2022 01G 0994
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

HSBC BANK CANADA

APPLICANT

AND:

CANADA FLUORSPAR (NL) INC.

RESPONDENT

APPLICANT'S MEMORANDUM OF FACT AND LAW

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2022 01G 0994
Date of Filing Document	March 18, 2022
Name of Party Filing or Person	The Applicant, HSBC Bank Canada
Application to which Document being filed relates:	Originating Application (Inter Partes) by the Applicant for an Order to appoint Deloitte Restructuring Inc. as receiver over certain property of the Respondent pursuant to section 105 in the *Judicature Act*, RSNL 1990, c J-4, as amended, and Rule 25.01 of the *Rules of the Supreme Court*, 1986 and for an order abridging the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent pursuant to Rule 29.05(2)(a) of the *Rules of the Supreme Court, 1986.*
Statement of Purpose in Filing	To support the Originating Application (*Inter Partes*)

NATURE OF THE APPLICATION

1. The Applicant seeks an order appointing Deloitte Restructuring Inc. ("**Deloitte**") as receiver over certain financed receivables of the Respondent pursuant to section 105 in the *Judicature Act*, RSNL 1990, c J-4, as amended, and Rule 25.01 of the *Rules of the Supreme Court*, 1986 and for an order abridging the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent pursuant to Rule 29.05(2)(a) of the *Rules of the Supreme Court, 1986.*

FACTS

2. The facts are as set out in the affidavit of Brian Pettit sworn March 16, 2022 (the "**Pettit Affidavit**").

3. Any capitalized terms used not otherwise defined in this Memorandum bear the same meaning as such term is given in the Pettit Affidavit.

4. Deloitte has consented to act as receiver of the Financed Receivables.

Reference: Affidavit of Brian Pettit, Exhibit "L"

ISSUES

5. Should Deloitte be appointed as Receiver over the Financed Receivables?

6. Should this Honourable Court, pursuant to Rule 3.03, exercise its discretionary power to abridge the required time for service of notice of the within Originating Application?

LAW AND ARGUMENT

Appointment of Receiver

7. Section 105 of the *Judicature Act* provides, in part, as follows:

> 105. (1) A mandamus or an injunction may be granted, or a receiver appointed, by an order of the court, in all cases in which it appears to the court to be just or convenient that the order should be made
>
> (2) An order made under subsection (1) may be made either unconditionally or upon the terms and conditions that the court thinks just.

Reference: Section 105 of the *Judicature Act*, R.S.N.L. 1990, c. J-4, as amended. (Tab 1 hereto)

8. Rule 25.01 of the *Rules of the Supreme Court, 1986* provides as follows:

> 25.01. (1) The Court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just.

Reference: Rule 25.01 of the *Rules of the Supreme Court, 1986*. (Tab 2 hereto)

9. The Applicant submits that the appointment of Deloitte as receiver of the Financed Receivables is appropriate pursuant to the foregoing provisions.

10. This Honourable Court has previously confirmed that "... the Court, in appointing a receiver has an inherent jurisdiction as well as ancillary powers to make that jurisdiction effective."

Reference: *In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2005 NLTD 146, para. 13 (Tab 3 hereto)

11. The test for appointment of a receiver has been considered previously by this Honourable Court in *Norcon Marine Services Ltd., (Re).*

Reference: *Norcon Marine Services Ltd., (Re)* 2019 NLSC 238. (Tab 4 hereto)

12. In *Norcon,* Justice Orsborn began his analysis by noting that:

> The appointment of a receiver by the Court engages the exercise of the Court's discretion. A receiver may be appointed when it appears to the Court to be just or convenient to do so. Any discretion must be judicially exercised.

Reference: ***Norcon Marine Services Ltd., (Re)*** **2019 NLSC 238, para. 40 (Tab 4 hereto)**

13. Justice Orsborn further reviewed factors that may be considered in determining whether it is just or convenient to appoint a receiver:

> [41] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Justice Edwards set out, from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, factors that may be considered by a court – at paragraph 26:
>
> > (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> >
> > (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> >
> > (c) the nature of the property;
> >
> > (d) the apprehended or actual waste of the debtor's assets;
> >
> > (e) the preservation and protection of the property pending judicial resolution;
> >
> > (f) the balance of convenience to the parties;
> >
> > (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
> >
> > (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
> >
> > (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
> >
> > (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
> >
> > (k) the effect of the order on the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.

[42] In *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35 (rev'd on constitutional grounds 2015 SCC 53), the Saskatchewan Court of Appeal suggested this analysis – at paragraph 99:

> 99 The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

Reference: ***Norcon Marine Services Ltd., (Re)*** **2019 NLSC 238, paras. 42-43 (Tab 4 hereto)**

14. Justice Orsborn stated that, in considering whether an appointment would be just or convenient:

> The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question.

Reference: ***Norcon Marine Services Ltd., (Re)*** **2019 NLSC 238, para. 46 (Tab 4 hereto)**

15. It is respectfully submitted that it is just and convenient to appoint Deloitte as receiver of the Financed Receivables on consideration of the factors set out in *Norcon,* but also as a result of the following:

(a) the Respondent is insolvent and currently subject to an Interim Receivership Order (pursuant to the BIA) and Amended and Restated Initial Order (pursuant to the CCAA);

(b) the Financed Receivables are "carved-out" from the Interim Receivership Proceedings and the CCAA Proceedings;

(c) the Respondent has defaulted in its obligations to the Applicant;

(d) it is a term of the security held by the Applicant in respect of the Respondent that the Applicant may seek the appointment of Court appointed receiver upon an event of default; and

(e) the Applicant has ceased operations with the result that the direct line of a customer / supplier relationship has been removed creating a collection risk.

16. As described in the Pettit Affidavit:

(a) given the current circumstances of Applicant, the filing of the CCAA proceedings and the focused efforts on the implementation of a SISP, the "carve-out" of the Financed Receivables as "*Excluded Property*" pursuant to the Interim Receivership Order and Initial Order, a transitional gap in the collection exercise for the Financed Receivables has developed that needs to be addressed through the use of a Court appointed receiver; and

(b) the appointment of a receiver over the Financed Receivables is necessary, just and convenient in order to protect the interests of the Bank, create a process upon which

a receiver can gain access to the necessary books and records associated with each outstanding Financed Receivable to address any issues that may surface in the future while protecting any sensitive information contained therein, and designate a Court officer in a transparent proceeding with the necessary authority and powers to prosecute any and all issues with respect to the collection of the Financed Receivables internationally.

Abridging Time for Service of Notice

17. Rule 3.03(1) of the *Rules of the Supreme Court, 1986* provides as follows:

> **3.03.** (1) The Court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these rules, or by any order, to do or abstain from doing any act in a proceeding.

Reference: **Rule 3.03 of the *Rules of the Supreme Court, 1986*. (Tab 5 hereto)**

18. When determining whether to exercise its discretion to amend a timeline set out in the *Rules*, the Court of Appeal in *Lundrigan Group Ltd.* v. *Pilgrim* noted that

> The overriding general principle must be that in exercising its discretionary power the Court must balance the equities and justice of the situation with which it is seized.

Reference: ***Lundrigan Group Ltd.* v. *Pilgrim*, (1989), 75 Nfld. & P.E.I.R. 217, para. 38. (Tab 6 hereto)**

19. This approach has been applied and used consistently through the jurisprudence of this Province. In *Taylor v. Walsh*, Justice LeBlanc, citing *Lundrigan* for support, stated:

> Rule 3.03 as set out earlier is what must be considered. This will necessarily invoke an assessment of the equities of the parties and the avoidance of possible injustice.

Reference: ***Taylor* v. *Walsh*, 2011 NLTD(G) 52, as para. 20. (Tab 7 hereto)**

20. Further, Justice LeBlanc noted:

> The Rules have generally been interpreted in a manner recognizing the need to forward the ends of justice and to provide fairness to the parties.

Reference: ***Taylor* v. *Walsh*, 2011 NLTD(G) 52, as para. 20. (Tab 7 hereto)**

21. The Applicant submits that in the current circumstances, including, without limitation, the prior involvement of the parties in the Interim Receivership proceedings and the CCAA Proceedings in this Honourable Court, there is no injustice or prejudice arising to the Respondent with respect to abridging service. In addition, the balance of equities, the justice of the circumstances at hand, and the exercise of the discretionary power of this Honourable Court (pursuant to Rule 3.03) support that this Court should abridge the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent.

RELIEF SOUGHT

22. The Applicant seeks an order:

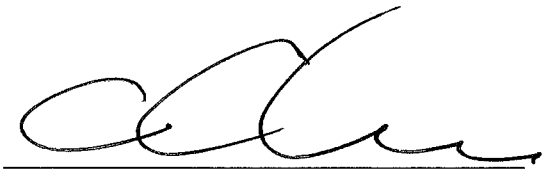
(a) appointing Deloitte as receiver of the Financed Receivables;

(b) abridging the required time for service of notice of the within Originating Application (*Inter Partes*) and supporting materials on the Respondent;

(c) for the Applicant's costs of this proceeding; and

(d) for such further and other relief as counsel may advise and this Honourable Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF MARCH, 2022.



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APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 1

Judicature Act, RSNL 1990, c J-4

Mandamus or injunction

105. (1) A mandamus or an injunction may be granted, or a receiver appointed, by an order of the court, in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under subsection (1) may be made either unconditionally or upon the terms and conditions that the court thinks just.

(3) An injunction that is asked for, either before, at, or after the hearing of a proceeding, to prevent a threatened or apprehended waste or trespass may be granted by the court

(a) whether the person against whom the injunction is sought is or is not in possession under a claim of title or otherwise;

(b) whether that person, if out of possession, does or does not claim a right to do the act sought to be restrained under a colour of title; or

(c) whether the estates claimed by both or either of the parties are legal or equitable.

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 2

Rules of the Supreme Court, 1986

Application for receiver and injunction

25.01. (1) The Court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just.

(2) When appointing a receiver, the Court may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought, from assigning, charging or otherwise dealing with that property until after the hearing of the application for the appointment of the receiver.

(3) Where an applicant wishes to apply for the immediate grant of an injunction, the applicant may do so ex parte.

(4) Where on a hearing of an application for the appointment of a receiver, it appears that the matter in dispute should be dealt with by an early trial, the Court may order accordingly and fix the place and mode of trial, and make such other order as is just.

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 3

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	**Mr. Justice Robert M. Hall**
Date of Document:	**2005 09 02**
Statement of purpose in filing:	**Reasons for Judgment on Application by PricewaterhouseCoopers Inc. ("PWC") (the "Receiver") for approval of the fees of the Receiver and the Receiver's Counsel.**
Court Sub-File Number:	**9:12 (Re Sub-File 7:62)**

CITATION: ***In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2005 NLTD 146**
DATE: 2005 09 02
DOCKET: 2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

IN THE MATTER OF a Court ordered Receivership of Hickman Equipment (1985) Limited ("Hickman Equipment") pursuant to Rule 25 of the **Rules of the Supreme Court, 1986**, under the **Judicature Act**, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the **Bankruptcy and Insolvency Act**, c. B-3 of the Revised Statutes of Canada, 1985, as amended (the "BIA")

Before: The Honourable Mr. Justice Robert M. Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: November 29, 2004

Appearances: Frederick J. Constantine for the Receiver, PricewaterhouseCoopers Inc.
Thomas R. Kendell, Q.C. for General Motors Acceptance Corporation.
Bruce C. Grant, Q.C. for John Deere Credit Inc.
Geoffrey L. Spencer for Canadian Imperial Bank of Commerce.

Authorities Cited:

Cases Considered: **Hart Building Supplies Ltd. v. Deloitte & Touche,** [2004] B.C.J. 49 (B.C.S.C. in Chambers**); Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.** (1971), 21 D.L.R. (3d) 75 (Man.C.A.); **Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.** (1995), 32 C.B.R. (3d) 303; **Walter E. Heller**, **Canada Ltd. v. Sea Queen of Canada Ltd.** (1974) 19 C.B.R. (N.S.) 252 (Ont. S.C.)

Statutes Considered: **Judicature Act**, RSN 1990 c. J-4

Texts Considered: *Bennett on Receiverships, (Second Edition)*, Carswell Toronto; I. H. Jacob, *The Inherent Jurisdiction of the Court, Current Legal Problems* 1970

REASONS FOR JUDGMENT

Hall, J.

Background

[1] This matter arises out of an application by the Receiver for approval of fees and disbursements incurred by it and by its counsel incurred subsequent to April 2003 and not previously approved by this court. The fees of the Receiver (before harmonized sales tax ("HST")) for the period May 1, 2003 to May 31, 2004 total $519,041. The Receiver had also retained the services of two law firms, namely, Merrick Holm and Patterson Palmer, who filed accounts in the amount of $47,558.98 and $136,916.89 respectively.

[2] Subsequent to the filing of the initial affidavits and applications with respect to this matter, both PWC and Patterson Palmer filed supplemental affidavits wherein they sought approval of their accounts for the period June 1, 2004 to October 31,

2004. The Patterson Palmer accounts totaled $27,010.43. PWC's supplementary affidavits sought approval of further fees and disbursements in the amount of $43,933 (before HST).

[3] On the application for approval of these accounts pursuant to the provisions of the Receivership Order issued in this matter, counsel on behalf of three secured creditors were heard in opposition to a portion of the accounts related to certain investigations undertaken by the Receiver and research undertaken by the Receiver's counsel relating to potential claims of the Receiver in negligence as against Deloitte & Touche LLP, an international accounting firm, which firm had served as auditors for the bankrupt company Hickman Equipment (1985) Ltd., ("HEL"). I shall refer to this aspect of the receivership as the "Deloitte & Touche matter". Up to the end of May 2004 the Receiver had expended $309,834 in professional fees and disbursements (before HST) related to the Deloitte & Touche matter. Merrick Holm had incurred fees and disbursements in the amount of $9,315.79 in relation to the same matter. Patterson Palmer had not incurred any fees in relation to this matter.

[4] HEL had been incorporated in 1985 and carried on the business of sales, rental and servicing of construction, mining and forestry equipment. It had a series of dealer agreements with a number of heavy equipment suppliers such as John Deere, Ingersoll-Rand, Terex Corporation, Timberjack Corporation, Cedarrapids Inc. and others. From 1985 up to and including 2001, HEL engaged Deloitte & Touche as its sole auditor and financial advisor to provide accounting, auditing, tax and consulting services in respect of its business. In accepting the annual appointment as auditor, Deloitte & Touche apparently undertook to audit HEL's financial statements in accordance with generally accepted accounting standards ("GAAS") and to provide an opinion on whether or not HEL's financial statements presented fairly in all material respects the financial position of HEL as of its year-end of December 31st in each of the years inclusive of 1985 to 2000, and to provide opinions on the results of HEL's operations and its cash lows for each year, all in accordance with Canadian General Accepted Accounting Principles ("GAAP").

[5] In March of 2003 after having conducted a preliminary investigation into the affairs of HEL (at a cost to the receivership of $175,000). PWC came to the conclusion that HEL (and thus PWC as Receiver thereof) may have a cause of action against Deloitte & Touche for professional negligence. In an application heard March 12, 2003, PWC sought the approval of the Court to conduct further investigations into the relationship of Deloitte & Touche with HEL. PWC wished to investigate further

the professional services provided to HEL by Deloitte & Touche and any professional negligence arising therefrom which may give rise to a claim by PWC as Receiver of HEL for recovery of the losses which HEL had incurred which losses resulted in its receivership and bankruptcy.

[6] The Receiver's application for Court approval to expend monies of the receivership on a further investigation of the Deloitte & Touche matter was opposed by a number of secured creditors, largely on the premise that the preliminary investigation conducted by PWC at a cost to the receivership of $175,000 had not, in the minds of these secured creditors, produced sufficient results to justify further expenditures being incurred in further investigation. Some of these creditors had, with the knowledge of Deloitte & Touche, advanced funds to HEL in apparent reliance upon the financial statements prepared by Deloitte & Touche. These creditors therefore considered that there was vested in them in their own right a separate cause of action against Deloitte & Touche and did not wish funds of the receivership (which would come out of the recoveries of the secured creditors) expended on investigations by the Receiver and its counsel which might benefit other creditors or the receivership in general. In the time frame of less than one year during its last year in operation, the actual value of the inventory of HEL (as opposed to its stated value on the books of the company) had shrunk from $90,000,000 to approximately $25,000,000. There were clear appearances of fraud associated with this situation, much of the inventory having been financed several times over without previous security documents having been discharged or those secured creditors being paid. In addition there was evidence of fictitious sales. Against the background of these circumstances I was satisfied that it was in the general interest of the receivership that PWC be authorized to conduct such further investigations and by an Order filed July 28, 2003 it was ordered, *inter alia*, that:

> "4. PWC, in its capacities as Trustee and Receiver of Hickman Equipment, is authorized to take such steps as it may deem necessary or appropriate, including retention of such agents, consultants, advisers, experts, auditors and solicitors to determine whether it had in its capacity as Receiver or Trustee a claim against Deloitte & Touche LLP.
>
> 5. All reasonable costs incurred by PWC for any of the purposes referred to herein, or in exercising the authority provided herein, are proper costs of the Receivership to be allocated and paid in accordance with the provisions of the costs allocation plan unless otherwise ordered by this Court."

[7] Late in 2003, while the investigation authorized by the above-mentioned Order was still continuing, PWC sought leave of the Court to issue a statement of claim against Deloitte & Touche and Deloitte & Touche LLP in order to preserve a limitation period. Such leave was given and a statement of claim was issued, notwithstanding the fact that the investigation was continuing. In the statement of claim PWC alleged that it was apparent from its review that for the financial years 1997 through 2000, inclusive, and perhaps earlier than that, and contrary to the representations of Deloitte & Touche, the audited financial statements of HEL did not fairly represent in all material respects the financial position of HEL for the applicable years in question in accordance with GAAP. Nor were the results of the company's operations and its cash flows for the relevant years in accordance with GAAP in the following regards:

(a) The value of the inventory was materially overstated for a number of reasons including, but not limited to, accounting practices were not in accordance with GAAP.

(b) There were receivables listed in the books and records of HEL that were fictitious.

(c) HEL, on many units of heavy equipment inventory, had double financed the same item by entering into a series of loan transactions with more than one lender on a single inventory unit for the purpose of granting security to both lenders, purportedly in priority to each other over the unit thereby falsely increasing cash flows.

(d) HEL in some instances had conveyed units of equipment from inventory to buyers while allowing loans that were outstanding on these units to remain unpaid, again falsely increasing cash flows.

(e) HEL purported to enter into a series of transactions with companies that did not exist which resulted in significant losses to HEL as a result of these transactions which were of a nature apparently intended to increase the apparent profitability of the company but which in fact did not increase its profitability but to the contrary concealed operating losses.

(f) HEL had made payments to senior management and directors under a profit based bonus plan arrangement far in excess of the actual amounts that were owed to such individuals given the actual financial status of the

company.

[8] The statement of claim went on to allege breaches of contract and professional negligence, the details of which are not necessary to be set out here but included negligent misrepresentation and breach of fiduciary duty.

Opposition to Receiver's Accounts.

[9] The opposition to the passing of the accounts of the Trustee, PWC, and its counsel came from three of the same creditors who had opposed vigorously the further investigation by the Receiver into the Deloitte & Touche matter. Counsel for the Receiver however argues that the Court Order authorizing the investigation was crystal clear. He states that essentially the Court directed PWC to determine whether Deloitte & Touche can be liable to the Receiver and/or HEL. He reminded the Court that there was a huge shortfall in the recoveries when the assets of HEL were realized and that it was necessary in this present application to consider two things:

(1) Had PWC stepped outside of its work mandate in conducting the investigation? and

(2) Was what PWC did necessary and reasonable, particularly with respect to whether or not there were points in time at which PWC should have stepped back from its investigation mandate and asked itself the question whether it should proceed any further with the investigation.

[10] Counsel for PWC asserted that both they and PWC were instruments of the Court. All should be judged by the standard of the Court Order and not by the standards of self-interested creditors. He pointed out that the potential claims against Deloitte & Touche could extend to as much as $90,000,000. He acknowledged however that it may be a lesser sum but that nonetheless the potential claim was a multimillion dollar one and therefore could be expected, simply on the basis of its large amount, to be seriously contested by Deloitte & Touche and therefore the employment of senior insolvency analysts by PWC in this investigation was justified. He characterizes the arguments of his opponents as being "Monday morning quarter backing".

[11] Counsel for an opposing creditor General Motors Acceptance Corporation objected to the characterization of his client's position as "Monday morning quarter

backing". He indicated to the Court that there was nothing appealing to him in having to go through another professional's accounts. However he must do so. He stated that every time he picked up the file he asked himself "How did we get this far apart?" and states that in his view the problem goes right back to when the additional investigation was recommended to the Court. At that stage $175,000 had already been spent and a number of creditors objected to any more being spent. He reminded the Court that he had requested a budget because he feared a blank cheque being given to PWC to conduct the investigation. He pointed out that his objection was not to the various hourly rates of some of the senior level insolvency analysts on the PWC team. His principal point was that the work undertaken was excessive and that his clients had never envisaged the extent of the monies that were ultimately expended. In his view the Receiver should have come back to the Court with a request for further directions at the time when it sought leave to issue the statement of claim as against Deloitte & Touche in December. He pointed out that at that time the Receiver had expended $100,000 and that this was an appropriate time to review the important features of the claim as were fleshed out in the statement of claim. He contended that at this point the Receiver's investigation was essentially completed. He questioned why the Receiver did not come back to Court demonstrating to the Court the progress which it had made, what it envisaged it had to do further with respect to the matter and what professionals it envisaged would need to be retained or assigned to the file. He states that as a result of doing that the Court could then ask the question "Are we all on the same page?". In his view the Receiver's fees in this regard (and those of its counsel related to this aspect of the file) ought to be approved only for those incurred up to December 31, 2003, or at the very latest by the end of February 2004 when the decision of the British Columbia Supreme Court in **Hart Building Supplies Ltd. v. Deloitte & Touche,** [2004] B.C.J. 49 (B.C.S.C. in Chambers**)** was issued. The decision in **Hart** was in an application by Deloitte & Touche to dismiss a claim against it for failing to discover and report to Hart a serious overstatement of its inventory value. A director who held 15% of the shares of Hart was aware of the overstatement and allowed it to continue. The Court ruled in favour of Deloitte & Touche on the basis that the director was a directing mind of Hart and his misrepresentations had allowed it to stay in operation.

[12] General Motors Acceptance Corporation is supported by counsel for John Deere Credit Inc. and Canadian Imperial Bank of Commerce. Counsel for John Deere pointed out the wording of the Order which referenced the Receiver's fees and disbursements as being required to be "reasonable". Implicit in this word, he argues, is the concept of "cost containment". In his view the intent of the Order was for the

Receiver to focus on what was to be the benefit to the receivership in proceeding any further. He argues that of December 31st that picture was reasonably clear, both from a legal and an investigatory point of view and the Receiver ought to have come back to the Court for further instructions.

Decision.

[13] In Court appointed receiverships, the Court, in appointing a receiver has an inherent jurisdiction as well as ancillary powers necessary to make that jurisdiction effective. (See **Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.** (1971), 21 DLR (3d) 75 (Man.C.A.), at para. 19 where the Court cited with approval I. H. Jacob, *The Inherent Jurisdiction of the Court, Current Legal Problems* 1970, pp. 23 - 52 who at p. 51 stated:

> "In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.")

[14] Section 105(1) of the **Judicature Act**, RSN 1990 c. J-4 states:

> "A mandamus or an injunction may be granted, or a receiver appointed, by an order of the court, in all cases in which it appears to the court to be just or convenient that the order should be made."

In **Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.** (1995), 32 C.B.R. (3d) 303, the Court observed:

> "The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors ... The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with what happens to the property that comes under its administration."

[15] In *Bennett on Receiverships, (Second Edition),* Carswell Toronto, at p. 474, the author concludes that Courts review the following criteria in setting a fee for the receivership:

(1) the nature, extent and value of the assets;

(2) the complications and difficulties encountered by the receiver;

(3) the degree of assistance provided by the debtor;

(4) the time spent by the receiver;

(5) the receiver's knowledge, experience and skills;

(6) the diligence and thoroughness displayed by the receiver;

(7) the responsibilities assumed;

(8) the results of the receiver's efforts; and

(9) the cost of comparable services.

[16] The author at p. 475 acknowledged that the receiver's efforts in maximizing the realization may not be successful and the receiver may not produce the highest dollar but that the receiver should nevertheless not necessarily be punished where, with the benefit of hindsight, the actions did not yield the greatest realization. Nor should the Court penalize the receiver for taking steps to preserve the property for sale, if the sale price turns out to be unproductive. In quoting from **Walter E. Heller**, **Canada Ltd. v. Sea Queen of Canada Ltd.** (1974) 19 C.B.R. (N.S.) 252 (Ont.S.C.):

> "The Court must look 'at the number of hours in relation to what was done and the length of time involved'. There should be some correlation of the cost to the benefits derived from the receivership although that may not be possible if the receiver is required to spend considerable time in administering the estate. On a *quantum meruit* approach, the Court does not penalize the receiver in taking steps that are unproductive, but are necessary for the preservation and sale of the assets, as compared to the cost/benefit approach."

[17] I have been involved in hearings with respect to this bankruptcy and receivership for over three and a half years. I am satisfied based upon that experience alone that the reasons for this bankruptcy and receivership are both complex and difficult. The investigation thereof has required a great degree of professional knowledge, experience and skill on the part of the Receiver. In this regard I am satisfied that the Receiver has exercised all due diligence and acted totally in accordance with the Court's authorization to investigate the Deloitte & Touche matter. Its recommendations have been received by the Court as have the recommendations of its counsel. I am satisfied that the recommendations are both thorough and reasonable. The costs incurred stem entirely from the fact that the receivership is a large one and has resulted from a great number of complex transactions skillfully entered into by the perpetrators thereof with a view to misstating the financial position of the company. I am further satisfied that the Receiver's investigations of the responsibility of Deloitte & Touche (if any) in not detecting these schemes has been competent and thorough. Naturally all of the creditors would prefer that the large costs of these investigations and opinions not have arisen. That however does not render the investigations and opinions unreasonable or contrary to the mandate granted by the Court Order. Considerable recovery possibilities potentially exist in the action against Deloitte & Touche and in this regard I am satisfied that the expenditures with respect to the investigation and the opinions of legal counsel are in compliance with the Court Order and the fees and disbursements of the Receiver and the Receiver's counsel in relation thereto therefore ought to be approved. I am not satisfied that the B.C. Supreme Court decision in the **Hart** matter in January 2004 should have caused the Receiver and its counsel to cease their work. **Hart** turned upon a specific finding that a director was a "directing mind" of Hart and had participated in the misrepresentation. I am satisfied that there is a real issue to be tried in this matter as to who were the directing minds of HEL and did those directing minds participate in the misfeasance. The views of the opposing creditors on this issue are not developed before this Court. They appear to have jumped at the **Hart** decision as a vindication of their initial views. I am not satisfied that the factual or legal state of affairs in the HEL matter is nearly as clear cut or simplistic as suggested by the creditors relying on **Hart**.

[18] I therefore order that the accounts of the Receiver, PricewaterhouseCoopers Inc., and their counsel, Merrick Holm and Patterson Palmer, to October 31, 2004 be approved as filed with the Court.

Justice

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 4

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238
Date: December 30, 2019
Docket: 201901G7732

IN THE MATTER OF an Application by Norcon Marine Services Ltd. for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

- AND -

Docket: 201901G7735

IN THE MATTER OF the Receivership of Norcon Marine Services Ltd.

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

NORCON MARINE SERVICES LTD.

RESPONDENT

Before: Justice David B. Orsborn

Place of Hearing:	St. John's, Newfoundland and Labrador
Date(s) of Hearing:	December 17, 2019
Date of Oral Judgment:	December 18, 2019

Summary:

On or about November 9, 2019, Business Development Bank of Canada ("BDC"), a secured creditor of Norcon Marine Services Ltd. ("Norcon") served a Notice of Intention to enforce its security pursuant to section 244 of the *Bankruptcy and Insolvency Act* ("BIA"). In response, but more than ten days after being served with BDC's Notice of Intention, Norcon, pursuant to section 50.4 of the BIA, filed Notice of Intention to make a proposal to its creditors. On December 5, 2019, Norcon applied pursuant to section 11.02(1) of the *Companies' Creditors Arrangement Act*, ("CCAA") to transfer its proposal process to the CCAA restructuring regime. Concurrently, BDC applied pursuant to section 243 of the BIA for a court-appointed receiver. Both applications were heard together. **Held:** Both applications were dismissed. The evidence did not support a finding of "appropriate circumstances" to warrant initiating proceedings under the CCAA. Neither, in the circumstances where BDC enjoyed a contractual right to appoint a receiver, did the evidence support the conclusion that it would be just and convenient for the Court to exercise its discretion to appoint a receiver.

Appearances:

Tim Hill, Q.C.	Appearing on behalf of Norcon Marine Services Ltd.

Darren D. O'Keefe and Allison J. Philpott	Appearing on behalf of Business Development Bank of Canada
Peter Wedlake	Appearing on behalf of Grant Thornton Limited, proposed court-appointed Receiver
Geoffrey L. Spencer	Appearing on behalf of Deloitte Restructuring Inc., proposed court-appointed Monitor
Joseph J. Thorne	Appearing on behalf of Bank of Nova Scotia

Authorities Cited:

CASES CONSIDERED: *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36; *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35, rev'd 2015 SCC 53; *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023; *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.).

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

TEXTS CONSIDERED: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell: Toronto, Ontario 2013-2014).

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] The Court has been asked to rule on what are essentially two competing applications. One is an application by a debtor – Norcon Marine Services Ltd. ("Norcon") to transfer restructuring proceedings from the proposal track in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), to the reorganization track provided by the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The second is an application by a secured creditor – Business Development Bank of Canada ("BDC") – pursuant to section 243 of the BIA for a court-appointed receiver.

[2] The applications were heard on December 17, 2019 and a decision given on December 18 in the form of a brief summary only. Both applications were dismissed.

ISSUES

[3] Is Norcon to be permitted to continue its restructuring proceedings under the CCAA?

[4] Should a receiver be appointed by the Court?

BACKGROUND

[5] For some 20 years, Norcon has been involved in the marine transportation business, operating passenger/freight and cargo ships. Presently, it owns four vessels.

[6] In recent times, Norcon has been hit hard by the loss of government contracts for ferry services and by problems in the aquaculture industry, an industry which provides and continues to provide a source of revenue for Norcon. Two of Norcon's vessels are presently listed for sale, and one is under arrest pursuant to proceedings in the Federal Court. The fourth vessel is working in the aquaculture business. Norcon also owns some real property.

[7] Because of the loss of the ferry contracts, the downturn in the aquaculture business and the need to write off a large debt from a related company, Norcon's financial situation is not good.

[8] BDC is owed almost $1,400,000, some $836,000 of which represents the guaranteed debt of Burry's Shipyard Inc. ("BSI"), a related company which is now bankrupt.

[9] On or about November 9, 2019, BDC served a Notice of Intention to enforce its security under section 244 of the BIA. On November 25, 2019, Norcon filed, pursuant to section 50.4 of the BIA, a Notice of Intention to make a proposal under the BIA. Such a notice may only be filed by an insolvent person.

[10] It is clear that one of the reasons, if not the primary reason, for Norcon's filing of a Notice of Intention was to impose a statutory stay on any enforcement actions by BDC. However, due to the lapse of time between November 9 and November 25, 2019, the statutory stay provision was not engaged.

[11] On December 5, 2019, Norcon filed an application seeking, in effect, to transition the BIA proceedings to CCAA proceedings. It asked for an initial order under section 11.02(1) of the CCAA, the effect of which would be to stay all proceedings – including BDC's enforcement action, for an initial ten days. Concurrently, BDC filed an application pursuant to section 243 of the BIA asking for a court-appointed receiver. These are the two applications before the Court.

DISCUSSION

[12] I will deal first with Norcon's application for an initial CCAA order.

[13] Provided that no proposal has been filed, proceedings commenced under Part III of the BIA may be continued under the CCAA. As Justice Brown said in *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, the BIA proposal regime and the CCAA regime "serve the same remedial purpose" (paragraph 11), with the CCAA regime being somewhat more flexible. However, the objective remains the same – to provide a window of opportunity within which, without having to deal with creditors' claims and enforcement proceedings (because of a statutory stay), a company can explore the prospect of a reorganization or a sale which would avoid or significantly lessen the harmful economic and social effects of a liquidation and cessation of the business. See, generally, *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60. I refer particularly to paragraph 59:

> 59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [Citation omitted.]

[14] The threshold for gaining access to the CCAA process is not high. On an initial application, section 11.02(3)(a) requires an applicant to satisfy the court that "circumstances exist that make the order appropriate". When a continuation is sought in circumstances where, as here, the BIA proposal process has already been engaged, case authorities suggest the section 11.02(3)(b) criteria of good faith and diligence also come into play. See *Clothing for Modern Times* at paragraph 14; and *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36, at paragraphs 22-23.

[15] Although the threshold of appropriate circumstances is, in my view, low, it does require the Court to consider the initial application in the context of the objectives of the CCAA. In other words, is the Court able to conclude, even at an early stage, that there is some chance that engaging the CCAA process – which brings all enforcement proceedings to a halt – will result in furthering the purposes of the legislation?

[16] To obtain this breathing room, a debtor must do more than simply plead for time. The authorities speak of the need to have "a germ of a plan" that would suggest "a reasonable possibility of restructuring". In *Industrial Properties Regina,* the Saskatchewan Court of Appeal put it this way – at paragraphs 19-21:

> 19 The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 14, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) [*Alberta Treasury*]; *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 (Ont. S.C.J.) at paras 51-53, (2015), 22 C.B.R. (6th) 67 (Ont. S.C.J.); *Redstone Investment Corp., Re*, 2014 ONSC 2004 (Ont. S.C.J.) at paras 49-50.
>
> 20 ... The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order [now ten days], the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

> 21 For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. … If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: ...

[17] The present case is a little different than the usual CCAA initial application. Norcon's Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago. In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the "germ" of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case. Further, once a debtor has engaged the BIA proposal process, there should be some reason, linked to the purpose of the restructuring/reorganization objective, to warrant continuing under the CCAA process. See, for example, the impending expiration of the maximum six-month proposal period in *Clothing for Modern Times*. The earlier in the BIA proposal process the transfer request, the more apparent should be the particular purpose precipitating the request for transition to the CCAA.

[18] What does the evidence here suggest?

[19] The evidence from Norcon consists of a pro-forma affidavit of Glenn Burry – an owner of the company – deposing as to the facts in the application. The only paragraph in the application that looks to the future is paragraph 12:

> 12. The Company is actively seeking new contracts for its vessels and services, but does not expect to enter into such new contracts until early Spring, 2020.

[20] There is no other evidence from Norcon about potential available contracts, ability to bid, chances of success, terms, efforts to date, or the like.

[21] BDC filed an affidavit of Robert Prince, Director of Business Restructuring, setting out the lengthy history of BDC's dealings with Norcon and BSI. Norcon filed a "Pre-filing Report" of Deloitte Restructuring, the proposed CCAA monitor, and also filed its "review engagement" financial statements for the year ending January 31, 2019. The monitor updated the figures to October 31, 2019.

[22] As October 31, 2019, Norcon's current assets totaled $611,000, primarily receivables of $561,000 (rounded). Current liabilities were just over $2,660,000, not including the $836,000 liability attached to the guaranteed debt of BSI. The current liabilities include approximately $444,000 owed to the Canada Revenue Agency for unpaid source deductions and the like, income taxes of $54,000, bank indebtedness and accounts payable of over $1,290,000, and $873,000 representing the current portion of long-term debt. The long-term debt (excluding the current portion) owed to arm's-length creditors is $1,400,000. It is not contested that Norcon, as of the date of filing of the application, satisfied the $5,000,000 threshold under section 3(1) of the CCAA.

[23] The net book value of the fixed assets – primarily the vessels – is shown as $5,800,000. There is no evidence of current estimated market value.

[24] Of the efforts to date to reorganize or restructure Norcon, the Pre-filing Report says this – at paragraph 6.1:

> 6.1 [Norcon] has taken the following steps to deal with operational and financial challenges it is currently facing:
>
> (i) Reduced operating expenses, including a reduction in headcount and a redeployment of Management resources from administrative to revenue generating tasks.
>
> (ii) Actively pursuing contracts for the next operating season.
>
> (iii) Prior to the NOI Filing, the Applicant was working with CRA on an arrangement satisfactory to both parties to reduce the liability owing from the Applicant.

> (iv) Engaged in discussions with Deloitte regarding a financial consulting engagement during the week beginning November 17, 2019.

[25] The proposed monitor reviewed Norcon's projected cash flow statement for the 13 weeks ended February 28, 2020. The Pre-filing Report says:

> 7.3 The Cash Flow Forecast has been prepared by Management for the purpose described in the notes to the Cash Flow Forecast, using the probable and hypothetical assumptions set out in the notes.

[26] The assumptions referred to are the projection of the collection of accounts receivable as of November 25, 2019, and the continuation of an existing vessel crewing contract and aquaculture support contract. No evidence was given as to the particular provisions or durations of these contracts.

[27] I did not find the proposed monitor's comments on the cash flow report particularly helpful:

> 7.4 The Proposed Monitor's review of the Cash Flow Forecast consisted of inquiries, analytical procedures and discussions on the information provided by Management of the Applicant. The Proposed Monitor's involvement with respect to the hypothetical assumptions was limited to evaluating whether they were consistent with the purpose of the Cash Flow Forecast. The Proposed Monitor has also reviewed the supporting documentation provided by Management of the Applicant for the probable assumptions and the preparation and presentation of the Cash Flow Forecast.
>
> 7.5 Based on our review and the foregoing reserves and limitations, nothing has come to the attention of the Proposed Monitor that causes us to believe that, in all materials respects:
>
> (i) the hypothetical assumptions are not consistent with the purpose of the Cash Flow Forecast;
>
> (ii) as at the date of the Pre-filing Report, the probable assumptions developed by the Applicant are not suitably supported and

> consistent with the plans of the Applicant or do not provide a reasonable basis for the Cash Flow Forecast, given the hypothetical assumptions; or
>
> (iii) the Cash Flow Forecast does not reflect the probable and hypothetical assumptions.

Counsel was not able to assist in my comprehension of these paragraphs.

[28] The projected cash flow report, on its face, shows a cash position improvement of $197,001 over the 13-week period. However, $283,476 of the cash inflow comes from the collection of existing accounts receivable. Taking these receivables out of the equation, the projected cash position will worsen by $86,475.

[29] The projected cash flow took no account of debt servicing over the 13-week period, such debt servicing estimated by BDC to be in excess of $83,000.

[30] The monitor appears to offer argument in support of Norcon's application for a CCAA process. It gives the following reasons – at paragraph 9.1:

> 9.1 As discussed herein, the Applicant wishes to convert the NOI Filing to the CCAA Proceedings on December 17, 2019 for the following reasons:
>
> (i) the CCAA will provide the Applicant with increased flexibility as it moves forward with its restructuring plan;
>
> (ii) the CCAA will provide the Applicant with additional time (if required) to prepare and present a restructuring plan, including a Plan of Arrangement, to its creditors; and
>
> (iii) if granted, the Initial Order will provide the Applicant with a stay of proceedings against all creditors, including the pending application of BDC to appoint a Receiver over the Property of the Applicant.

[31] The arguments relating to increased flexibility and additional time were not explained. The time argument is difficult to accept where, unlike the situation in *Clothing for Modern Times*, the BIA proposal process is just beginning and can potentially last for six months. I note that the situation in *Clothing for Modern Times* was where the available extensions of time to make a proposal had expired, leaving a CCAA continuation as the only means of avoiding a deemed bankruptcy.

[32] There is nothing I see in the proposed monitor's report which provides a hint of a plan for restructuring, other than, as noted, a plan to reduce operating costs in some undefined amount.

[33] The cash flow projection shows a 13-week total of compensation, occupancy and related general expenses of some $263,000, a weekly average of just over $20,000. How savings within these expenditures would realistically assist in restructuring the finances of Norcon – with a current ratio (current assets/current liabilities) of 0.23 was not explained. I think it is fair to say that, overall, the issues facing Norcon are issues of revenue and debt servicing rather than control over relatively minor expenses.

[34] The financial statements and the projected cash flow statement provide no support for Norcon's position. The report of the proposed monitor provides no support for Norcon's position. The only hope offered is one in the form of pursuing new contracts with the hope of getting one. In the circumstances of this case, that hope is not sufficient to satisfy the appropriateness threshold needed to open the door to CCAA proceedings.

[35] Assessing the matter as objectively as I can, the evidence does not disclose a germ of a reasonable possibility of reorganizing or restructuring Norcon to a position from which it can either continue its operations or be sold as a going concern or otherwise. The evidence discloses no potentially viable thread with which to begin the process of weaving a plan that will fulfill the objectives of the CCAA. The threshold of appropriate circumstances has not been crossed.

[36] In view of this finding, it is not necessary to consider the issues of good faith and due diligence.

[37] The application for an initial CCAA application is dismissed.

[38] That leaves BDC's request for a court-appointed receiver. BDC's request is supported by the Bank of Nova Scotia, another senior secured creditor.

[39] BDC's application was brought following its November 9, 2019, Notice of Intention to enforce its security. As noted, BDC is owed almost $1,400,000 by Norcon, including the guaranteed debt of BSI, a related company which is now bankrupt. It is fair to assume that BDC initiated the enforcement mechanism to protect its own interests as a secured creditor.

[40] The appointment of a receiver by the Court engages the exercise of the Court's discretion. A receiver may be appointed when it appears to the Court to be just or convenient to do so. Any discretion must be judicially exercised.

[41] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Justice Edwards set out, from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, factors that may be considered by a court – at paragraph 26:

> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> (c) the nature of the property;
> (d) the apprehended or actual waste of the debtor's assets;
> (e) the preservation and protection of the property pending judicial resolution;
> (f) the balance of convenience to the parties;
> (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
(i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
(k) the effect of the order on the parties;
(l) the conduct of the parties;
(m) the length of time that a receiver may be in place;
(n) the cost to the parties;
(o) the likelihood of maximizing return to the parties; and
(p) the goal of facilitating the duties of the receiver.

[42] In *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35 (rev'd on constitutional grounds 2015 SCC 53), the Saskatchewan Court of Appeal suggested this analysis – at paragraph 99:

> 99 The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

[43] These factors are not unlike those considered when injunctive relief is sought.

[44] It is accepted that the court's appointment of a receiver over the property of a person is an extraordinary order. It reflects the authority and jurisdiction of the court to act to protect and preserve property, often before the issues between the parties have been adjudicated.

[45] The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver.

[46] The party asking the Court to appoint a receiver must persuade the Court that the appointment would be just or convenient. The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question. To put it simply, is it fair or necessary that the authority of the Court be used to pass control of, in this case, the debtor's assets to a receiver who will deal with those assets pursuant to court supervision?

[47] In this analysis, of what relevance is it that the applicant – here, BDC – has the ability and contractual authority to appoint a receiver and manager without enlisting the aid of the Court?

[48] In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, the Court said this at paragraph 42:

> 42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).
>
> [Emphasis added.]

[49] Blair J. of the Ontario Superior Court expressed it slightly differently in *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.) when he said at paragraphs 11 and 13:

> 11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: … In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. … The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; …
>
> …
>
> 13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver … and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances … including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.
>
> [Emphasis added.]

[50] I note his use of the word "necessary" when referring to a court appointment. Thus, while the fact of a party's prior consent to a private contractual appointment may lessen or eliminate the need for caution because of the intrusive nature of the appointment of a receiver, the threshold of just or convenient must still be met. Particularly when considering whether an appointment would be convenient – an element which incorporates the practical and protective nature of the appointment – my view is that a court must consider whether court supervision of the receiver is necessary to protect and preserve the assets in question and to manage any undue complexity in the functioning of the receivership. The issue is not that far removed from situations in administrative law where the availability of an adequate alternative avenue of relief may persuade

a court not to exercise its discretion to grant relief by way of an order in the nature of a prerogative writ.

[51] Is a court-supervised receivership order convenient in the sense of the added factor of court supervision being necessary to protect the interests of BDC and others affected by the fortunes of Norcon?

[52] Here, counsel for BDC acknowledged that a receivership of Norcon's secured property would be relatively straightforward. As noted, the assets are primarily fixed assets – four vessels and real property – covered by security. There is no suggestion that the assets are at risk of being removed from the jurisdiction. Any ongoing management of the business would not be complex. Counsel advised that two primary creditors, BDC and the Bank of Nova Scotia, have already signed an inter-creditor agreement addressing issues of relevance to them.

[53] BDC offers the following reasons to support a finding of just or convenient:

> 29. BDC submits that it is just and convenient for this Court to appoint a receiver in the present case for the following reasons:
>
> (a) BDC has the contractual right to appoint a private receiver.
> (b) The amount of the Indebtedness is not in dispute.
> (c) … Norcon has withheld information, has shown disregard for DBC's rights and has occasioned several Events of Default. A court-appointed receiver will be able to prevent and/or mitigate further defaults through greater transparency.
> (d) The arrest of one of Norcon's vessels in which BDC has a security interest establishes that BDC's security is in jeopardy. A court-appointed receiver is necessary to immediately protect and preserve BDC's security interest in Norcon's property.
> (e) A court-appointed receiver will be able to more effectively deal with and sell property in a manner that will maximize the value for the creditors of Norcon.
> (f) A court-appointed receiver will be able to provide all stakeholders with a more efficient forum for creditors of Norcon to resolve priority issues.

> (g) A court-appointed receiver is required as the cooperation of Norcon with a private receiver is unlikely, given Norcon's conduct to date.

[54] The application continues:

> 30. The Court's refusal to grant the Receivership Application would place the interests of BDC and other creditors at significant risk.

[55] There is little, if any, evidence on these points.

[56] With respect to the conduct of Norcon, the evidence is that it did not disclose to BDC that one of its vessels had been arrested in the context of a proceeding in Federal Court. Without further evidence and argument on the point, I am not prepared to conclude, without more, that the arrest in and of itself places BDC's security in jeopardy and while this one instance of non-disclosure may be a fact, it is not sufficient to support the inference that Norcon or its management would be obstructionist so as to warrant Court supervision of a receivership. Neither, in my view, does it support the inference that Norcon's management would not cooperate with a private receiver. The evidence does support the view that the BIA-related history of the related company, BSI, and the CCAA filing by Norcon reflect efforts to delay enforcement action by creditors. But where a creditor has the ability to act expeditiously pursuant to a contractual right, the fact that a debtor may try to delay the process does not call for the intervention of the Court.

[57] The suggestion by BDC that Court supervision is necessary to more effectively deal with and sell the property and provide a more efficient forum for the resolution of priority disputes is simply that – a suggestion. I refer again to Blair J.'s comments in *Freure Village* where he suggests that an examination of all the circumstances is required to determine whether or not an appointment by the court is necessary.

[58] A fair assessment of all of the circumstances requires evidence. I note the comprehensive nature of the evidence before Edwards J. in *Crown Jewel Resort*.

[59] Looking at the evidence as a whole, I am not satisfied that there is sufficient evidence from which to draw reliable inferences relating to, and these are examples only, (i) the potential for irreparable harm in the absence of court supervision; (ii) the risk to BDC and the need for the added factor of court supervision in the protection and preservation of the assets; (iii) the need for court supervision of the relationship between Norcon and its creditors; and (iv) the relative costs and returns of a court-supervised process.

[60] In effect, and with respect, I am being asked to assume that a court-supervised process is necessary – just or convenient – for the effective and lawful realization of BDC's security interest. I am not prepared to make such an assumption.

[61] BDC has the contractual right to appoint a receiver/manager with wide powers to take over the business, manage Norcon and its assets and, if considered appropriate, sell the assets. There is no evidence to suggest that such a receiver/manager would not act efficiently and responsibly in accordance with the law, would not properly protect BDC's security, would not act in good faith to secure maximum value for the secured property, and would not have ready access to the court process should the need arise.

[62] In summary, on such evidence as I have, I am not able to reasonably draw the inference that the circumstances are such as to render just or convenient the Court's appointment of a receiver.

[63] BDC's application for a court-appointed receiver is dismissed.

[64] The parties will bear their own costs in both matters.

DAVID B. ORSBORN
Justice

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 5

Rules of the Supreme Court, 1986

Extension, etc, of time

3.03. (1) The Court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these rules, or by any order, to do or abstain from doing any act in a proceeding.

(2) The Court may extend any period referred to in rule 3.03(l) although the application for extension is not made until after the expiration of the period.

(3) The period within which a person is required by these rules or any order to serve, file or amend any pleading or other document may be extended by consent in writing of the parties.

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 6

1989 CarswellNfld 220
Newfoundland Court of Appeal

Lundrigan Group Ltd. v. Pilgrim

1989 CarswellNfld 220, [1989] N.J. No. 22, 14 A.C.W.S. (3d) 238, 234 A.P.R. 217, 75 Nfld. & P.E.I.R. 217

Joseph Pilgrim, Appellant v. The Lundrigan Group Limited, Respondent

Gushue, Mahoney, Marshall JJ.A.

Judgment: February 2, 1989
Docket: Docs. 143/87, 85/88

Counsel: *Mr. Gerard Gushue*, for the Appellant.
Mr. Carl Thompson, for the Respondent.

***Marshall, J.A.*:**

1 Joseph Pilgrim has taken these appeals from decisions in the Trial Division denying his applications to set aside a prior order granting Lundrigan's Group Limited leave to enter judgment against him for $25,000.00. That order was granted as a result of the failure of either Mr. Pilgrim or his co-defendant or their counsel to appear when the proceeding was called for trial.

The judgment and the facts and proceedings relevant to it

2 The action by Lundrigans was taken against Joseph and Ambrose Pilgrim and claimed wrongful conversion by Messrs. Pilgrim of certain restaurant furniture and equipment which had been located in commercial premises situate in the Viking Mall in St. Anthony that had been leased in 1982 by Lundrigans to a company bearing the name "Hungry Eye Limited". The Pilgrims had not been associated with Hungry Eye when the lease was consumated but had purchased the shares of the Lessee in 1983.

3 By March of 1986 rental under the lease had fallen into arrears whereupon Lundrigans sued Hungry Eye and ultimately issued execution against the furniture, fixtures and other restaurant equipment of the Lessee in an effort to recover $14,738.00, being the amount of its judgment and costs. However, no recovery was realised since these assets had been sold previously and the proceeds of sale allegedly used to defray other debts of Hungry Eye after Mr. Pilgrim had consulted the Bank of Nova Scotia which held a chattel mortgage upon these assets. Being thus frustrated in realizing upon its judgment, Lundrigans sought recourse against Ambrose and Joseph Pilgrim claiming wrongful conversion of the assets.

4 Following issuance of a writ on April 28, 1986 against Messrs. Pilgrim, an appearance and defence were filed on their behalf by Mr. Gerard J. Martin, a solicitor practicing in Corner Brook. The defence simply denied "each and every allegation set out in the statement of claim".

5 When the matter came for trial on January 15, 1987, the defendants failed to appear either in person or by counsel. The trial judge thereupon gave leave to Lundrigans to prove its claim pursuant to rule 42.01(2)(b) which provides that when a proceeding is called for trial and the plaintiff appears, but the defendant fails to do so, the Court may allow the plaintiff to prove his claim. Having proven its claim, Lundrigans entered judgment on January 23, 1987, against both defendants for $25,000.00.

6 There ensued a series of attempts on the part of Lundrigans to recover from Joseph Pilgrim. On February 7, 1987, it levied upon his residence in St. Anthony. This was shortly followed by an application to require Mr. Pilgrim to appear in the Court at Corner Brook to disclose information regarding his assets. An order requiring him to so appear on April 6, 1987 was served upon him twelve days prior to the required appearance date. When he failed to appear on April 6th, an order was issued requiring his appearance on May 27, 1987, to show cause why he ought not be cited for contempt. This later order was served

upon Mr. Pilgrim in St. Anthony on May 20, 1987. He responded to this order and appeared in Court at Corner Brook on the day appointed when he was duly examined. Following this last proceeding attachments were placed upon his account in White Hills Credit Union and upon his salary in the hands of his employer. It was only after all of these post-judgment proceedings had been taken that Joseph Pilgrim moved to have this judgment set aside.

7 Mr. Pilgrim's affidavit supporting his application portrayed a lack of communication by his solicitor with him. His failure to appear at the trial or to respond to the ensuing proceedings until summoned to answer the potential contempt citation was ascribed to this neglect. He averred that he heard nothing from his solicitor after his initial visit to the latter's law office in Corner Brook, when he first entrusted his defence to him, until he received the execution order on his residence in early February. The affidavit stated that upon becoming aware of the execution he made phone calls to the solicitor's office and while he was unable to contact him directly, apprised his office of the happening. Mr. Pilgrim further swore in his affidavit that on each occasion when further court orders were received he asked his solicitor to look after the matter.

8 On retrieving his file from the solicitor's office in early June, he states in his affidavit that he discovered that numerous letters and notices of court proceedings had been sent to his solicitor about the matter of which he had no knowledge.

9 At this juncture Mr. Pilgrim instructed new counsel who proceeded with an application to set aside the judgment on the basis of rule 42:01(3). That rule empowers the court to set aside a judgment entered upon default of appearance at trial "on such terms as it thinks just, upon an application made to it within ten days after the order has been given".

10 The application was not made within the ten day period and, at the hearing on June 26, 1987, Soper J. observed that it had not been shown to him that there was any power vested in the court to extend the ten day time limit prescribed by Rule 42:01(3) and in the absence of that power he was bound by the time limitation. Thus he denied the application making the following observation:

> The application made to the court was beyond the ten-day period. Therefore, regardless of how sympathetic one may feel towards the application under the circumstances, it must be denied

.

11 An appeal from this order of Soper J. was duly taken to this Court. The notice of appeal claimed the learned judge erred in his decision because he failed to consider Rule 3:03 which empowered the court to extend the time limits in any proceeding.

12 This action was coupled with a second application by Mr. Pilgrim to the trial division seeking an extension of time pursuant to Rule 3:03 for leave to apply to set aside the judgment obtained by Lundrigans. That application was heard by Woolridge J.

13 At this second hearing in the trial division counsel for Mr. Pilgrim explained the initial application to set aside was made under rule 42:01(3). By this subsequent application counsel for Mr. Pilgrim drew to the Court's attention the power to extend time conferred by rule 3:03 with the objective of obviating the impediment perceived by Soper J. to setting aside of the original judgment.

14 In responding to the application before Woolridge J., counsel for Lundrigans noted that, while it might be open to him to argue *res judicata*, he thought it inappropriate to so argue because Soper J. had explicitly noted in his judgment that he had not dealt with the merits of the application. Consequently he based his objections to the second application on grounds that Mr. Pilgrim had not demonstrated in his affidavit supporting it that he had a defence to the action or that there was any reasonable cause for Mr. Pilgrim's delay in the matter.

15 Nevertheless Woolridge J. expressed the view that the issue of setting aside the judgment was *res judicata* since the effect of granting the extension would be to re-try the issue determined by Soper J. However, Woolridge J. went on to observe that the circumstances brought before the court did not, in his view, demonstrate that Mr. Pilgrim had either the necessary defence worthy of trial or a reasonable excuse for not appearing at trial which would warrant the court exercising its discretionary powers to extend time under Rule 3:03.

16 This decision of Woolridge J. was not appealed within the time prescribed by the rules. Consequently on December 1, 1987, Lundrigans applied to this Court to strike out the appeal against the judgment of Soper J. on the basis that Woolridge J.'s unchallenged decision represented a decision of the trial division disposing of the matter on its full merits.

17 On the initiative of Lundrigan's counsel the matter came before this Court on May 2, 1988, both in respect of the application to strike and to set down the appeal against the decision of Soper, J. should the prior motion be denied. As a result of discussion between the bench and counsel the matter was adjourned to enable Mr. Pilgrim to apply for leave to appeal the decision of Woolridge J. in order to bring all existing proceedings before the Court so that the entire matter could be dealt with.

18 The application was heard on June 6, 1988, when leave was granted to appeal the second decision in the matter which had been rendered by Woolridge J. At that time it was ordered the notice of appeal be filed by June 17, 1988, and the appeal book and factum in respect of the second application on the same date.

19 The notice of appeal was duly filed within the time so ordered but neither appeal book nor factum had been filed by September 15, 1988, when Lundrigans again applied to set the matter for hearing. The appeal was set down for hearing on November 28, 1988. In the interval Lundrigans further gave notice of its intention to move that the appeal proceedings before the Court be struck out by reason of the failure of Mr. Pilgrim to comply with his latest judicial obligation to file the appeal book and factum as he was ordered. Following receipt of this notice counsel for Mr. Pilgrim finally on November 22, 1988 filed the factum relative to the appeal from the decision of Woolridge J.

Notice to strike appeal proceedings

20 The first question which must be addressed is whether Lundrigan's motion to strike proceedings should be granted because of the appellant's failure to file the appeal documents relating to the second appeal within the time ordered.

21 While the delay in filing the appeal book and factum respecting the second application strains one's comprehension when one considers the history of this matter in its entirety, in my view the motion must be denied. The essential reason for its denial is because the documents when finally filed prior to the hearing contained no new material which could be deemed to have taken Lundrigans by surprise. Hence the respondent's capacity to respond was not impaired by the delay. This fact appears to have been tacitly recognized by Lundrigans since it applied for a hearing of the matter in the absence of the documentation and, in fact, did not file its motion until shortly before the hearing.

22 In the circumstances, therefore, this motion should be denied and the issues raised by the dispute considered on their merits.

The issues

23 The first issue to be addressed is whether Soper J. erred when he concluded there was no power vested in the Court to extend the time of an application by a party to set aside the judgment beyond the ten day limitation prescribed in Rule 42:01(3). If the first question is resolved affirmatively, consideration must then be given to whether the circumstances as reflected by the foregoing facts and proceedings are such that they justify such extension and setting aside of the judgment obtained by Lundrigans against Messrs. Pilgrim.

The power to extend time

24 As to the first issue, with the utmost respect, I am of the opinion that Soper J. did err when he deemed himself powerless to extend the time for Mr. Pilgrim's application to set aside the judgment beyond ten days. This power is contained in Rule 3:03, in which clauses (1) and (2) are relevant to the issue and read as follows:

> 3:03 (1) The Court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these rules, or any other order, to do or abstain from doing any act in any proceeding.

(2) The Court may extend any period referred to in rule 3:03(1) although the application for extension is not made until after the expiration of the period.

25 This rule confers the power which Soper J. deemed lacking to extend the ten day time limit prescribed in Rule 42:01(3) and enabled him to entertain the application to set aside the judgment. Furthermore, it was not a pre-requisite to the exercise of this power that the time extension be made the subject of a separate substantive application since resort could have been had to the rule, as a part of the general body of extant law, in the course of considering the motion to reopen proceedings. Support for this premise is found in *Bradshaw v. Warlow* (1886) 32 Ch. D. 403.

26 *Bradshaw* was also an appeal against a decision denying an application to set aside a judgment which had been entered after the defendant failed to appear at trial. That application had likewise been rejected on grounds that it had been taken too late. At the hearing the defendant had requested an extension of time for taking the application relying upon a rule, substantially similar to rule 3:03, which empowered the court to enlarge the time appointed by the rules for taking any proceedings upon such terms "as the justice of the case may require" and which also provided any such enlargement may be ordered although the application for the same was not made until after expiration of the time appointed. Notwithstanding his knowledge of this rule, the Vice-Chancellor of the Country Palatine refused to accede to the request as he was of the opinion that an application for an extension of time ought to have been made by separate motion.

27 Although the English Court of Appeal determined the particular circumstances in *Bradshaw* did not merit setting aside of the judgment, all three appeal judges were of the unanimous opinion that it was unnecessary to make a separate motion for time extension and that the Vice-Chancellor was erroneous in that respect.

28 Similarly, in my view, no separate motion was required to extend time for applying to set aside the judgment entered against Messrs. Pilgrim by Lundrigans. Counsel for the judgment creditor could not be heard to say he was taken by surprise if the time extension was considered in concert with the application to set aside the judgment. It was patently evident that such consideration would be necessary to maintain the motion. Time extension was complementary to the question whether the matter should be reopened. Requiring a separate application would only serve to impede timely resolution of the issue.

29 Consequently, with utmost respect, the learned judge who heard the initial application to set aside erred in concluding he had no power to extend the ten day period prescribed by Rule 42:01(3) for applying to set aside a judgment rendered under 42:01(2)(b).

Effect of second application before the trial division

30 Before considering whether the circumstances of this case justify an extension of time and the setting aside of the judgment, it is necessary to consider the effect of the second application upon these circumstances.

31 In my opinion Woolridge J. was correct when he held the issue was *res judicata*. The denial of the initial application amounted to a judicial decision by the trial division in respect of the motion to set aside the judgment. It is a well settled principle that such decisions are final in the adjudicating tribunal, not only as to the matters dealt with but also with respect to questions which the parties had the opportunity to raise. The unsuccessful party will not be permitted to reargue its case before the same court relying upon additional material unless that material could not have been ascertained by reasonable diligence and contains evidence which would, if established, be demonstrably capable of altering the result (see *Phosphate Sewerage Co. v. Malleson* (1879) 4 App. Cas. 801; *Fenerty v. City of Halifax* (1920) 50 D.L.R. 435; and *Scotia Chevrolet Oldsmobile Limited v. Wynate* (1970) 15 D.L.R. (3rd) 438).

32 Obviously the pre-requisite of inavailability is not present in this case. The power conferred under Rule 3:03 was readily available for counsel's use when he advanced his argument in the first application. The judgment debtor cannot obtain a reconsideration of his motion by the adjudicating court on the basis that he had failed to bring to the attention of that court a rule which was in effect at the time and, indeed, the substance of which has been embodied for decades in our rules of procedure and practice.

33 As previously noted, counsel for Lundrigans did not oppose this second application on grounds of *res judicata* but on the merits of the application itself. He drew the attention of this court to the observations of Woolridge J. to the effect that Mr. Pilgrim had not demonstrated either the quality defence or a reasonable excuse for his laches which were requisite to invoke the discretionary power of the court to reopen proceedings. Counsel portrayed the decision of Woolridge, J. as a finding on the merits of the matter by the trial division in valid exercise of the discretionary power conferred by rule 3.03 upon the judge of first instance and, as such, the same ought not to be disturbed by the appellate court.

34 With respect, that argument cannot be sustained. Regardless of the undoubted respect due to the observations of Woolridge, J., the effect of *res judicata* renders any finding upon the merits of no binding consequence. That finding cannot constitute a foundation for the exercise of a discretionary power by a trial court since no circumstances existed which would permit reconsideration of the application by the trial division.

35 The matter must, therefore, be addressed solely in relation to the first application where, in consequence of the error of law, the presiding judge had not in fact exercised his discretionary power. Thus, it is open to this Court to resolve the issues whether time should be extended and the judgment set aside and it should do so in the interest of avoiding further protracted delays in resolving this already prolonged matter.

Law applicable to this application for time extension

36 There are no strict inviolable rules defining the exact circumstances upon which the court must entertain a time extension in cases such as the one at bar. This was noted in *re. Manchester Economic Building Society* (1883) 24 Ch. D. 488. In this case, Bowen, L.J. in addressing the question of extension of time for appeal, said at p. 503:

> ... The section gives leave to the Court of Appeal practically to extend the time for appealing. It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circimstances and in a defined way, would be very perilous. The Rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for a decision of that case - otherwise there is the great danger, as it seems to me, of crystalizing into a rigid definition that judicial power and discretion which the Legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered ....

37 These observations relating to extension of time for appeal to the Court of Appeal in England under the applicable rule then extant have, in my view, equal application to the extension of time under rule 3:03 for setting aside of a judgment under Rule 42:01(3). Both of our rules state decisions "may" be taken by the Court "on such terms as it thinks just". They both, therefore, confer a discretionary power which ought not be fettered by "iron rails" but rather should be guided by general prinicples.

38 The overriding general principle must be that in exercising its discretionary power the Court must balance the equities and justice of the situation with which it is seized. A successful plaintiff ought not, without good and sufficient reason, be deprived of the means of judicial enforcement of the Court's order. On the other hand, avoidance of injustice must be the paramount overriding consideration of the Court. Permitting justice to be done in specific circumstances appears to be the reason for existence of rules relating to setting aside of judgments and extending time to entertain such applications. This was noted in *Schafer v. Blyth* (1920) 3 Q.B.D. 140 where the Court also addressed an application to set aside a judgment and to extend the time for the application relating to it. The rules under consideration were expressed in language essentially similar to rules 3:03 and 42:01(3). Lush J. made the following observation at p. 143 in addressing whether the rule relating to extension of time should be applied:

> Counsel for the plaintiff has contended that it ought not to be applied, because the plaintiff should not be deprived of the fruits of the judgment which has been given in his favour, unless the defendant's application to set aside the judgment has been made strictly in accordance with the rules. I cannot agree with that. The object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice.

39 In this case, in order for the court to be satisfied that the setting aside of the judgment is just, it must be shown that Mr. Pilgrim has a potentially good and meritorious defence to the action. This does not mean the judge must be convinced the defence would succeed. That determination can only be made at trial and not from the affidavit upon which the application is based. However it does mean that the facts deposed in the affidavit of Mr. Pilgrim grounding the application to set aside the judgment must show that the defendant has a good and substantial defence and that there is a serious issue between the parties to be tried, in other words, that the defence is not vexations on frivolous (see *Ives v. Parlier* (1949) 2 D.L.R. 204).

40 Secondly, the defendant must also show that his or her conduct has been bona fide in relation to the delay and that it is explicable and reasonable in the circumstances. (*See Attwood v. Chichester* (1878) 3 Q.B.D. 722.) If the conduct of the defendant exhibits an attitude of dealing with the matter in his or her own time such conduct in itself might evidence a contempt for society's judicial institutions disentitling the defendant to relief and tipping the scales in favour of the judgment creditor.

Merits of proposed defence

41 The merits of the ostensible defence must be assessed in relation to the basis of the claim to which it is addressed. In this case that claim is based upon the tort of conversion which entails the "act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby the other is deprived of the use and possession of it". (Salmond: "on Torts", 14th ed. pp. 143-144.)

42 The affidavit of Mr. Pilgrim alleges the impugned act was that of Hungry Eye and not of Joseph Pilgrim since he was acting as agent of the company. It further raised the question of justification in that it stated Mr. Pilgrim had acted in consultation with a bank which held a registered chattel mortgage upon the assets alleged to have been converted.

43 Moreover, the affidavit challenged the right of Lundrigans to the assets by deposing that it had leased other space in Viking Mall to a competitor, in direct contravention of the terms of the lease and in discharge of it, with the effect that whatever claim it might have had to the assets in question by virtue of the lease was forfeited. It also contended that substantial assets, over and above those allegedly converted had been sold and the proceeds derived from that sale ought to be taken into account.

44 In my opinion these allegations raise issues which afford a serious defence to the action. This view is not affected, in respect of the argument based upon vitiation of the lease, by argument of counsel for Lundrigans that it was not open for Mr. Pilgrim to now challenge the validity of the lease since judgment had gone against Hungry Eye based on the lease's existence or because no claim or action had been made by the tenant against Lundrigans respecting the alleged breach. With respect, the extent, if any, by which any estoppel flowing from the judgment or acquiescence of Hungry Eye may affect Mr. Pilgrim's defence in these circumstances is itself litigable.

45 Furthermore, the measure of damages in the conversion action in itself constitutes a factor to be considered in determining the justice of reopening proceedings in this case. By executing under the judgment which it obtained against Hungry Eye, Lundrigans showed itself satisfied to resort to the assets which it subsequently alleged to have been converted for the amount of the judgment and costs in that action. Had it been successful in realising upon that execution, the maximum it could have realised for the assets would have been $14,738.00 being the total amount of the levy under the first judgment. The fact that some two months later in the second action against Messrs. Pilgrim it alleges itself to be entitled to recover $25,000.00 from these same assets is, in my view, a relevant consideration in determining whether justice would be served by setting aside the judgment obtained in that matter and granting the extension of time to make the application.

46 It may indeed be possible for Lundrigans to demonstrate that, as plaintiff in an action against a different party resting upon different grounds, it is entitled to recover in excess of $9,000.00 additional from the same assets. However, the acceleration is so marked and accrued within such a short period that the balance of justice militates towards the measure of damages being made subject to contested proceedings. Furthermore, the apparent willingness to settle upon the smaller amount to which Lundrigans would have been restricted under the levy may have some bearing upon the lease's validity which was one of the proposed defences.

47 Therefore, with all due respect to contrary views, and especially to those proffered by Woolridge, J., I am of the opinion that the circumstances of this case as set forth in the affidavit of Mr. Pilgrim, challenge to a sufficiently substantial degree the bases of the conversion claim, i.e. the right of Lundrigans to the assets and the justification of the impugned actions.

48 It needs to be observed by way of re-emphasis that the foregoing analysis ought not be interpreted as passing any opinion upon the superiority of the ultimate merits of the defence over the claim. That can only be determined by trial. However, in my view, the affidavit grounding the application to set aside the judgment raises serious questions and presents a potential defence which is neither, on its face, frivolous or vexatious. Consequently when viewed solely from the perspective of the merits of the proposed defence, the circumstances in this particular case indicate that justice would best be served by allowing the application.

The reasonableness of the delay

49 The second question to be addressed is whether those same circumstances demonstrate the delay to be reasonable and the conduct of Mr. Pilgrim to be bona fide in relation to it.

50 A superficial view of events from February 7, 1987, when the execution against his residence gave to Mr. Pilgrim knowledge that something was radically wrong, lends weight to the questioning of his bona fides. Counsel for Lundrigans forcibly argued that the appellant's inaction reflected a wish to proceed at his own convenient pace and laid particular stress on the fact that it took a motion to cite for contempt to force him from his sense of inertia. Indeed, it was not until he faced the peril of attachments upon his wages that he took the initiative of applying to set the judgment aside.

51 In explanation of this apparent inaction counsel for Mr. Pilgrim argued that his client had on each occasion contacted his solicitor's office by telephone. He contended that in so doing Mr. Pilgrim was under the impression he was in effect contacting the court as he equated lawyers with the court system itself, an equation which reflected the general communal opinion of the community where he resided and many other kindred communities in the Province. Consequently, he maintained Mr. Pilgrim had not treated any of the court's proceedings with nonchalance and there had been no inaction on his client's part. To the contrary, he argued Mr. Pilgrim had reacted promptly on each occasion by telephoning his solicitor's office and in so doing felt he had done all that was necessary by entrusting matters to his legal representative. Since, in his client's eyes, these actions were tantamount to responding directly to the court, Mr. Pilgrim saw no need of further action on his part until after his examination in court on May 27, 1987, and the ensuing wage attachment, when he engaged new counsel and promptly proceeded with his application.

52 In my opinion this explanation is tenable. It credibly depicts Mr. Pilgrim's conduct as being bona fide in relation to the delay and dispels any contrary impression that might otherwise be inferred from his perceived inaction.

53 In addressing this aspect of the matter, one must also have regard to the fact that St. Anthony, where Mr. Pilgrim resides, is one of the more northerly communities on the Island of Newfoundland. It is located on the top of the great northern peninsula and is some 350 miles distant from Corner Brook where his solicitor's office and the judicial centre is located. Hence communication by telephone was reasonable and personal visitations to the respective offices to supplement the calls would not reasonably be expected as they might ordinarily be from a person residing in closer proximity.

54 The period of time itself is a factor and there is no doubt that some time elapsed between February 7, 1987, when Mr. Pilgrim became aware that all could not be well as a result of the execution on his home, and some four months later when the application to set aside was launched. However, while the time lapse is a relevant consideration, it cannot be the determinative factor where it is demonstrated that a defendant has not lain by intentionally and the justice of the situation requires that proceedings be reopened.

55 This point was made in *Atwood* where in excess of nine months had transpired between the entry of judgment and the application to set it aside. There, having determined the defendant had a meritorious and substantial defence, Bramwell, L.J. at p. 723, disposed of the argument that the defendant's application was too late with the following words:

> When sitting at chambers I have often heard it argued that when irreparable mischief would be done by according a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view.

56 I agree that this is the correct view and necessary to do justice between the parties. In this context it is relevant also to note that any injury inflicted upon Lundrigans by the delay may not only be compensated by payment of costs but also by pre-judgment interest. Under the Judgment Interest Act (1988) S.N. cap. 81, the court has power to award pre-judgment interest from the date when the cause of action arose. Should it be shown just so to do, the judge at trial has the latitude to make such an order if the circumstances warrant.

57 Therefore, an analysis and weighing of all factors leads me to conclude that the delay in applying to set aside the judgment was not such which, in the circumstances pertaining, would reasonably preclude entertainment of the application to set the judgment aside. Furthermore, the explanation of Mr. Pilgrim's conduct during that period affords sufficient basis to accept his actions as being bona fide.

Conclusion and costs

58 Presented with serious bases of defence and a reasonable explanation for the delays and actions following entry of the judgment, I am of the opinion that it is just that the judgment in this matter be set aside. Any inconvenience that may be occasioned to the plaintiff as a result of the delay may be compensated if the circumstances warrant. In any event any inconvenience must be balanced against the irreparable harm which could be visited upon the defendant with an ostensible defence as a result of being required to respond to a judgment if on trial that judgment cannot be sustained in whole or in part.

59 One inconvenience to Lundrigans may be dealt with at this time by awarding to it costs both in this Court and in the Trial Division in respect of all proceedings from and including the appearance of its counsel before Soper, J. on January 15, 1987, when no one appeared for the defendants. This is in concert with rule 55.03(2)(b) which provides that the costs of an application to extend the time fixed by any rule shall be borne by the party so applying unless the court otherwise orders. It is also just to award these costs to Lundrigans since, as between it and Joseph Pilgrim, the former has shown a degree of forebearance throughout and ought not incur costs arising from the post judgment proceedings. On the other hand Mr. Pilgrim ought to bear responsibility for the alleged inaction of his counsel.

60 In summary, the appeal against the decision of Soper, J. should be allowed. The time for applying to set aside the judgment arising from the action against Messrs. Pilgrim is extended to permit the application to be entertained and the judgment is set aside to enable the matter to be defended and an amended defence filed. This defence must be filed no later than three weeks from the date of filing of this decision. Furthermore, the appeal against the decision of Woolridge, J. is denied insofar as it challenged the finding of *res judicata* only. The costs in connection with all proceedings from and including the hearing on January 15, 1987 on a party and party basis should be borne by the appellant.

***Mahoney, J.A.*:**

61 I concur.

***Gushue, J.A.*:**

62 I have had the advantage of reading the judgment of Marshall, J.A. and I agree with his disposition of the matter. However, I do so reluctantly, not because of any substantial disagreement with the reasons of my brother Marshall, but because the reality is that, through the laches and ineptitude of the appellant and/or his various counsel, this matter has dragged on for a period of two years, obviously at considerable cost and aggravation to the respondent and with no sign of disposition yet in sight. Almost every forward step in the process to date has had to be taken by the solicitor for the respondent, when such should have been

taken by the appellant. There is no question that, at the least, the respondent is entitled to its costs throughout, whatever the outcome of any further proceedings.

63 The reason why the judgment obtained under Rule 42.01(2)(b) must be set aside is that it does appear that the appellant may possibly have a valid defence to the action taken against him personally for the debt owing by the company of which he is a shareholder. There is further the fact that this judgment is for the amount of $25,000.00 when the debt proved by Lundrigans against the company is only for $14,738.00. Once again, the information supplied by the appellant is vague, but on the face of the matter it is possible that an injustice could be done the appellant if the judgment were permitted to stand.

64 I concur that the judgment be set aside and that the respondent will have its costs on a party and party basis to date. Leave is granted the appellant to amend its Defence which will be done within three weeks from the date of filing of this decision.

APPLICANT'S MEMORANDUM OF FACT AND LAW

TAB 7

2011 NLTD(G) 52
Newfoundland and Labrador Supreme Court (Trial Division)

Taylor v. Walsh

2011 CarswellNfld 122, 2011 NLTD(G) 52, 14 C.P.C. (7th) 185, 200 A.C.W.S. (3d) 947, 307 Nfld. & P.E.I.R. 145, 94 C.C.L.I. (4th) 204, 954 A.P.R. 157

Pamela L. Taylor, Plaintiff and Carol Walsh, First Defendant and AXA General Insurance AXA Assurance Generales, Second Defendant and The Dominion of Canada General Insurance Company Compagnie D'Assurance Generale Dominion du Canada, Third Defendant

Richard D. LeBlanc J.

Heard: February 24, 2011; March 7, 2011
Judgment: April 11, 2011
Docket: 200901T0860

Counsel: Colin D. Feltham, for Plaintiff
Gerry R. Fleming, for First Defendant

***Richard D. LeBlanc J.*:**

Introduction

1 On February 1st, 2010, the Statement of Claim of Pamela L. Taylor, the Plaintiff, as against the First Defendant (not the Second Defendant or the Third Defendant) was dismissed by order of Chief Justice Orsborn in response to an application filed by the First Defendant based upon the failure of the Plaintiff to comply with an order for disclosure made by Faour, J. on December 1st, 2009. The Plaintiff, while served with the applications heard by Faour, J. and Orsborn, C.J. in accordance with the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*"), failed to appear or respond to either application. The Plaintiff now seeks an order pursuant to Rule 29.11(2) to reinstate that Statement of Claim as against the First Defendant. This application was not filed until December 13th, 2010, notwithstanding that Chief Justice Orsborn's order was made on February 1st, 2010.

2 Two main issues arise based upon the present application before me:

> 1) Whether there has been compliance with the time requirement of ten days set out in Rule 29.11(2) for the Plaintiff to apply to set aside or vary Orsborn, C.J.'s order of February 1st, 2010 and, if not, whether that time period can and should be extended; and
>
> 2) If the Plaintiff succeeds on the first issue, whether this Court should set aside or vary the order of Orsborn, C.J. and reinstate the Plaintiff's action as against the First Defendant.

Factual Background

3 The Plaintiff commenced her action as against the three Defendants on February 23rd, 2009. Her claim related to a motor vehicle accident that had occurred on February 23rd, 2007 in which she alleges that the First Defendant drove into her lane of traffic and caused a collision with her vehicle. As a result of the collision, the Plaintiff allegedly sustained certain injuries as well as other damages.

4 The Plaintiff was represented by a lawyer, Wade Drover. According to Mr. Drover, due to other law-related commitments on other files, no effort was made to serve the Defendants at the time the Statement of Claim was issued. Mr. Drover does state that he had a telephone conversation with a representative of the insurer for the First Defendant on June 11th, 2009 and, at that time, advised her that due to litigation commitments he would not be able to get back to her until some subsequent time. Notwithstanding that and the fact that none of the Defendants were actually served, the First Defendant filed a Statement of Defence to the Plaintiff's claim on July 3rd, 2009.

5 At the time of filing the Statement of Defence, counsel for the First Defendant requested certain information regarding the injuries of the Plaintiff and damages claimed. Correspondence was sent and telephone contact made with Mr. Drover's office. Unfortunately no reply was forthcoming and, as a result, on November 20th, 2009 the First Defendant filed an application to seek an order compelling production of the Plaintiff's List of Documents as well as other medical and financial information related to the claim. Service was made of this application by faxing it to Mr. Drover's office.

6 On December 1st, 2009, an order for production of the required information was made by Faour, J., such to have been provided within 20 days of that order. A review of the transcript of that proceeding before Faour, J. shows that he assumed that the Plaintiff had been served with that application. Neither the Plaintiff nor her counsel appeared on the application and nor did they provide any response to it.

7 When no documentation was filed in response to that order, the First Defendant filed a further application seeking to strike the Plaintiff's claim as against the First Defendant. That application was filed on January 21st, 2010 with the return date of February 1st, 2010. Again, the Plaintiff was served with this application by faxing a copy to Mr. Drover's office. On February 1st, 2010, when the Plaintiff neither responded to the application nor appeared, Orsborn, C.J. dismissed the Plaintiff's claim as against the First Defendant with costs.

8 It was not until December 13th, 2010 that the Plaintiff applied to set aside or vary that order of Orsborn, C.J., which was some ten months after it was made. I am satisfied, based upon my review of the material before me, that it was only on February 8th or 9th, 2010 that Mr. Drover actually became aware that the Plaintiff's claim as against the First Defendant had been dismissed. After obtaining a transcript of the proceedings before Orsborn, C.J. and further reviewing the matter, Mr. Drover filed a Notice of Appeal on March 2nd, 2010 with regard to that order. Subsequently, in June 2010, the Plaintiff's file was given to counsel now representing the Plaintiff on this application, Colin Feltham. Shortly after, a fire destroyed the offices of Mr. Feltham's firm and file recovery and reconstruction along with preparation of affidavits in support of the present application is said to have resulted in the delay in not bringing this application forward until December 13th, 2010.

9 It is clear from the affidavit filed by the Plaintiff herself that she had no knowledge of the two applications earlier referred to or of the dismissal of her claim until December 5th, 2010. She had assumed that her claim was proceeding in the normal fashion through the courts. Why she was not notified by Mr. Drover or Mr. Feltham before then remains somewhat a mystery to me at this time. The suggestion that she was not told earlier so as to preserve her right to apply to set aside Orsborn, C.J.'s order pursuant to Rule 29.11(2) seems wanting to say the least. In any event, based upon what I have decided to do in this case, this is of little matter at this time.

10 The justification argued to support the success of the present application is that due to the workload issues, the manner of practice of law by Mr. Drover without an assistant, the medical problems and medication effects due to Mr. Drover being involved in two previous motor vehicle accidents as well as certain technology glitches involving notices by facsimile, Mr. Drover did not receive actual notice of the two applications referred to above which caused the Plaintiff not to respond to or appear with regard to them. The Plaintiff claims that the order striking her Statement of Claim was made through accident, mistake or other just cause that now justifies it being set aside or varied. As well, the Plaintiff argues that there is no demonstrable prejudice to the First Defendant if her claim is to be reinstated at this time.

Rule 29.11(2) — Application to Set Aside or Vary

I. Timing

11 Rule 29.11 of our *Rules* states as follows:

> (1) When a party fails to attend on a hearing of an application or on any adjournment thereof after being served with an application, the Court may proceed in the party's absence.
>
> (2) A party who has failed to appear on an application through accident, mistake, insufficient notice or other just cause may, within ten days from the time when the order granted on the application comes to that party's attention, apply to set aside or vary the order and the Court may do so on such terms as it thinks just.

Here, as the order striking the Plaintiff's claim was made by Orsborn, C.J. in the absence of the Plaintiff, in order to have that order set aside or varied, the party failing to appear may apply to the Court "within ten days from the time when the order granted on the application comes to that party's attention". The Plaintiff argues that notwithstanding that Mr. Drover became aware of the order on February 8th or 9th, 2010, the Plaintiff herself only got notice of the order on December 5th, 2010 and therefore this application was filed in time.

12 Even if I were not to accept this, the Plaintiff asks me to extend the time to make the present application pursuant to Rule 3.03(1) and (2) which states:

> (1) The Court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these rules, or by any order, to do or abstain from doing any act in a proceeding.
>
> (2) The Court may extend any period referred to in rule 3.03(l) although the application for extension is not made until after the expiration of the period.

13 I must first determine if it is appropriate to interpret Rule 29.11(2) in the manner suggested by counsel for the Plaintiff in this case. He argues that the reference to the ten-day limit in that section means that it is only triggered when it comes to the "party's" attention, in this case the party being Pamela Taylor. I have little difficulty concluding that that interpretation is either not a correct one, or certainly in the circumstances of this case, is not a just one.

14 As stated above, Mr. Drover became aware of the order striking the Plaintiff's Statement of Claim on or about February 8th or 9th, 2010. While he states that he then took some time to get further details about the order, I am satisfied that Mr. Drover knew the effect of what had been ordered by Orsborn, C.J. at that time. In fact, he filed an appeal of that order on March 2nd, 2010.

15 I am satisfied that knowledge on the part of the Plaintiff's counsel here amounted to knowledge on the part of the Plaintiff as well. Clearly the intention of Rule 29.11(2) as regards the timing of applications to set aside or vary an order made in the absence of one of the parties is to ensure not only that any injustice can be remedied but also that such shall be dealt with in a timely fashion. To ensure this intention is met, surely, at least in all but perhaps the rarest of cases, notice to the party's counsel should be sufficient to trigger the timeline set out in that Rule.

16 My decision in this regard is fortified by what could be the effect of the very argument put forward by counsel for the Plaintiff. When I inquired of him as to why no notice of the two orders was provided to the Plaintiff herself until December 5th, 2010, as stated earlier, he suggested such was done for strategic reasons. He stated that notice was intentionally withheld from the Plaintiff to avoid triggering the ten-day period so as to permit counsel to consider their position and prepare supporting documents for the present application. This was a justification put forward by counsel for what was approximately a ten-month period of delay in bringing forward the present application and, further, to provide notification to the Plaintiff of her claim having been struck as against the First Defendant.

17 Aside from the obvious entitlement of the Plaintiff, and what I find was the duty upon her counsel, to be notified at the earliest possible date of what had transpired, such a passage of time also has a potentially significant effect on the First Defendant. I am satisfied that Rule 29.11(2) cannot be read in the manner suggested by counsel for the Plaintiff and that, in the circumstances of this case, notice to her counsel must be found to be notice to her for the purposes of triggering the time limit set out in that Rule. While there might be a rare case where such might not be the result, this is not one of them.

18 One other point that should be made as regards the interpretation of the time limit set out in Rule 29.11(2) is the wording of Rule 1.06. That Rule provides that where any Rule provides that any act may be done or omitted by a party, the term "party" shall be deemed to mean the party or the solicitor of the party unless the context otherwise requires.

19 As a result, I find that this application was not brought within the time set out in Rule 29.11(2). Such being the case, I must now go on to decide whether it is appropriate in the circumstances to extend the timeframe set out in Rule 29.11(2) so as to permit full consideration of the present application.

20 Rule 3.03 as set out earlier is what must be considered. This will necessarily invoke an assessment of the equities of the parties and the avoidance of possible injustice. In *Lundrigan Group Ltd. v. Pilgrim* (1989), 75 Nfld. & P.E.I.R. 217 (Nfld. C.A.) [hereinafter Lundrigan], Marshall, J.A. was dealing with the ten-day period permitted to apply to set aside a default judgment. At paragraph 38, Marshall, J.A., in discussing when such time period in the *Rules* can be extended, stated as follows:

> The overriding general principle must be that in exercising its discretionary power the Court must balance the equities and justice of the situation with which it is seized. A successful plaintiff ought not, without good and sufficient reason, be deprived of the means of judicial enforcement of the Court's order. On the other hand, avoidance of injustice must be the paramount overriding consideration of the Court. Permitting justice to be done in specific circumstances appears to be the reason for existence of rules relating to setting aside of judgments and extending time to entertain such applications. This was noted in *Schafer v. Blyth* (1920) 3 Q.B.D. 140 where the Court also addressed an application to set aside a judgment and to extend the time for the application relating to it. The rules under consideration were expressed in language essentially similar to rules 3:03 and 42:01(3). Lush J. made the following observation at p. 143 in addressing whether the rule relating to extension of time should be applied:
>
> > Counsel for the plaintiff has contended that it ought not to be applied, because the plaintiff should not be deprived of the fruits of the judgment which has been given in his favour, unless the defendant's application to set aside the judgment has been made strictly in accordance with the rules. I cannot agree with that. The object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice.

I am satisfied that this approach is appropriate in considering whether to extend the time to make an application pursuant to Rule 29.11(2). The *Rules* have generally been interpreted in a manner recognizing the need to forward the ends of justice and to provide fairness to the parties. (See for instance *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (Nfld. C.A.)).

21 Here the Plaintiff argues that the delay in bringing the application was not "untoward, inexcusable or inordinate". In that regard reference is made to the fact that counsel for the Plaintiff filed a Notice of Appeal on March 2nd, 2010 related to Orsborn, C.J.'s dismissal order. The firm Roebothan McKay and Marshall was retained after to bring on the present application and a fire occurred at their law office shortly after which damaged or destroyed files. This required substantial effort to recover and reconstruct files over a number of months. As well, it is also claimed that the substantial amount of time that passed was required in order to prepare the supporting affidavits filed with this application.

22 The First Defendant argues that the delay in filing the application is not fully explained and that I should not exercise the discretion I have in light of the ten-month delay in bringing the application.

23 Here, I agree that the time delay in bringing the present application is a long one that is not fully explained, especially when the Plaintiff's initial counsel had notice of the order striking out the Statement of Claim some days after it was made. However, balancing the equities of the parties as described by Marshall, J.A. in the *Lundrigan* case and taking into account the full circumstances of this case as well as the delay itself, I find that it is in the interests of justice to extend the time for filing the present application such that it can be determined on its full merits. There is nothing before me that would cause me to conclude that the equities favour the First Defendant such that an extension of time should be denied.

24 The delay in this case, while lengthy, is not to the extent seen in *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 (Ont. C.A.), which involved an approximate five-year delay in bringing on an application

to revive an action that had been dismissed for delay. The fact that a delay is lengthy is, of itself, not sufficient to require that a court not exercise the discretion it has notwithstanding other justification exists. Here I am satisfied the Plaintiff should be permitted to have her application dealt with on the merits notwithstanding the ten-month delay in bringing it.

II. Accident, Mistake, Insufficient Notice or Other Just Cause

25 As set out earlier, Rule 29.11(2) permits a court to set aside or vary an order made where a party fails to appear on an application "through accident, mistake, insufficient notice or other just cause".

26 While the circumstances of this case for failure to respond or appear on the application on February 1st, 2010 (and for that matter the December 1st, 2009 application) might be argued to be accidental or due to mistake on the part of Mr. Drover, it certainly cannot be found to be due to insufficient notice. I am satisfied here, and it is indeed acknowledged by the Plaintiff's counsel, that sufficient notice in accordance with the *Rules* regarding service was made by the First Defendant to the Plaintiff regarding the application in question. That notice was provided by way of facsimile transmission.

27 In this case, it seems to me that the reason why the Plaintiff failed to appear on the application in question is most appropriately categorized as "other just cause". In his affidavit Mr. Drover sets forth three main reasons for his failure to obtain actual notice of the hearing of the application. I find that the primary reason causing his failure to view the facsimile notice sent by counsel for the First Defendant was what can be termed as a technological glitch. Mr. Drover states in his affidavit that he arranged, through his service provider, to have a facsimile-to-email system put into place. When this was done, a problem was encountered regarding the routing of facsimiles received such that they would not necessarily be retained on the server or be sent to Mr. Drover's business computer. As I understand it, there was some change made to the settings of his office computer system which meant that not all law-related facsimiles were going to that computer. This problem was not discovered by Mr. Drover until sometime after the order in question was made. As such, Mr. Drover was not aware of the application notwithstanding that it was served in accordance with the *Rules*.

28 Additional reasons were given in order to attempt to explain the failure of Mr. Drover to respond to the earlier requests for disclosure of information made by counsel for the First Defendant and to explain what transpired thereafter. These reasons included the fact that Mr. Drover practiced on his own and employed no administrative assistant, that Mr. Drover had two other significant files as well as other administrative requirements which preoccupied his time and effort during the period from February 2009 to February 2010, that due to his being injured in two motor vehicle accidents which occurred in 2004 and 2006 respectively Mr. Drover was medically disabled resulting in him being able to work only on a reduced time schedule and, finally, that Mr. Drover was on a holiday from December 14th, 2009 to January 4th, 2010 resulting in his office being closed for that period of time in which the order for disclosure made by Justice Faour was to have been complied with.

29 In his argument as to why the Plaintiff's application should succeed, counsel for the Plaintiff also raised a procedural issue that he submits should impact the result of this application. In June of 2009, four months after the Statement of Claim in the present matter was issued, Mr. Drover advised a representative of the First Defendant's insurance company that he was involved in other lengthy litigation matters and would not be able to deal with the Plaintiff's claim at that time. He went on to tell her that he would get back to her as soon as he was able to do so with regard to the claim of the Plaintiff. Shortly after, without any actual service of the Statement of Claim on any of the Defendants, the First Defendant's counsel filed a Statement of Defence on June 29th, 2009. A copy of the Defence was sent along with a request for disclosure on that day to Mr. Drover which he ultimately failed to respond to in any manner. This, Mr. Drover says, was due primarily to his involvement in other matters at that time. When further requests went unanswered with regard to that disclosure, the application for the Plaintiff's List of Documents together with medical and other financial disclosure was made in late 2009. Technically, at least, the pleadings had not closed at that time as there had been no formal service of the Statement of Claim on the First Defendant and the two other Defendants had not been served nor had they filed any Statement of Defence to the claim.

30 Counsel for the Plaintiff argues that the failure to respond to the disclosure order was the basis for Orsborn, C.J.'s order to dismiss the claim and was not procedurally correct. In such circumstances, it is argued that it would be unjust not to reinstate the Plaintiff's action.

31 Counsel for the First Defendant argues that it was proper for the First Defendant to have filed a Statement of Defence in the circumstances despite the lack of service as it was felt necessary to move the claim forward. In argument, he suggested that this practice is necessary in dealing with certain lawyers who tend to delay matters. He went on to say that he never heard anything from Mr. Drover in response for his request for disclosure and, as a result, proceeded as he did. He was never advised of Mr. Drover's circumstances, including his medical disability, and, had he been, he would have given him more time to respond.

32 In deciding whether I should set aside or vary the order of Orsborn, C.J. dismissing the Plaintiff's claim as against the First Defendant and what approach should be taken, counsel for the First Defendant has referred me to the *Marché d'Alimentation Denis Thériault Ltée* case previously referred to where the Ontario Court of Appeal accepted a four-factor test to reinstate an action as is described in paragraph 12 of that judgment as follows:

> (1) *Explanation of the Litigation Delay*: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.
>
> (2) *Inadvertence in Missing the Deadline*: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.
>
> (3) *The Motion is Brought Promptly*: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.
>
> (4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action.

In that case the court was dealing with an Ontario rule of procedure where an action commenced was to be set down within a specified period of time or it could be dismissed by the Registrar for want of prosecution. Therefore, the reference to the second factor regarding the setting of the matter down for trial was included as a consideration.

33 While I am unaware of any written decision in this jurisdiction related to the approach or factors to be taken into account on an application under Rule 29.11(2), it appears to me that types of factors considered in applications to set aside a default judgment or to reinstate an action or appeal based upon a want of prosecution can be of assistance. For instance, I find the comments of Green, J.A. (as he then was) in *Philpott v. Greening* (1998), 166 Nfld. & P.E.I.R. 130 (Nfld. C.A.), at paragraph 30, of assistance in suggesting appropriate factors to consider in an application made pursuant to Rule 29.11(2):

> ... this Court should, in balancing the potential injustice to the appellant if the appeal were not reinstated against the potential injustice to the respondent and affected third parties if the appeal were reinstated, look for: (i) some discernible potential merit in the appeal; (ii) an indication that since the striking of the original notice, the appellant continued to have a bona fide intent to appeal (i.e. by his subsequent actions he has not effectively abandoned altogether the idea of appealing); (iii) some explanation for any delay that may have occurred in applying for reinstatement; (iv) the existence of any prejudice to the respondent and third parties if the appeal were allowed to proceed; and (v) any other factors that might have a bearing on the justice of the case. It will be noted that these considerations are very similar to the sorts of matters that the Court would consider when deciding whether to grant an extension of time for filing a notice of appeal.

In the *Philpott* case the issue was whether an appeal should be reinstated where it had been struck for want of prosecution. Green, J.A. held that of the factors listed by him, only the first one dealing with the potential merit of the appeal was to be

considered as a pre-condition for reinstatement. He held that there was to be flexibility with regard to the weight to be given to the other four factors listed based upon the particular circumstances of the case.

34 In *Ellis v. JSS Enterprises Ltd.* (2003), 221 Nfld. & P.E.I.R. 223 (N.L. T.D.), Chief Justice Green (when Chief Justice of the Trial Division) stated the following regarding the requirements for setting aside a default judgment beginning at paragraph 16:

> 16 The principles upon which a court will act to set aside a judgment pursuant to Rule 16.06 are well-established in the case law. The principles differ, depending upon whether the judgment in question has been irregularly obtained or regularly obtained.
>
> 17 In the case of irregularly obtained judgments, Goodridge, C.J.N. in *Soreltex International Inc. v. Custom Carpet Sales Ltd.* (1993), 113 Nfld. & P.E.I.R. 263 (NFCA) stated the principle as follows:
>
> > [13] Where a default judgment is irregular, the defendant is entitled to have it set aside as of right. It is not a matter of discretion.
>
> 18 With respect to a regularly obtained judgment, the requirements for setting it aside are more stringent. In *Langor v. Spurrell* (1997) 157 Nfld. & P.E.I.R. 301 (NFCA), I stated the requirements thus:
>
> > [44] ... It is a precondition to setting aside a default judgment that the applicant demonstrate a potentially good defence on the merits. ... [T]he defendant has to demonstrate to the court that the re-opening of the case will not be a waste of time and that there is a real issue in controversy which requires adjudication on the facts or the law, i.e. it is not simply the wishful thinking of the pleader but that the position has some basis in the reality of the available evidence. Once a potentially good defence is shown, the defendant should then prima facie be entitled to have the judgment set aside so as to have a trial on the merits unless, considering all of the other circumstances, including the timeliness of the application and whether there is an explanation for not filing a defence within time, and whether there will be non-compensable prejudice to the plaintiff if the judgment is set aside, and the necessity for bringing finality to disputes, the court concludes that to set aside the judgment would not be a fair exercise of its discretion.

35 Therefore, such matters as the existence of some potential merit to the party's claim, the existence of a continuous *bona fide* intent to proceed on the part of the party against whom the order was made, some explanation for the failure to attend on the application, any delay in applying to set aside or vary the order and the existence, if any, of prejudice to the party who obtained the order in the absence of the applicant are relevant for consideration. These factors set out are not meant to be exclusive considerations in every application made pursuant to Rule 29.11(2) as the circumstances may vary from case to case. Therefore, other factors bearing on the interests of justice must also be considered.

36 In this matter, I am satisfied that an explanation has been given for why the Plaintiff failed to respond or appear in order to deal with the applications of both December 1st, 2009 and February 1st, 2010. While not fully justifying the failure to appear or, for that matter, the lack of any response to the requests put forward by counsel for the First Defendant for disclosure, I am satisfied that there was more involved here than negligence or a lack of interest in proceeding by the Plaintiff's counsel and the Plaintiff herself respectively.

37 The claim itself, based upon my preliminary review of it, appears to be such as to permit the Plaintiff a potential opportunity to succeed as against the First Defendant if the matter were to proceed.

38 Of much significance here is the lack of prejudice to the First Defendant if the matter is reinstated. While I accept that pre-judgment interest might be awarded to the Plaintiff if she succeeds with her claim as against the First Defendant and that this goes to the existence of some possible prejudice, I am satisfied that any order obtained after trial can well deal with this matter based upon the full circumstances referred to in this application.

39 The fact that the Statement of Defence was filed without service on the Defendants after Mr. Drover spoke to a representative of the First Defendant's insurer and explained his wanting to delay service is something that must also be

considered in the Plaintiff's favour here. As well, the request made by the First Defendant for the Plaintiff to file her List of Documents at the time it was made, prior to service of the claim on any of the Defendants, cannot be overlooked.

40 All of this leads me to conclude that had Orsborn, C.J. been aware of the full circumstances now before me when he was dealing with the application to dismiss the Plaintiff's claim as against the First Defendant, he likely would not have made the order that he did.

41 There is no doubt that there has been significant delay in bringing this application after Chief Justice Orsborn's order. I have referred to the reasons put forward for that delay earlier. While not being fully satisfied that the delay of some ten months was explained or necessary, considering the totality of the circumstances of this case, I am not prepared to deny this application on that basis.

42 In this case, I am satisfied that the order made by Orsborn, C.J. dismissing the Plaintiff's claim as against the First Defendant should be set aside on the following terms and conditions:

> 1) THAT within ten (10) days of the issuance of these reasons the Plaintiff shall serve her Statement of Claim on each of the Defendants;
>
> 2) THAT the First Defendant need not file a further Statement of Defence but may rely on the defence presently filed with this Court, if she so wishes;
>
> 3) THAT once pleadings have closed, all discoveries and other disclosure of documents are to be completed within a period of four (4) months;
>
> 4) THAT a certificate of readiness shall be filed with this Court on or before August 31st, 2011; and
>
> 5) THAT the time limits set out in this order can only be changed where all parties consent or where this Court otherwise orders.

Costs

43 Considering the full circumstances, the First Defendant shall be entitled to party and party costs related to the applications brought before Faour, J. on December 1st, 2009 and as ordered by Orsborn, C.J. on February 1st, 2010.

44 With regard to costs on the present application, the First Defendant will have her costs on a party and party basis, notwithstanding the success of the Plaintiff on this application.

45 While I considered awarding solicitor and client costs on this application, I have decided that it would be inappropriate to do so here primarily based upon the fact that the Respondent's filing of her Statement of Defence partially contributed to what followed. The idea that a party can file a Statement of Defence even though not having been served so as to make matters move forward seems to me to impede a Plaintiff's right to determine when the court process will be engaged in a full way. Having said this, considering the full circumstances presented, the First Defendant is entitled to party and party costs on this application.

46 I believe that the costs on this application should be borne by Wade Drover as opposed to the Plaintiff herself. However, before ordering this I will give Mr. Drover an opportunity to be heard as to whether he should be personally liable to pay those costs. A hearing to deal with this shall be set down by counsel for the Plaintiff within ten (10) days of the release of these reasons and shall be heard at a time convenient to the Court, should Mr. Drover wish to be heard. If not, after ten (10) days from the release of these reasons, an order will go forward awarding party and party costs for this application to the First Defendant, such to be paid by Wade Drover.

Application granted.