement made by Liquibrands and Sun Pac with Bridging at the same time as the guarantee, Liquibrands agreed not to take any steps whereby the priority or rights of 852 might be delayed, defeated, impaired or diminished and agreed not to challenge, object to, compete with or impede in any manner any act taken or proceeding commenced by 852 in connection with the enforcement of 852's security.

34 Liquibrands also claims that as second secured creditor of Sun Pac, it should have priority over the security of 852 because of the breach by 852 of the Forbearance Agreement. I am not in a position to say that there has been a breach of that agreement and in any event the Subordination, Assignment, Postponement and Standstill Agreement precludes that contention. It provides that Liquibrands consents to the security granted to Bridging by Sun Pac and acknowledges that notwithstanding any priority provided by any principle of law or equity, the security of Liquibrands is unconditionally subordinated to the security held by Bridging. Liquibrands also agreed in that agreement that it would not take any steps whereby the priority of Bridging might be defeated and that it would not challenge any proceeding to enforce that security. 852 holds those rights as assignee from Bridging.

35 I find that it is just and convenient that a receiver of Liquibrands be appointed and BDO is appointed as receiver of all of its property, assets and undertakings in the form contained at tab 3 of the Application Record.

(d) Procedure for the litigation

36 The action by Liquibrands and Sun Pac against 852 and Bridging for breach of the Forbearance Agreement is outstanding. Liquibrands requests an order that a different receiver from BDO be appointed as receiver of "the remaining assets" of Sun Pac for the purposes of advancing the litigation. The reason is that BDO, the receiver of Sun Pac, has indicated that it does not wish to spend money on the law suit.

37 BDO is prepared to market the right to commence the action. There is precedent for such a procedure. In *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893 (Ont. S.C.J. [Commercial List]) it was held that a lawsuit by the debtor in receivership constituted collateral that was subject to the existing receivership proceeding. The court appointed receiver

subsequently brought a motion seeking court approval to conduct a marketing process for the sale of the claim and that relief was granted by Justice C. Campbell. It seems sensible that now that BDO is the receiver of both Sun Pac and Liquibrands, the two plaintiffs in the action, BDO should be permitted to market the litigation in a marketing process.

38 No specific marketing process has been proposed. The receiver should propose a marketing process and Sun Pac and Liquibrands can consider whether it is agreeable to the marketing process proposed. If there is agreement to the marketing process, it can be included in the order to be signed reflecting these reasons. If there is no agreement, a further attendance to settle it can be arranged at a 9:30 am conference.

(e) Receiver's motion

39 The receiver has applied for orders approving the Third Supplement to its First Report, approving its Third Report, approving its fees and disbursements of those of its counsel, approving its statement of receipts and disbursements, and authorizing and directing the receiver to make a distribution to 852 and maintain a holdback in accordance with its Third Report. The relief requested is reasonable and is granted.

Order accordingly.

TAB 4

Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.C. Weatherill J.

Heard: September 24, 2014.

Judgment: October 2, 2014.

Docket: S-139627

Registry: Vancouver

[2014] B.C.J. No. 2463 | 2014 BCSC 1855 | 17 C.B.R. (6th) 41 | 245 A.C.W.S. (3d) 21 | 2014 CarswellBC 2916 | [2015] 1 W.W.R. 606 | 72 B.C.L.R. (5th) 294

Between Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd., Petitioners, and P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal, Respondents

(62 paras.)

Case Summary

Creditors and debtors law — Receivers — Court-appointed receivers — Powers — Realization of property — Sales by receiver — Duties — Standard of care — Act in commercially reasonable manner — Remuneration — Application by receiver to approve stalking horse bid and sale of strata lot, $1,000,000 increase in borrowing charge and approve activities in first and second reports allowed in part — Stalking horse bid recognized means of maximizing recovery but, in this case, no evidence receiver considered other methods, appraisals out-of-date and termination fee not proven reasonable, so not approved — More work needed on marketing development, so increased charge approved — Proposed sale of strata lot reasonable and beneficial so approved — Receiver's activities in first report approved, but approval of second premature given findings on stalking horse bid.

Application by the receiver for an order approving the stalking horse bid in respect of sale of the assets of the development, and conditional vesting of title to the bidder, approval of a pre-stratification contract for the purchase and sale of a strata lot, to increase the receiver's borrowing charge by one million, approval of the receiver's activities as set out in the first and second reports and to seal the appraisal on the basis it could prejudice marketing of the development. The development ran into financial problems and the receiver was appointed and empowered to market and negotiate terms of sale. The receiver decided the best course of action to preserve value was to complete and market phase one without completing phase two, for which construction had not yet begun. To complete phase one, the receiver borrowed $2.5 million and had entered leases and the proposed contract for purchase and sale of one strata lot. The major creditor was fourth in line and opposed any sale that would result in it receiving less than it was owed. At least $29 million would be needed to pay off the first three creditors in line and the major creditor. The appraisal valued the development at $28,405,000 for both phases. The receiver decided a stalking horse bid process would be the most effective way to sell the property. The stalking horse bid was for $29.5

million, which the receiver wanted to approve subject to no better bid being received. The stalking horse bid was strenuously objected to by one of the creditors.
HELD: Application allowed in part.

The stalking horse bid process had been recognized as a legitimate means of maximizing recovery in bankruptcy or receivership processes. However, there were several concerns in this case. There was no evidence the receiver had considered any other method of marketing and selling the development, and no evidence upon which the court could assess whether the economic incentives behind the agreement were fair and reasonable. The appraisal was dated and prepared before phase one was completed so did not accurately reflect the current value. There was no evidence on how the termination fee was arrived at, and $1.5 million was on the high side and could had an adverse effect on creditors. There was also no evidence of urgency. As such approval was not granted as the receiver had not established the agreement was in the best interests of creditors as a while. Given that finding, there was no need to consider whether to grant a conditional vesting order. The proposed purchaser of the strata lot had already expended money on improvements, the agreement was reasonable, and the purchase would reduce operating costs and occupancy would help with marketing, so the sale was approved. More work was needed on valuation and marketing of the development, so the borrowing charge was increased, provided the borrowing terms were no less favourable. The receiver had fulfilled its mandate regarding completion of phase one, so the activities in the first report were approved. Given the findings on the stalking horse bid, it was premature to consider approval of the second report. As the appraisal was outdated, there was no reason to seal it.

Counsel

Counsel for the Receiver, Ernest & Young Inc.: J.D. Schultz, J.R. Sandrelli.

Counsel for the Petitioners: D.E. Gruber.

Counsel for Valiant Trust Company: J.D. Shields.

Counsel for 0964502 B.C. Ltd.: C.K. Wendell.

Counsel for Interior Savings Credit Union: S.A. Dubo (by telephone).

Counsel for Maynards Financial Ltd.: R.H. Harrison.

Reasons for Judgment

G.C. WEATHERILL J.

Introduction

1 This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

2 The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;

b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;

c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;

d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and

e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

3 The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

4 The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

5 The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

6 The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

7 Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

8 The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

9 The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

10 In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

11 The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

12 The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

13 An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

a) Phase 1: $21,575,000

b) Phase 2: $6,830,000

$28,405,000

14 The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

15 Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

16 In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

17 By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

a) a purchase price of $29.5 million;

b) a deposit of $1.0 million;

c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and

d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

18 The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

19 The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

20 The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.*, 2011 ONSC 4450 at para. 44 [*Baysong*]; *Re Digital Domain Media Group Inc.*, 2012 BCSC 1567.

21 The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) at para. 16:

a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

b) the efficacy and integrity of the receiver's sale process by which offers were obtained;

c) whether there has been unfairness in the working out of the process; and

d) the interests of all parties.

22 The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

23 The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

24 The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

25 The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed the deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

26 Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

27 He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and

chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

28 Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

29 Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

30 There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

31 To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

32 In this case, I have several concerns.

The Stalking Horse Process

33 No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

34 The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

35 The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

Termination Fee

36 While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the "range of reasonableness" as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

37 The foregoing notwithstanding, given the Receiver's function and role, the Court will often defer to the Receiver's recommendation unless there is a compelling reason to reject it. In Frank Bennett's *Bennett on Receiverships,* 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> ...The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it has made its decision. If the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

38 In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the "range", albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

39 I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

40 There is no evidence before me of any urgency regarding the sale of the Development.

41 Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

42 Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

43 At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

44 Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

45 The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000. Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

46 The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

47 On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

48 The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a) Phase 1 completion costs:

i.	completion payables:	$200,000
ii.	parking lot and courtyard landscaping:	$100,000

b) interest and fees on financing:

i.	Interest accrued to date:	$150,000
ii.	future fees and interest:	$100,000
c)	Professional fees:	$450,000
d)	fees from leasing activities:	$125,000
e)	engagement of Colliers for SH Process:	$50,000

f)	other consulting fees:	$75,000
g)	office, utility and operating expenses:	$52,500
h)	contingency:	$55,000
TOTAL		$1,357,500

49 The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

50 The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

51 I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

52 I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

53 The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

54 The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, *[1993] O.J. No. 1647* (Ct. J.) at paras. 3-5, aff'd *[1996] O.J. No. 2806* (C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, *2005 BCSC 684* at para. 21.

55 I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

56 After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

57 Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

58 The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

59 The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

60 The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

61 The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

62 The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

G.C. WEATHERILL J.

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