2025 Hfx No. 539955

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF THE RECEIVERSHIP OF ANNAPOLIS MANAGEMENT, INC., RUBY LLP, BSL HOLDINGS LIMITED, 3337151 NOVA SCOTIA LIMITED and 4551650 NOVA SCOTIA LIMITED

Between:

DOURO CAPITAL LIMITED, GRAYSBROOK CAPITAL LIMITED, LEAGUE SAVINGS AND MORTGAGE COMPANY, ATLANTIC CREDIT, ASSUMPTION MUTUAL LIFE INSURANCE COMPANY, and 3046475 NOVA SCOTIA LIMITED

Applicants

And:

ANNAPOLIS MANAGEMENT, INC., RUBY, LLP, BSL HOLDINGS LIMITED, 3337151 NOVA SCOTIA LIMITED and 4551650 NOVA SCOTIA LIMITED

Respondents

BOOK OF AUTHORITIES OF THE APPLICANTS
Application for Receivership Order: January 24, 2025 at 9:30 a.m.

Darren O'Keefe
O'Keefe Sullivan
80 Elizabeth Avenue, Suite 202
St. John, NL A1A 1W7
dokeefe@okeefesullivan.com

Marc Dunning
Burchell Wickwire Bryson LLP
1900-1801 Hollis Street
Halifax, NS B3J 3N4
mdunning@bwbllp.ca

Counsel to the Applicants

Josh Santimaw

BoyneClarke LLP
99 Wyse Road, Suite 600
Dartmouth, NS B2Y 3Z5
jsantimaw@boyneclarke.ca

Counsel to the Respondents

Index

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136

Date: 20220128
Docket: S220231
Registry: Vancouver

In the Matter of the Receivership of Otso Gold Corp.

Between:

Pandion Mine Finance Fund LP, Rivermet Resource Capital LP and PFL Raahe Holdings LP

Petitioners

And

Otso Gold Corp.

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Petitioners:	M. Buttery, Q.C. J. Enns M. Burris N. Levine J. Atamian
Counsel for Otso Gold Corp.:	R. Morse T. Louman-Gardiner
Counsel for Brunswick Gold Limited	J.K. McEwan, Q.C. W. Stransky
Counsel for Deloitte Restructuring Inc.	L Hiebert
Counsel for Blackrock Financial	M. Wasserman K. Esaw
Counsel for Lionsbridge Pty. Ltd. and Westech International Pty. Ltd.	V. Tickle

Place and Date of Hearing:	Vancouver, B.C. January 14, 2022
Place and Date of Judgment:	Vancouver, B.C. January 28, 2022

Table of Contents

Introduction

[1] Otso Gold Corp ("Otso") is a Canadian company that owns a gold mine in Finland. The ownership is indirect. Otso owns a Swedish subsidiary ("Otso AB"), which in turn owns a Finnish subsidiary ("Otso OY"). It is Otso OY that owns the mine. The mine is Otso's only substantial asset. It is an open pit mine that employs more than 130 people together with an array of consultants when it is in operation.

[2] Otso produced gold at the mine between November 2018 and March 2019, and again briefly in November and December 2021. Both times it was obliged to cease operations and put the mine into care and maintenance because it lacked working capital.

[3] Otso is also beset by a dispute between the company and its former managers (collectively, "Lionsbridge"). Lionsbridge withdrew from management at the end of November 2021. Consultants brought in to replace Lionsbridge are critical of the plans made and the steps taken under Lionsbridge's management. Lionsbridge defends its work. This dispute clouds projections of the mine's potential productivity upon which valuations of the mine depend.

[4] The petitioners ("Pandion") collectively constitute Otso's only secured creditor. There is a dispute as to how much Pandion is owed. It may be in the vicinity of US$26 million or exceed US$95 million. Whatever the amount owing, there is no dispute that Otso is in default and is not in a position to pay.

[5] Otso's majority shareholder ("Brunswick") maintains that it was induced by fraudulent misrepresentations and other wrongful conduct on the part of Pandion and Lionsbridge into investing US$27 million in Otso in exchange for shares. Brunswick is advancing these claims in actions recently commenced in Connecticut and in this Court. Pandion and Lionsbridge vigorously deny Brunswick's claims.

[6] Accordingly, Otso is insolvent because it is at present unable to pay its debts as they come due. Otso's financial predicament is compounded by the following:

a) The value of the mine is uncertain;

b) The amount owing to Pandion is uncertain; and

c) Brunswick is suing Pandion and Lionsbridge, and there may be claims by or against Otso arising from or in connection with this litigation;

[7] In early December 2021, Otso sought court protection for the purpose of preparing a proposal to its creditors in three jurisdictions: British Columbia, Sweden, and Finland. It obtained the necessary court orders staying all proceedings against the Otso companies in all three jurisdictions. In this Court, I granted Otso, Otso AB and Otso OY relief under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 [*CCAA*]. I appointed Deloitte Restructuring Inc. ("Deloitte") as Monitor. In a decision indexed as *Otso Gold Corp. (Re),* 2021 BCSC 2531 I extended the duration of the stay to January 14, 2022.

[8] Because Otso's insolvency is the subject of proceedings in three jurisdictions, there is a risk that one court's attempt to manage the insolvency risks being viewed as an interference in matters falling within another court's purview.

[9] On January 7, 2022, Pandion filed an application in the *CCAA* proceeding seeking to terminate the stay of proceedings against Otso and to appoint Deloitte as a receiver of Otso, Otso AB and Otso OY. The application was returnable on January 14. On January 13, Otso conceded that it was unable to obtain the financing required to pay its expenses while it prepared a proposal to its creditors. It abandoned its claim to further court protection in this Court.

[10] The stay of proceedings under the *CCAA* therefore lapsed on January 14. For the time being, court orders staying proceedings against Otso AB and Otso OY in Sweden and Finland remain in effect.

[11] On January 14, 2022, Pandion's application for appointment of a receiver came on for hearing before me. Pandion restated the application as one advanced in a fresh proceeding, and confined it to an application for the appointment of a

receiver of Otso's assets and undertaking (excluding Otso AB and Otso OY). This is the application addressed in these reasons.

[12] Otso does not oppose Pandion's application, but it says that the appointment of a receiver should include certain terms. Brunswick opposes the application.

[13] Having heard Pandion's application on January 14, 2022, I reserved judgment and made an interim order appointing Deloitte as receiver of Otso until my decision on the application could be delivered in these reasons for judgment.

Issues

[14] Having regard to the arguments advanced, Pandion's application raises the following issues:

1. Is Pandion limited on this application to obtaining an interim receivership order?

2. Is it just or convenient that a receiver of Otso be appointed?

3. If so, what are the appropriate terms of a receivership order?

Background

[15] The parties filed more than 2,500 pages of evidence. In their submissions, counsel went into considerable detail with a view to explaining why their respective clients' actions were reasonable, and those of their adversaries were careless and wrongful. Each side accuses the other of bad faith.

[16] There are material conflicts in the evidence. Faced with extensive affidavit evidence untested by cross-examination, and having heard just three days of argument in chambers (counting a hearing without notice on December 3, 2021 and a contested hearing on December 15, 2021, both in the *CCAA* proceeding), I am not in a position to resolve the conflicts. However, to provide context for this decision, it is important that I outline three important disputes.

The issue concerning the mine's prospects

[17] In these reasons, "Lionsbridge" encompasses Lionsbridge Capital Pty. Ltd., its subsidiary, Westech International Pty. Ltd., and their principals, Brian Wesson and Clyde Wesson. The two companies were contracted to provide management services to Otso from 2019 until November 30, 2021. The Wessons were directors of Otso.

[18] In the summer and fall of 2021, Otso was approaching the point of reopening the mine. In the run-up to production, it needed more cash. Brunswick advanced US$27 million in exchange for shares. Brunswick ended up with 67% of the common shares and a majority of the seats on the Otso's board.

[19] It became apparent that Otso would not be in a position to make a substantial payment to Pandion when it became due on December 7, 2021. Brunswick and the directors it had nominated to Otso's board came to suspect that they had been misled as to Otso's financial circumstances and the mine's prospects. They decided that Otso should retain Alvarez & Marsal Europe LLP ("A&M"), to investigate, advise on the restructuring of the company, and effectively assume control of the mining operations. In light of that decision, on November 30, 2021, the Wessons abruptly resigned from the board and Lionsbridge abandoned its management services agreement with Otso.

[20] Otso made its application under the *CCAA* three days later, on December 3, 2021. Following the appointment, A&M determined that a long term mine plan was required. In the *CCAA* proceeding, based on evidence from A&M's managing director, Thomas Dillenseger, I found that a long term mine plan is a prerequisite to the development of a reliable financial projection of the revenues to be expected from the mine; *Otso Gold Corp. (Re)* at paras. 25-26. A reliable financial projection is required to value the mine.

[21] As of January 12, 2022, the long term mine plan was complete. It featured larger gold reserves and higher costs than were anticipated under Lionsbridge's management. A&M expected that the preparation of mine cash flow projections

would require further funding and take another month, until February 14. A&M noted that significant capital expenditures would be required for the purchase of spare parts and essential maintenance would be required in the short term, if the mine was to remain in operation. Mr. Dillenseger described Otso's accounting records as disorganized and decentralized.

[22] The value of the mine is therefore uncertain, because the mine's prospects are uncertain. Resolving the uncertainties to the extent that may be possible will require time and money.

The dispute as to the amount owing to Pandion

[23] At the commencement of the *CCAA* proceeding, Otso acknowledged that it owed Pandion US$25.875 million and advised the Court that the amount might be much larger.

[24] Pandion loaned money to Otso and its subsidiaries beginning in late 2017. From the beginning, the loans were secured and extensively documented. The documentation took various forms, including two Pre-Paid Gold Forward Purchase Agreements, a Net Smelter Returns Royalty Agreement (the "Royalty Agreement"), and a Maintenance Loan Agreement.

[25] In October 2019, Otso and its subsidiaries agreed with Pandion to restructure the loans in an agreement entitled Consent and Agreement to Pre-Paid Forward Gold Purchase Agreement and Maintenance Loan Agreement (the "Consent Agreement"). It consolidated the indebtedness to Pandion into a single US$23 million obligation to be paid in two instalments no later than the "Deferment Termination Date". Clause 2.1 set out the following consequence if the US$23 million payment was not made on time:

> The deferment and consolidation granted pursuant to this Section 2.1 shall automatically terminate on the Deferment Termination Date and the Deferred Payment Amounts, together with all other amounts due on such date under this Agreement and the Transaction Documents, shall be immediately due and payable on such date.
>
> [Emphasis added.]

[26] On December 13, 2020, Otso and its subsidiaries agreed with Pandion to amend the Consent Agreement to provide that the Deferred Payment Amounts would be paid in one lump sum on December 7, 2021, which became the last possible Deferment Termination Date.

[27] The interpretation and legal consequences of clause 2.1 of the Consent Agreement are in issue. By clause 6.2(a), the Consent Agreement is governed by the laws of the State of New York. The balance of clause 6.2 contemplates litigation in the District Court of Helsinki or the U.S. Federal Courts sitting in the City of New York.

[28] Pandion says that the amount owing by Otso pursuant to clause 2.1 is US$95 million. Otso says that Pandion has both understated and overstated its claim. Understated, because the total of the amounts payable by virtue of the words I have emphasized is approximately US$118 million. Overstated, because, under New York law, the emphasized words amount to a penalty that is legally unenforceable as a matter of public policy. Otso has obtained an apparently credible expert opinion from a retired Justice of New York State's Appellate Division providing support for its legal argument. Referring to the sentence quoted above from clause 2.1 as the Fixed-Damages Clause, the expert, James McGuire, states:

> In sum, the Fixed-Damages Clause of the Consent Agreement is an unenforceable penalty provision under New York law. While I am not being asked to opine on whether it is an unenforceable penalty provisions (*sic*), I believe my obligation to the Court requires that I do. ...

[29] Mr. McGuire's expert report was delivered to Brunswick on the eve of the hearing of this application. Counsel for Brunswick advises that, while time did not permit a response, she expects to obtain a credible report to the contrary. For present purposes, I assume that the issue is fully arguable on both sides.

[30] Accordingly, the amount owing to Pandion under its security cannot be determined on this application. It will require judicial determination by a court applying the law of New York State.

Brunswick's claims against Pandion and Lionsbridge

[31] On December 23, 2021, Brunswick commenced an action in the Superior Court in Connecticut, naming Pandion and two of its officers as defendants. On January 5, 2022, Brunswick commenced action No. 220017 in the Vancouver Registry of this Court naming the same defendants together with Lionsbridge defendants (the two companies and the Wessons).

[32] The claims advanced by Brunswick in the two actions are essentially the same. According to the Complaint filed in Connecticut:

> ... this action concerns a brazen scheme in which Defendant PFL, the largest creditor and major shareholder of a struggling mining company, together with the other Pandion Defendants, sought to secure a favorable return, and potential exit, on their investment by hand-picking new management for the company that would be beholden to them and then colluding with management to fraudulent lure and exploit a new investor, Plaintiff BGL. To induce BGL to invest in Otso Gold Corp. (the "Company"), the Pandion Defendants and Lionsbridge Capital Pty. Ltd., the management services company selected and appointed by the Pandion Defendants, concealed both PFL's security interest in the Company's primary asset, a gold mine in Finland, and the extent of the Company's potential indebtedness to PFL. ... After successfully luring BGL to invest, the Pandion Defendants and management then used the threat of massive escalating debt to PFL to extract additional investments from BGL. In less than one year, the Pandion Defendants and their management improperly extracted $27,000,000 in investments from BGL, without disclosing to BGL that the Company's contingent liabilities to the Pandion Defendants were more than three times that amount.

[33] Pandion and Lionsgate deny that there was collusion between them. They maintain that the matters which Brunswick alleges were concealed – Pandion's interest under the Royalty Agreement, and the extent of Otso's indebtedness to Pandion – were disclosed to Brunswick before it invested. They say that, if Brunswick misunderstood what it was getting into when it invested in Otso, it was as a result of its own failure to conduct due diligence.

[34] As already noted, I am not in a position on this application to decide whether Brunswick's claims are well-founded.

Analysis

1. Is Pandion limited on this application to obtaining an interim receivership order?

[35] Pandion seeks appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], s. 66 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, *Supreme Court Civil Rule* 16-1, and the inherent jurisdiction of the court. In argument, counsel focused their attention on s. 243(1) of the *BIA* and s. 39 of the *LEA*. Both statutes contemplate the appointment of a receiver where the court considers it "just or convenient".

[36] Section 244 of the *BIA* requires a secured creditor who intends to enforce security on all or substantially all of the property of an insolvent person to give the debtor notice in a prescribed form. The notice must be given 10 days in advance.

[37] Otso and Brunswick submit that recourse to s. 243 is not available in this case because Pandion has not yet given notice to Otso in the manner contemplated by s. 244 of the *BIA*. They rely on s. 243(1.1) which provides:

> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.
>
> [Emphasis added.]

[38] Otso and Brunswick submit that all that is possible at this stage, prior to delivery of the 10-day notice required under s. 244, is appointment of an interim receiver pursuant to s. 47 of the *BIA*. The difference is that the appointment of an interim-receiver is time-limited. Section 47 provides:

> 47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

> (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
>
> (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
>
> (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

[39] Pandion responds that the Court can and should permit the appointment of a receiver under s. 243(1) on the basis that it is "appropriate" in this case not to be bound by the 10-day notice requirement, as contemplated by s. 243(1.1)(b).

[40] It is not obvious that the 10-day notice requirement under s. 244 of the *BIA* is necessarily relevant if the application is viewed as one brought pursuant to s. 39 of the *LEA*; *Saskatchewan (Attorney General) v. Lamare Lake Logging Ltd.*, 2015 SCC 53 at paras. 32, 49 [*Lamare Lake*]. For the purpose of this application, I will assume against Pandion that its application is brought solely pursuant to s. 243 of the *BIA*, so that the 10-day notice requirement must be addressed.

[41] Absent consent, the 10-day notice requirement can be avoided in two ways: by making an interim order under s. 47; or by a finding that it is appropriate to appoint a receiver immediately or on shorter notice, pursuant to s. 243(1.1)(b). In effect, Otso and Brunswick argue that an interim order under s. 47 is to be preferred, at least in the circumstances of this case. Counsel did not direct me to any cases addressing the choice between an interim order under s. 47 and an immediate order under s. 243(1.1)(b).

[42] Brunswick submits that the manner in which Pandion has brought this application favours a time-limited, interim order rather than an order under s. 243. As noted above, Pandion initially brought its application as an interlocutory application in the *CCAA* proceeding. At the hearing on January 14, 2022, when it was pointed out that the *CCAA* proceeding was about to come to an end with the lifting of the stay pronounced on December 3, 2021 and Otso's abandonment of its claim for relief under the *CCAA*, Pandion undertook to immediately commence a fresh proceeding by petition seeking the relief claimed in its notice of application.

Brunswick submits that this manner of proceeding has deprived it of the opportunity to put up a full defence to the application.

[43] In my view, pursuant to s. 243(1.1)(b), it is appropriate that any receivership order I make should be made under s. 243(1), on terms addressed below.

[44] The discretion conferred under s. 243(1.1)(b) is broad. An inquiry into whether it is "appropriate" to appoint a receiver before the 10-day notice period has elapsed is necessarily a wide-ranging inquiry. There is nothing in the language of s. 243(1.1)(b) to suggest that the inquiry is confined by the possibility of an interim receiver under s. 47.

[45] Court appointment of a receiver under s. 243 (or any other statute) is a drastic and exceptional remedy; *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 81. The purpose of the 10-day notice requirement is to provide a debtor company with the opportunity to negotiate and reorganize its affairs before a receiver is appointed; *Lamare Lake* at para. 53. Provision is made in subsection (1.1)(b) for the 10-day period to be abridged because there may be circumstances in which immediate appointment is appropriate. An obvious example is where there is an immediate risk of dissipation of assets. Parliament has not circumscribed the possible circumstances with limiting language. It has left it to the court's discretion.

[46] In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to Pandion resulting from the requirement, and the possibility of prejudice to Otso and Brunswick if it is waived.

[47] Otso initially applied to court for protection under the *CCAA* in the face of the looming deadline to replay its indebtedness to Pandion. Otso made the application on December 3, 2021 and the deadline was December 7, 2021. Otso anticipated that steps might be taken by Pandion and was not in a position to pay Pandion what

it was owed. The looming deadline was one of Otso's reasons for seeking court protection.

[48] On December 15, 2021, Pandion made Otso and Brunswick aware of its intention to seek appointment of a receiver on January 14, 2022, and obtained leave to bring such an application, if leave was required, notwithstanding the *CCAA* stay of proceedings. Thus, Otso has had much more than 10 days notice of Pandion's intention to seek appointment of a receiver. Pandion might have given notice under s. 244 at that time.

[49] On January 7, 2022, Pandion served its motion materials for its application returnable on January 14.

[50] Otso is not in a position to repay Pandion, and would not have been in a position to repay Pandion if Pandion had given it notice under s. 244 more than 10 days before the application was heard. In the circumstances of this case, compliance with the 10-day notice requirement would serve no practical purpose. It would just be a formality.

[51] The only reason not to make a receivership order under s. 243(1), as opposed to an interim order under s. 47, would be if Otso or Brunswick were prejudiced by the manner in which Pandion has proceeded. Brunswick says that there is prejudice because Pandion did not file the petition under which it is proceeding with the application in a timely way. While I am not able to say that Brunswick would be on firmer ground, opposing the application, had Pandion filed its petition well in advance of the hearing, it is a fair point that Pandion is seeking a remedy in this action without giving the notice required in the case of a fresh proceeding under the *Supreme Court Civil Rules*. To the extent that there is prejudice arising from the belated commencement of a fresh proceeding, it can be remedied in the terms of an order under s. 243(1).

[52] Accordingly, in my judgment, rather than making a time-limited, interim order under s. 47, it is appropriate to proceed under s. 243(1), making it a term of any

receivership order made that any interested party will be at liberty to apply to set the order aside. On that basis, there is no prejudice to Otso and Brunswick resulting from the truncation of notice. It may well be that a further application will not be required.

2. Is it just or convenient that a receiver of Otso be appointed?

[53] The purpose of a court-ordered receivership, generally, is to preserve and protect property pending the resolution of issues between the parties; *Lamare Lake* at para. 51. The cases identify a long list of considerations to be taken into account in determining whether the appointment of a receiver is just or convenient. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, Masuhara J. adopted a list of factors from a leading text, *Bennett on Receivership, 2nd ed.* (Toronto: Carswell, 1999) at p. 130. This approach was affirmed in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 at paras. 21-55. The factors are:

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, particularly where the appointment of a receiver is authorized by the security documentation;

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 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 which 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 upon 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;
p) the goal of facilitating the duties of the receiver.

[54] These factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient; *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348 at para. 23.

[55] The following considerations favour the appointment of a receiver in this case.

[56] A continuing expenditure of funds is necessary to preserve the value of the mine. Otherwise, it is a wasting asset. Otso does not have the funds required even to keep the mine in "care and maintenance" mode. It has been unable to find a lender in the context of the *CCAA* proceeding. Brunswick is unwilling to inject further equity. Pandion is willing to fund the necessary expenditure in the context of a receivership, but not otherwise.

[57] Appointment of a receiver will facilitate preservation and the orderly marketing of the mine for the benefit of all of Otso's creditors, and perhaps even its shareholders. Pandion is the party with the greatest economic stake. It has first call on the assets, it is not clear that there is sufficient value that it will be paid in full, and the value of its security is deteriorating. It is the fulcrum creditor. Moreover, Pandion has contracted for the right to appoint a receiver.

[58] There are only two ways out of the present predicament. If the amount owing to Pandion is resolved in Otso's favour so that Pandion can be paid out, it is conceivable that Brunswick may come up with the necessary funds or another equity investor may be found. Otherwise, the mine must be sold. Either way, the appointment of a receiver will facilitate matters by stabilizing the situation. It will prevent the assertion of lawsuits against Otso without leave of the court. The likely alternative is a free for all of litigation and a wasting asset.

[59] A court-appointed receiver is objective and neutral, characteristics of particular importance in a case involving competing claims and factual disputes. The receiver may seek assistance from the court. In the context of a receivership, the court may give directions for the resolution of contentious issues.

[60] As noted above, Otso does not oppose appointment of a receiver *per se*, although it seeks terms I will address below.

[61] Brunswick submits that appointment of a receiver must be refused because Pandion lacks good faith. It is true that good faith is required of an applicant for a receivership order under s. 243; *BIA*, s. 4.2. Brunswick submits that:

> The extant allegations of conspiracy against Pandion directly impugn Pandion's conduct in the lead up to the alleged default under its loan agreements. Pandion is alleged to have acted dishonestly [and] fraudulently in inducing or permitting the inducement of [Brunswick's] investment and thereafter in frustrating Otso gold and [Brunswick's] ability to satisfy the $23 million liability, permitting its "reinstatement" to USD$95 million as currently alleged.

[62] Brunswick's allegation that Pandion engaged in a conspiracy is disputed. I am unable to determine on this application whether it is well founded.

[63] I cannot find that Pandion is pursuing its claim against Otso and seeking appointment of a receiver in bad faith. Whether or not Pandion is liable to Brunswick, it is undisputed that Otso owes more than US$25 million to Pandion. It is undisputed that Pandion has the status of a secured creditor.

[64] I conclude that it is just and convenient that a receiver be appointed.

3. If so, what are the appropriate terms of a receivership order?

[65] The starting point is the model receivership order established pursuant to Practice Direction 47. The parties' submissions require consideration of modifications to the model order under the following heads:

a) Inclusion of choses in action in the receivership;

b) Claims against Otso;

c) Resolution of the amount owing to Pandion;

d) Marketing of assets; and

e) Other terms.

a) Inclusion of choses in action in the receivership

[66] The model order extends to "all of the assets, undertakings and property" of the debtor, including choses in action. Clause 2(j) of the model order authorizes the receiver to:

> initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of any of the Debtors, the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings.

[67] Otso initially took the position that the receiver should not be appointed over choses in action of Otso as against Pandion, Lionsbridge, or any of its former directors or officers. In oral argument, it modified its position to submit that the receiver might be appointed over the choses in action, reserving to the parties' liberty to apply.

[68] Choses in action belonging to Otso should be realized for the benefit of Otso and its creditors. The receiver should be afforded an opportunity to investigate and report on any choses in action it might discern. If the receiver chooses to pursue a claim on Otso's behalf, the model order permits it to do so. As an independent officer of the court, the receiver can be trusted to take such steps. However, it is easy to imagine that Pandion might choose not to fund pursuit of a chose in action that other interested parties might wish to pursue, and that the receiver might be impaired in its ability to pursue such claims.

[69] It will be a term of the order that, if the receiver chooses not to pursue a chose in action that an interested party believes should be pursued, that party will be afforded a reasonable opportunity to seek the court's direction. The court might

allow the interested party to pursue the claim in Otso's name, on appropriate terms such as those contemplated, in the context of a bankruptcy, by s. 38 of the *BIA*, or make such other order as seems appropriate for the realization of the claim.

b) Claims against Otso

[70] Clause 2(j) of the model order, quoted above, extends to claims against Otso. The receiver may defend, settle, or compromise such claims. Clause 8 is also important, because it stays actions against Otso without the receiver's consent or leave of the court, except for the filing of a proceeding to prevent the tolling of a limitation period.

[71] One of Brunswick's concerns, articulated in oral argument, is that Otso itself may be liable under the various agreements documenting Brunswick's investment in respect of losses flowing from defaults on the part of Lionsgate and Pandion. Brunswick says that it is not just the majority shareholder but also a contingent creditor of Otso. Accordingly, it may wish to apply to court to lift the stay of actions against Otso, perhaps in the context of its actions against Pandion and Lionsbridge.

[72] The stay afforded under clause 8 of the model order is one of the advantages of the receivership. It contemplates further applications to court, as may be necessary. No further provision is necessary.

c) Resolution of the amount owing to Pandion

[73] The amount of money owing to Pandion is disputed and the nature of the dispute is such that it will require a judicial determination. It should be a term of the receivership order that the receiver or any interested party may seek directions to facilitate early resolution of this question by this Court or another court.

d) Marketing of assets

[74] Otso and Brunswick submit that Otso's assets – ultimately, the mine itself – should not be marketed until the amount owing to Pandion is settled. Brunswick submits that there is "a serious risk that Pandion will be paid funds that it is subsequently found not to be entitled to".

[75] I disagree that the marketing of Otso's assets should be postponed. Given the amount in issue and jurisdictional uncertainties, resolution of the amount owing to Pandion may take some time. In the meantime, Pandion will be bearing the costs of the receivership. Pandion is admittedly owed more than US$23 million as a secured creditor, and has an arguable claim that it is owed US$95 million. There is a risk that Pandion is under-secured, and the mine is a wasting asset. There is a real risk of unfairness to Pandion if it is held up in its ability to recover its debt indefinitely.

[76] Brunswick's stated concern that Pandion may be paid funds that it is subsequently found not to be entitled to is without substance. Brunswick is protected by standard terms of the model order requiring court supervision of sales and distributions. Clause 2(l) of the model order requires the receiver to seek court approval of asset sales exceeding stipulated thresholds. I fix the thresholds at $100,000 for a single transaction, or $1 million in the aggregate. Clause 12 of the model order requires the receiver to hold funds received through the sale of assets and not to pay them out except by court order.

e) Other terms

[77] Clause 23 of the model order requires me to fix a borrowing limit for funding of the receivership. Based on Otso's cash flow projections, I fix the limit at $3.5 million.

Disposition

[78] For these reasons, I order that a receiver be appointed on the terms of the model receivership order with the following additional terms:

a) The receiver will establish a Service List as provided in the interim order made on January 14, 2022;

b) The receiver will inform parties on the Service List if the receiver chooses not to pursue a chose in action belonging to Otso, and if any interested

party believes the chose in action should be pursued, that party may apply to this Court for directions;

c) The receiver or any interested party may apply to this Court for directions to facilitate early resolution of the amount owing to Pandion by this Court or another court;

d) The thresholds for Court approval under clause 2(l) are set at $100,000 for a single transaction, or $1 million in the aggregate;

e) The borrowing limit under clause 23 is fixed at $3.5 million;

f) Any interested party may apply to vary or set aside this order.

[79] I am seized of future applications in connection with this receivership.

"Gomery J."

SUPREME COURT OF NOVA SCOTIA
Citation: *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82

Date: 2018-04-11
Docket: *Tru.* No. 470166
Registry: Truro

Between:

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 20, 2018, in Truro, Nova Scotia
Subject:	Appointment of a receiver, to seek repayment of indebtedness owed to a secured creditor as a final remedy, pursuant to ss. 243(1) *Bankruptcy and Insolvency Act*; Section 77, *Companies Act* (Nova Scotia); CPR 73; Section 43(9) *Judicature Act*
Summary:	LL's core business was a cattle farm. BMO was a secured creditor of LL, whose primary security was the cattle herd. LL failed to make payments for 18 months. It continued to grow the size of its distinctive and valuable herd. It owed at least $200,000 to the bank. BMO sought to have a receiver appointed, with power to sell, over time, portions of the herd, to effect a pay down of LL's debt.
Issues:	(1) Is it just or convenient to order the appointment of a receiver in the circumstances?
Result:	Receiver appointed. The Court found that at least $200,000 is owing. Order granted permitting the receiver to effect a reasonably timely reduction of that indebtedness by sale of portions of the cattle herd, the timing and amounts thereof to

be in its sole discretion, after collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for continued viability.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82

Date: 2018-04-11
Docket: Tru. No. 470166
Registry: Truro

Between:

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 20, 2018, in Truro, Nova Scotia
Counsel:	Bruce Clarke, Q.C., and Leon Tovey for the Applicant Jillian Foster representing the Respondent

By the Court:

Introduction

[1] Linden Leas Ltd. (LL) is a corporation. However, its embodiment is the Foster family.

[2] Frank and Edna Foster and their children started, and continue to grow, a distinctive herd of cattle, which are highly sought after by buyers. They have collectively worked and managed the farm that sustains the cattle herd that is its core enterprise. Their daughter, Jillian, is a veterinarian and intimately involved with the farm. Even in the documents filed herein, the respondent Corporation is referred to by the Fosters as the "Farmer". [1]

[3] The Bank of Montréal (BMO) are presently the *only* secured creditor having as security the farm's cattle herd. Its financial dealings with LL stretch back to at least May 2001. [2] It seeks a receivership order in relation to the cattle herd.

[4] LL contests the application. It does not deny that it owes approximately $200,000 in principal payments, while recognizing BMO is claiming a further $220,000 for legal *and* receiver fees to date, some of which began accruing between 2012 and 2017, and $165,000 in accrued interest on those outstanding amounts.

[5] BMO made a demand for the immediate full payment of those outstanding amounts on September 20, 2017. [3]

[6] LL has made no payments towards the claimed indebtedness since October 2016. [4]

---

[1] Some of the background is contained in Justice Moir's decision- *Bank of Montréal v. Linden Leas Ltd.*, 2017 NSSC 223; the herd had grown between 2012 and 2016 from 650 to 850 head – para. 52 Rachel Chemtob affidavit sworn January 25, 2018

[2] See comprehensive affidavit of Rachel Chemtob, sworn January 25, 2018

[3] Exhibit "R", Chemtob affidavit

[4] The only payments made in 2015, were pursuant to the Fifth Forbearance Agreement, and limited to: $2000 in January; $900 in June; $1000 in August; and $1000 in December; the only payments made in 2016 were: $1000 in March, $1000 in August, and lastly $10,000 in September and October – see Exhibit "Q" and paras. 41-46, Chemtob affidavit

[7] LL says, based on various arguments, including that they were unnecessary and unreasonable, that it should not be responsible to pay a substantial portion of the legal and receiver fees to date and accrued interest thereon.

[8] BMO says that throughout, it is has made sustained diligent and good faith efforts to provide financing to LL, and particularly so over the course of the years 2011 to present, but that LL has not paid its indebtedness as agreed. BMO therefore no longer has confidence in the financial management of the farm by the Fosters. BMO is no longer prepared to place itself at such a level of ongoing risk. Its primary security is the herd, and it proposes to have the receiver sell off not more than $40,000 worth of cattle per month (without an express "total amount owing" limit in the draft order), which it suggests will still allow the herd to retain a critical mass for viability. BMO also wants the receiver to have the power to insure the herd.

[9] LL says that the farm is a "going concern", and still has a bright future, without the appointment of a receiver as suggested by BMO. It strenuously argues that insuring the herd is prohibitively expensive. From the evidence and representations presented I infer that no insurance is presently in place, nor has there been in the past [5]

[10] As Justice Moir summarized it in his recent decision, when the bank made its application for an interlocutory receivership:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[5] See also para. 26 *Linden Leas*, 2012 NSSC 223.

The evidence presented at the hearing

[11] BMO presented only the affidavit of Rachel Chemtob, sworn January 25, 2018. No notice of intent to cross-examine was filed – Civil Procedure Rule (CPR) 5.05(5), nor was there a request to do so at the hearing. [6]

[12] LL presented no evidence. I note that Jillian Foster, who was authorized to speak on behalf of the Corporation, indicated in her written materials that she wished to rely upon previous decisions of, and evidence from, proceedings in this court contained in files Tru. No. 408708 and Amh. No. 348700, including affidavits filed therein.

[13] I advised Ms. Foster that I would not be reviewing the contents of those files[7] or the affidavits therein, because BMO had provided evidence that was up-to-date and superseded any evidence presented therein; and our Civil Procedure Rules require that the affidavits be related to the same "proceeding". In my view that is not the case here. I have as the "proceeding", an originating application in chambers before me. [8]

[14] CPR 39.06 reads:

> (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit filed a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

[15] Thereafter, Ms. Foster spontaneously suggested that she wished to call as witnesses to give *viva voce* evidence to the court on the application, her brother Robert Foster, and David Boyd (the proposed receiver), both of whom were present.

---

[6] Rachel Chemtob was present at the hearing

[7] Keeping in mind the principles in *British Columbia (Atty. Gen.) v. Malik*, 2011 SCC 18

[8] Under the old Rule 38.14, see Justice Fichaud's comments at paras. 15-18, *Amica Mature Lifestyles Inc. v. Brett*, 2004 NSCA 100. Moreover, although the Truro file might have been readily available as we were sitting in Truro, the Amherst file was not.

[16] I ruled against her request. Nevertheless, I do believe that some of her representations of fact/opinion made by way of inclusion of her unsigned September 14, 2012 affidavit from the proceeding in Amh. No. 390679, found at Tab 8 of LL's "brief", are not disputed by the bank and remain relevant at present. Those representations include:

> I am a veterinarian with 25 years of professional experience in livestock medicine and health. I have witnesses [sic] firsthand on clients' farms in the Maritimes, and Ontario and through observation in Alberta, the effects of moving cattle from their "homes". Movement of cattle where unnecessary, results in direct costs and losses to health, life and consequently value and food safety.
>
> ...
>
> a) the gestational period, the time from breeding or conception to calving or giving birth, for the common North American cattle breeds is between 275 and 292 days, with 285 being used as average.
>
> b) The ideal is for breeding females to calve or give birth to one calf every year (12 months)
>
> c) the weaning age in days used as an industry standard for calculations to compare animals is 205 days. Weaning is the graduation of calves from being dependent on their mother's milk for nutrition to not. Premature weaning causes stress to both calf and cow and consequentially results in a loss in value and becomes a welfare issue.
>
> d) Cows or breeding females ideally are already 3 to 5 months pregnant when their calves are weaned.
>
> e) Premature weaning of calves results in excess stress and consequently even if safeguarded for, can result in substantial losses and welfare concerns (see [reference to "shipping fever"]).
>
> f) Bred females are most safely moved between four and six months of gestation, after the risk of early embryonic death caused by change of home and stress, when their calf is naturally weaned and before they become heavy in calf. The calf they are pregnant with gets big.
>
> g) Pregnancy tested cattle, *certified safe in calf* at least four months, have a market value above that of *exposed to the bull* and not confirmed pregnant and substantially more than *open not bred* cattle.
>
> h) The Linden Leas herd is synchronized to optimize the benefits of the seasons and grass growth.
>
> i) Calving. Cows calve or give birth on grass with most births occurring in the summer months.

j) Breeding. Insemination. Eligible females are bred by bulls at pasture starting at the beginning of August.

k) Natural weaning of calves occurs between December and February as calves reach adolescence. At this age they are ruminating and able to forage on their own.

...

'Shipping fever' is the common term used to describe the diseases of cattle that occur when they are moved from their home. Orderly weaning, proper "preconditioning" at least five weeks ahead of shipping and an adequate period of bunk adjustment are preventative measures that can make a substantial difference to losses. Given the time that is needed to travel to the next "home" destination for calves weaned early the price paid by buyers is reflective of the expected morbidity and mortality rates that occur from purchasing "high risk" calves. The associated price drop per pound can be 50% of optimal for calves of the same weight as the losses can be substantial to the buyer not to mention the unnecessary suffering and deaths that occur.

The position of BMO

[17] The bank has established that no payments have been made since October 2016, and that at least $200,000 in principal payments presently remain outstanding. *Prima facie*, approximately $220,000 in legal counsel and receiver fees and $165,000 in interest are also presently outstanding. The bank has permitted LL to have the benefit of five Forbearance Agreements (October 4, 2012; February 7, 2013; June 24, 2013; September 4, 2014; and April 30, 2015). Mr. Clarke represented to the court that most of the legal counsel expenses arose not as a result of litigation, but rather solicitor work, in preparing and dealing with the forbearance agreements etc. Notably, within each Forbearance Agreement, LL acknowledged the debt outstanding, and that it was in default. There was no rectification to those defaults, and on September 20, 2017, the debt was again demanded to be immediately paid. On the limited evidence presented, I infer that it is more likely than not, that LL is insolvent.

[18] There is a provision in the contractual documentation for the bank to have a receiver appointed in circumstances such as in evidence before the court. BMO emphasizes that it is seeking the receivership as a "final remedy", and not as a

typical interim receivership. It points out that the Model Order from this court does *not* require a judgment amount to be determined before such appointment. [9]

[19] BMO relies on several legal bases to support its application in chambers, filed October 30, 2017, for the court-ordered appointment of a receiver:

> 1-Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA)- "... on application by a secured creditor, a court may appoint a receiver to do any or all of the following *if it considers it to be just or convenient to do so*:
>
> a-take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> b-exercise any control of the court considers advisable over that property and over the insolvent persons or bankrupt's business; or
>
> c-take any other action that the Court considers advisable."
>
> 2-Section 77 of the *Companies Act*, RSNS 1989, C. 81-"upon an application by a receiver or receiver manager, whether appointed by a court or under an instrument, or upon an application by any interested person, *a court may make any order it thinks fit including*, without limiting the generality of the foregoing,
>
> a-*An order appointing*, replacing or discharging *a receiver* or receiver manager and approving his accounts;
>
> ...
>
> c-An order fixing the remuneration of the receiver or receiver manager;
>
> ..."
>
> 3-Civil Procedure Rule 73 and specifically 73.02(2)(b) and 73.04 –
>
> 73.01 (1) This Rule provides for receivership as a final remedy, such as an order appointing a receiver to liquidate mortgaged property or to sell a business as a going concern.
>
> (2) An interlocutory or interim receivership may be obtained under Rule 41...
>
> (3) A receivership may be ordered and conducted in accordance with this Rule.

[9] However, in these specific circumstances, the bank requests the Receiver be appointed soley to sell cattle and effect a pay down of the debt. In my view, the better practice is to determine a fixed amount that this Receiver will be authorized to reduce over time by sales of cattle (as well as payment of its own reasonable fees and disbursements, and any statutory claims having priority to the bank's security).

> 73.02 (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.
>
> (2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:
>
> (a) the party is entitled to the order under Rule 8 – default judgment, or Rule 13 – summary judgment;
>
> (b) *a judge determines, after* the trial of the action or *hearing* of the application in which the claim is made, *that the appointment should be made*.
>
> 4-Section 43(9) of the Nova Scotia *Judicature Act,* RSNS 1989 c. 240 - "A... receiver [may be] appointed by an interlocutory order of the Supreme Court, in all cases in which *it appears to the Supreme Court to be just or convenient* that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just..." based on principles established pursuant to the equitable common-law jurisdiction of this Superior Court.

[20] The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; and the decision of Justice Morawetz, in *Bank of Montréal v. Sherco Properties Inc.*, 2013 ONSC 7023, which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.

[21] Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (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.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

> [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 Limited v. Chetwynd Motels Limited, 2010 BCSC 477; Freure Village, supra; Canadian Tire Corp. v.Healy,2011 ONSC 4616 and Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd., 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc.* offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) The terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

> (b) The terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) The value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

[22] *Crown Jewel* involved a request for the appointment of a receiver to effect a final remedy. As was the case there, here, a security instrument contains an express clause permitting the creditor to appoint a receiver. Justice Edwards reiterated the importance of appreciating the distinction between a court-appointed and private receiver:

> 40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. *A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court.* Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.
>
> 41 *The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However,* in Houlden, Morawetz and Sarra at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or

> convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> 42 Finally, the authors note at p. 1024 of The 2013-2014 Annotated Bankruptcy and Insolvency Act that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In Romspen Investment Corp. v. 1514904 Ontario Ltd. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:
>
> > [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.
>
> [My italicization]

[23] Notably, although Justice Moir was dealing with a request for an interlocutory appointment of a receiver in *Linden Leas,* 2017 NSSC 223, he did state in relation to the appointment of receivers to effect a final remedy:

> 19 While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order....
>
> 20 The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against pre-judgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

[24] **An examination of some factors relevant to whether it is just and equitable to appoint a receiver** [10]

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) [11]

[25] Although BMO's security contains a provision permitting it to have a private receiver appointed, insofar as a court-appointed receiver is concerned, it still bears the onus. Its evidence as contained in the Chemtob affidavit suggests that:

i) On January 25, 2018 the outstanding amounts were: $203, $314.36 in principal; $220,419.12 in legal and receiver fees; and $164,915.63 in interest, for a total of $588,649.11.

ii) That indebtedness is also secured by the May 18, 2001 personal guarantees of Frank Foster and Edna Foster (limited to $200,000); the July 26 2004 personal guarantees of Frank Foster, Edna Foster, Jillian Foster and Robert Foster, (limited to $100,000) the July 26, 2004 guarantee of Robert Foster (limited to $100,000); and the July 26, 2004 guarantee of Jillian Foster (limited to $100,000).

iii) LL and the Nova Scotia Farm Loan Board are the registered owner of 24 real properties in Nova Scotia. The cattle herd has grown from 650 in 2012 to approximately 850 head in 2016. The 2017 financial statements of LL indicate the value of its cattle to be more than $1 million.

iv) "BMO is concerned about Linden Leas' ability and willingness to take necessary steps to reduce the Indebtedness... [and] is therefore of the view that a receiver needs to be appointed by the court with the authority to begin selling some of the company's cattle in order to reduce the amount of the Indebtedness.

---

[10] While these factors arise in the general context of interlocutory receivership applications, they do provide a ready starting point for determining whether, as a final remedy for a secured creditor, it is "just or convenient" to appoint a receiver.

[11] In the circumstances of this case, there is a serious concern that *any* culling of the herd could precipitously undermine the viability, and value of the cattle operation.

[26] In its brief, BMO argued that there exists a risk of such harm to its security. Because the herd is the company's most valuable asset,and is BMO's only direct security, BMO may be at greater risk. To the extent that there are valid concerns about the company's financial ability to care for the herd, and no insurance on the herd, its security is presently particularly vulnerable.

[27] On the facts and representations herein, I cannot conclude that BMO has established irreparable prejudice might occur, if no receiver is appointed by the court. I accept that, at law, it is not essential that BMO demonstrates irreparable harm.

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

[28] As set out above, the cattle herd, which is the primary security that BMO can claim, has an estimated $1 million value. [12] The debtor's equity in the assets appears to be significant.

c) The nature of the property

[29] The cattle herd is an ever-changing group of living assets. By its nature, it requires intensive monitoring, handling and care, by trained or experienced personnel in order to ensure its maximum value. Realistically, this monitoring must be done by the Fosters, although it could be under the auspices of a court-appointed receiver.

d) The apprehended or actual waste of the debtor's assets

[30] This is not a significant concern here.

(e) The preservation and protection of the property pending judicial resolution (i.e. material reduction or elimination of the Indebtedness)

[31] While this is a significant concern given that the cattle herd is BMO's primary security (beyond any risk reduction attributable to the personal

[12] The bank's security includes the cattle specifically, pursuant to s. 427 *Bank* Act security documentation registered April 19, 2010 – see Exhibit "C" Chemtob affidavit referred to at paras. 4-6.Linden Leas also owns real property.

guarantees), LL, and the Fosters collectively, are similarly motivated to preserve and protect the cattle herd.

f) The balance of convenience as between the parties.

[32] LL argues that the receiver should not be appointed, but more importantly even if appointed, should not be permitted to sell off *any* of the cattle herd without its consent; and in particular not to do so to pay down the indebtedness attributable to past receiver and legal fees or any interest accruing on those amounts. The amount of that indebtedness is in dispute. In contrast, the approximately $200,000 in principal owing is not seriously in dispute. LL suggested at the hearing, it will be in a position within several weeks to pay close to $200,000 to BMO. [13]

[33] However, LL has presented no particularized plan to pay off, or pay down, the Indebtedness. BMO has received no payments since October 2016 – this is suggestive of a failing business. BMO could fairly comment that there is no evidence, but only a somewhat vague representation by Ms. Foster at the hearing, that there has been an accumulation by LL of such vast stores of surplus monies, now available to it to pay BMO $200,000.

[34] I observe that, if issued including terms to an order appointing a receiver is limit the sale of cattle to the amount of the principal owing such monies are paid, then LL would be able to avert the sale of any of the herd *at this time.*

g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan

[35] This factor generally strongly supports BMO's position that the Court should appoint a receiver.

h) The enforcement of rights under security instrument where the security holder encounters, or expects to encounter, difficulty with the debtor and others

[36] BMO and LL have fundamentally different perspectives on how to resolve the financial dispute between them. I repeat Justice Moir's recent comments:

---

[13] At the hearing, Jillian Foster alluded to monies LL had received from timbering operations, and suggested $200,000 would shortly be available to pay BMO.

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[37] If the court appoints a receiver with conditions that ensure that the Foster family have meaningful input [14] into the decisions of the receiver which affect the viability of the herd, it would expect a genuine good faith collaborative effort by the parties will emerge.

i) The principle of the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly

[38] While this is generally true, here the contractual provisions between the parties permit a private receiver to be engaged, and LL does not seriously dispute that it owes at least $200,000 to BMO under the security, and has not made a payment since October 2016, thereon.

j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently

[39] I am satisfied that this is the case. The receiver is responsible to the court. This heightened fiduciary responsibility is to the benefit of both parties.

k) The effect of the order on the parties

[40] The Foster family is understandably very protective of its hands-on management of the cattle herd, and the farm generally. They have invested their lives, as much as their money and talent, in creating and growing this distinctive and valuable herd. However, while they appear to have had the determination, knowledge, and resources to be outstanding farmers, they have not managed their

---

[14] A right to be meaningful consulted in a timely manner regarding, but not a right to veto, decisions of the receiver in determining, which cattle, and how many should be sold, and when.

financial affairs to that same standard. The bank is entitled to be paid according to law. They have sought the Court's intervention to effect payment by LL of the Indebtedness. The appointment by the court of a receiver, who is an officer of the court, and must take instructions from the court, and not favour the interests of the debtor or creditor, can be an effective means of resolving disputes such as the one before the court. It is intended to let the Fosters be farmers, and the receiver be a conduit through which BMO can receive sufficient payments towards its indebtedness to alleviate its concerns.

l) The conduct of the parties

[41] There is no evidence of past misconduct, nor any anticipated.

m) The length of time that a receiver may be in place.

[42] If the receiver is entitled to sell some of the herd over time in order to satisfy at least the $200,000 principal indebtedness, and if the 850 head of cattle have a value of $1 million, then, in static terms, roughly speaking 20% of them (170 head) would need to be sold in order to generate $200,000. If BMO's proposal to sell *no more* than $40,000 worth per month is accepted by the court, that would see no more than 34 cattle sold monthly (presuming their price is approximately $1200 per head), for five months to reach 170 head in total.

[43] I am reluctant to arbitrarily set out a fixed monthly maximum allowable sale of the cattle by the receiver. No particulars were offered in evidence regarding such a timetable. Even presuming 20 head are sold per month continuously, that could entail roughly 8 consecutive months of sales. Given LL's legitimate concerns about sustaining a critical mass and mix required for herd viability, and the requirement to sell approximately 170 head in total to pay back $200,000, the receiver may need to be in place for an indefinite period of time. This cannot be calculated with precision. The court must accord the Receiver the necessary discretion to effect an orderly and thoughtful reduction of the debt.

Conclusion

[44] Upon consideration of all the circumstances, viewing those through the factors noted above, and collectively pursuant to the statutory and equitable

jurisdiction of the court, [15] I am satisfied that it is convenient or just to appoint a receiver.

The order to issue

[45] Specifically, I appoint Price Waterhouse Coopers Inc., without security. [16]

[46] Although, it is not necessary to articulate a precise amount of indebtedness in the order, I am satisfied it is more likely than not that LL is indebted to BMO for an amount of at least $200,000 as at March 23, 2018.

[47] The Receiver will effect a reasonably timely reduction of LL's indebtedness to BMO, only toward payment for any true principal and interest thereon outstanding as of March 23, 2018, and to a maximum of $200,000. [17] The Receiver will reduce that indebtedness, by making payments to BMO arising from the revenue generated by sales of portions LL's cattle herd. The timing, content, and amounts thereof to be in the Receiver's sole discretion, *but* only after having had genuine and timely collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for viability. LL will fulsomely facilitate the Receiver's patent and patently implied responsibilities to effect the debt reduction.

[48] I decline to order LL to be responsible for the cost of any herd insurance.

[49] I believe it appropriate for the court to order the parties to attend at a mutually convenient time for a status update in approximately six months. [18]

Costs

---

[15] As reflected in s. 43(9) of the *Judicature Act*, and s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 77 of the *Companies Act (Nova Scotia)* and our *Civil Procedure Rule* 73

[16] I am satisfied that this is appropriate – see Rule 73.07(a).

[17] The Receiver shall also pay from the proceeds before paying BMO's indebtedness: its costs incurred in acting as Receiver, including its own fees, charges and expenses; any statutory claims due and owing, which have prioirity over the secured claim of BMO.

[18] The mutually convenient date will be ascertained in advance and inserted into the body of the court's order. BMO also sought payment of the legal and Receiver fees and disbursements with interest to date, but were agreeable to defer the court's assessment of their reasonableness to a future date. I will leave it to the parties to arrange any further hearings required, on notice to all parties including the guarantors, regarding the remaining claimed indebtedness beyond $200,000, and costs of this Application. I direct the Applicant to draft the form of order.

[50] Typically, an application in chambers set for one half day, would justify an order of approximately $1,000 in costs as against the Respondent. I note that in the *Crown Jewel,* Justice Edwards ordered $1,500 costs. BMO has suggested deferring the determination of the costs of this proceeding to the date when the legal, professional fees and outstanding interest amounts are assessed. I believe this can best be addressed at a future date.

Rosinski, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243

Date: 20190607
Docket: Hfx No. 483616
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 7, 2019, in Halifax, Nova Scotia
Oral Decision:	June 7, 2019
Counsel:	Gavin D.F. MacDonald, for the Plaintiff Kevin A. MacDonald, for the Defendants Stephen J. Kingston and Colin J. Boyd (summer student) for Ernst and Young (Receiver-Monitor)

By the Court (orally):

Background

[1] The Plaintiff, Royal Bank of Canada ("RBC"), moves for an order appointing Ernst and Young ("EY") as a receiver of the property of the Defendants, Eastern Infrastructure Incorporated and Allcrete Restoration Limited. Both are, of course, corporate entities, and I will refer to them individually as "Eastern" and "Allcrete", and jointly as "the Companies".

[2] EY already has an appointment as Receiver-Monitor of the assets of the Companies, pursuant to an order of this court dated February 4, 2019 ("the first order"). All parties consented to it.

[3] However, the scope of that order limits the powers of EY as compared to those which would ordinarily be contained in a receivership order under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The order sought by the Plaintiff would discharge EY of its obligations under the order of February 4, 2019, and substitute therefore the expanded powers and responsibilities contained in the order sought, which is a "traditional" receivership order.

[4] For its part, EY supports RBC's motion. It has indicated that it is prepared to "act as a fully empowered Receiver of the Companies pursuant to s. 243 of the *BIA*", if RBC's motion is granted.

[5] The second order issued in this proceeding was granted by Justice Michael J. Wood (as he was then) on March 19, 2019. It came about after RBC had filed a motion "seeking the advice and direction of the court as regards to the further discharge of its powers and duties under the Consent Order" of February 4, 2019. The Defendant Companies were ordered to provide EY with certain information as set out in Schedules "A" and "B" thereto on or by 5 p.m. on March 22, 2019.

[6] The first order did not empower the Receiver-Monitor, EY, to take possession or control of the Defendant Companies' assets or business. It was, however, similar in most other ways to a standard Receivership Order. This limitation resulted, primarily, from concerns raised by the Companies, the most pressing of which was to the effect that they should be permitted more time to arrange their own sale process, while their businesses remained going concerns.

Having said that, EY asserts that it has not yet been provided with all of the information contemplated by the second order.

[7] There are also other matters of concern both to the Plaintiff and EY. For example, the Companies have not provided a sales plan or a proposal for the sale of their assets, or a plan for debt restructuring either to this court or to EY, the Receiver-Monitor. Nor is there a plan or agreement in place to repay monies owing to RBC. Indeed, no such payments have been made by the Companies since RBC commenced this proceeding. More concerningly, the Companies' financial positions have become much worse over that interval.

[8] RBC contends that the situation has become untenable, that the powers under the first order are not sufficient to protect either RBC's interests or those of the other creditors, and that the only way to extend appropriate safeguards for the benefit of all is to provide EY with a full receivership. The Companies have filed no materials or written brief in response. However, their counsel attended the hearing and initially stated that he took "no position" with respect to the relief sought by RBC. He then proceeded to argue vehemently against it.

Discussion and Analysis

[9] It is clear from the affidavit of Dave Northup (Special Loans and Advisory Services for RBC), dated December 21, 2018, that the Companies are indebted to RBC. For example at para. 4 we note that:

> According the records of RBC, Eastern Infrastructure Inc. ("Eastern") was directly indebted to it as of November 19, 2018 in the aggregate amount of $523,088.61 excluding accruing interest and costs of enforcement. In addition, Eastern has guaranteed the obligations of Allcrete Restoration Limited ("Allcrete") limited to the amount to $1,600,000.00 plus interest accruing from the date of demand. Therefore, Eastern's total obligation to RBC is $2,131,088.61 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[10] In para. 15, Mr. Northup continues:

> According the records of RBC, Allcrete was directly indebted to it as of November 19, 2018 in the aggregate amount of $2,096,167.86 excluding accruing interest and costs of enforcement. In addition, Allcrete has guaranteed the obligations of Eastern to RBC limited to the amount of $1,600,000,000.00 plus interest from the time of demand. Therefore, Allcrete's total obligation to RBC is 2,619,256.47 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[11] Demands for payment were issued by RBC on March 9, 2018. The demands were reissued on November 18, 2018. This latter instance included provision to the Companies by RBC of fresh notices of intention to enforce security pursuant to s. 244 of the *BIA*.

[12] During RBC's forbearance, or the hiatus between the two demands, significant negotiations took place between the parties. No settlement was made, nor was repayment of the debts effected. No payments have been made by the Companies to RBC or EY at all since the second demand was made in November 2018.

[13] I am satisfied that both the General Security Agreement and collateral mortgage provide RBC with the ability to appoint a receiver. For example, at Tab "J" of Mr. Northup's affidavit, we find the former, executed by Eastern Infrastructure, para. 2 of which reads:

> The Security Interest granted hereby secures payment and performance of any and all obligations, indebtedness and liability of Debtor to RBC (including interest thereon) present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wheresoever and howsoever incurred and any ultimate unpaid balance thereof and whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again and whether Debtor be bound alone or with another or others and whether as principal or surety (hereinafter collectively called the "Indebtedness"). If the Security Interest in the Collateral is not sufficient, in the event of default, to satisfy all Indebtedness of the Debtor, the Debtor acknowledges and agrees that Debtor shall continue to be liable for any Indebtedness remaining outstanding and RBC shall be entitled to pursue full payment thereof.

[14] Para. 13(a) goes on to provide:

> Upon default, RBC may appoint or reappoint by instrument in writing, any person or persons, whether an officer or officers or an employee or employees of RBC or not, to be a receiver or receivers (thereinafter called a "Receiver", which term when used herein shall include a receiver and manager) of Collateral (including any interest, income or profits therefrom) and may remove any Receiver so appointed and appoint another in his/her stead. Any such Receiver shall, so far as concerns responsibility for his/her acts, be deemed the agent of Debtor and not RBC, and RBC shall not be in any way responsible for any misconduct, negligence or non-feasance on the part of any such Receiver, his/her servants, agents or employees. Subject to the provisions of the instrument appointing him/her, any such Receiver shall have power to take possession of Collateral, to preserve Collateral or its value, to carry on or concur in carrying on all or any part of the business of Debtor and to sell, lease, license or otherwise dispose of or

> concur in selling, leasing, licensing or otherwise disposing of Collateral. To facilitate the foregoing powers, any such Receiver may, to the exclusion of all others, including Debtor, enter upon, use and occupy all premises owned or occupied by Debtor wherein Collateral may be situate, maintain Collateral upon such premises, borrow money on a secured or unsecured basis and use Collateral directly in carrying on Debtor's business or as security for loans or advances to enable the Receiver to carry on Debtor's business or otherwise, as such Receiver shall, in its discretion, determine. Except as may be otherwise directed by RBC, all Money received from time to time by such Receiver in carrying out his/her appointment shall be received in trust for and paid over to RBC. Every such Receiver may, in the discretion of RBC, be vested with all or any of the rights and powers of RBC.

[15] Sub paras. (b) – (h) go on to further particularize powers that RBC may exercise ancillary to the appointment of a receiver.

[16] At tab (h) of Mr. Northup's affidavit, we find the collateral mortgage executed by Eastern on November 24, 2011. The relevant portions of para. 12.1 (i) and (j) of that instrument provide as follows:

> Notwithstanding anything herein contained, it is declared and agreed that if at any time when there shall be default under the provisions of this Mortgage, the Mortgagee may, at such time and from time to time, and with or without entry into possession of the Mortgaged Premises, or any part thereof, by instrument in writing appoint any person, whether an officer or officers or an employee or employees of the Mortgages or not, to be a receiver (which term, as used herein, includes a receiver manager) of the Mortgaged Premises, or any part thereof, and of the rents and profits thereof, and with or without security, and may from time to time by similar writing remove any receiver and appoint another receiver, and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor, but no such appointment shall be revocable by the Mortgagor. Upon the appointment of any such receiver from time to time, the following provisions shall apply:
>
> ...
>
> (j) The rights and powers conferred herein in respect of the receiver are supplemental to and not in substitution of any other rights and powers which the Mortgagee may have.

[17] Since EY's appointment as Receiver-Monitor pursuant to the first order on February 4, 2019, it has issued three reports. The first report is dated March 8, 2019. In the interests of brevity, I will point to only some of its relevant features. All references to "RM" in the reports relate to Ernst and Young, the receiver-monitor.

[18] First, para. 10:

> On 6 February 2019, the RM, through its counsel, issued a preliminary request for information to both the Company and RBC (the "Preliminary Request"). A copy of the Preliminary Request is attached as Appendix "B". The Preliminary Request included among other items that RBC provide copies of all appraisals commissioned and copies of its loan agreements with the Company and that the Company produce various financial data, including a 13-week cash flow projection with primary assumptions (the "Cash Flow"), necessary to provide the RM with an overview of the Company's current financial situation.

[19] Then, paras. 17 and 18:

> During the February 18 Call, Management advised that t he Company had limited liquidity and anticipated cash flow challenges in the next few weeks. The RM reiterated its request for the Cash Flow during the call. Management undertook to provide the Cash Flow prior to 21 February 2019, being the date of the next scheduled in person meeting between the RM and management at Company premises at 129 Park Street, in Elmsdale, Nova Scotia.
>
> The RM provided Management, including Mr. Wheaton (who was unavailable for the February 18 Call) a summary of the February 18 Call to which Mr. Wheaton provided his comments. A summary of the call and email exchanges as between the RM and the Company is attached as Appendix "C".

[20] Then, at para. 20:

> The Company did not produce a Cash Flow during the February 21 Meeting notwithstanding the RM's Preliminary Request, the February 12 Email, the February 14 Email and the February 18 Call. During the February 21 Meeting Management and Mr. Wheaton undertook to prepare and provide the RM with the Cash Flow by 22 February 2019. The RM offered to assist the Company in the preparation of the Cash Flow if required and, in an effort to advance the process, the RM provided the Company with a Cash Flow template for guidance.

[21] Then, at para. 23:

> The Company again failed to produce the information requested by the 28 February 2019 deadline. On 1 March 2019, correspondence from the RM's counsel was delivered to counsel for the Company and RBC confirming that:
>
> a. information requests remained outstanding;
>
> b. the production of the Cash Flow was critical in relation to the RM's monitoring, efforts to develop a sales process, and the RM's assessment of the Company's liquidity concerns;

c. The RM was, as a result of information requests not being provided, unable to respond to concerns raised by counsel for Intact Insurance (as described below), referencing certain bonded Company projects, and their confirmation request that the Company was meeting its obligations under the *Builder's Lien Act*; and

d. The current status quo situation was untenable and that the RM would be issuing a report to advise the Court on the lack of cooperation being provided.

[22] Next, at paras. 26 and 27:

> As noted above, the RM received correspondence from Intact Insurance ("Intact"), a copy of which is attached as Appendix "F", which provides surety bonding for EII and various Performance and Labour and Material Payment Bonds ("Bonds") in relation to Company projects. Intact advised the RM that it had received various claims under its Bonds and accordingly requested confirmation from the RM that the Company was meeting its obligations under the *Builder's Lien Act*. The RM advised Intact that it was not in a position to confirm the information requested because the RM's information requests to the Company remaining outstanding. A copy of the RM's response, through counsel, is attached as Appendix "G".
>
> The RM received e-mail correspondence on a without prejudice basis from counsel of an alleged unpaid vendor seeking the RM's consent to allow said vendor to register a lien claim against ARL pursuant to the *Builder's Lien Act*. In addition, the RM has been contacted by a third counsel also seeking to file a lien claim against ARL. Counsel for the Company and RBC have been provided with copies of the lien claim correspondence.
>
> [Emphasis added]

[23] Finally, at paras. 29 and 30:

> In addition to possible prejudice to lien claimants the RM is concerned, based upon initial comments arising from the 18 February Call in which Management advised that the Company had limited liquidity and anticipated cash flow challenges in the next few weeks, that the Company may not be in a position to sustain its operations on a cash flow positive basis such that other creditor interests (including but not limited to RBC, Canada Revenue Agency and/or other trade vendors providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> The RM has serious concerns that such stakeholders may have a false sense of comfort that the RM is monitoring the Company operations pursuant to the terms of the Consent Order when, in fact, the RM is not in a position to provide comfort to these stakeholder groups or the Court with respect to the financial position of

the Company as a result of the lack of cooperation extended by the Company to date.

[Emphasis added]

[24] Reference to the second report, dated April 12, 2019, indicates:

Pursuant to the terms of the Production Order, the Company was directed to provide the RM with specific information on or before 22 March 2019 (the "Deadline"). A portion of the specific information required to be produced was delivered to the RM on the Deadline date. However, not all of the Court ordered information was provided. Most notably, the Company failed to provide the RM with its bank statements (and/or online access to the bank statements) for the periods requested. The Company did produce a 13-week cash flow projection, a copy of which is attached as Appendix C (the "Original Cash Flow"). The Original Cash Flow unfortunately did not provide sufficient disclosure to address the RM's monitoring needs.

[25] At paras. 13 and 14 we find:

The Company, with the assistance and guidance of the RM, agreed to prepare an amended cash flow incorporating actual cash receipts and disbursements from the date of the Consent Order through 29 March 2019 (the "Period") and a 12 week forecast for the period ending 21 June 2019 (the "Projected Period").

The amended cash flow report was provided to the RM on 2 April 2019. The RM adjusted and reconciled the Period results to the EII's bank statements. A copy of the reconciled amended cash flow report (the "Amended Report") is attached as Appendix E. No banking activity was processed through ARL's bank account during the Period with the exception of service fees. ARL's closing cash balance at the end of the Period was $6,122.

[26] Paras. 16 and 17 tells us that:

Actual cash receipts of $496,686 were comprised of:

a. Trade accounts receivable collections - $451,999;

b. Advances from Related Parties (as defined below) - $20,000;

c. Advances from third parties - $16,500 (see below offsetting disbursement); and

d. Rental (69 Park Road) receipts - $8,188.

Actual cash disbursements of $468,930 were comprised of:

a. Payroll and source deductions - $226,175;

b. Related Party (as defined below) payments - $137,100;

c. Repayment of third party advances - $16,500 (see above offsetting advance);

d. HST payment - $10,000; and

e. General operating disbursements - $79,155.

[27] Paras. 18 - 20 of the second report go on to describe the relentless deterioration of the Companies' financial structures. For example, although the Companies' net cash positions remained neutral, there was a troubling erosion of net working capital during the period from February 4, 2019 to March 2019. Accounts receivable were utilized to cover payroll and other operating expenses. Sufficient new revenue was not generated to replace the funds exhausted by this process to sustain the Companies' capital positions.

[28] As a result, the extrapolated cash flow for the ensuing period ending June 21, 2019 forecasted a cash deficiency position of $242,019, even excluding those professional fees which are being funded directly by RBC. Moreover, EY indicated that it was unaware of any credit facilities to which the Companies could turn to remediate or mitigate their dire straits.

[29] At para. 22 of the second report, EY notes:

> The reduction of the trade accounts receivable balance since the issuance of the Consent Order has negatively impacted the value of the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist.

[30] Para. 24:

> The RM has requested the necessary information to enable it to assess whether there are any unpaid subcontractors and/or potential Builder's Lien claims pertaining to these projects, but the requested information has not been provided to date.

[31] Paras. 31 – 34:

> HST Filings and Obligation
>
> The RM has reviewed EII's HST account obligation due to the Canada Revenue Agency (the "CRA") which totals approximately $305,000.
>
> Management have not filed their December 2018 HST return nor their February 2019 HST return. EII anticipates the filing of these returns will generate HST refunds thereby reducing EII's net HST exposure to the CRA. The RM submits that an organization benefiting from a Court ordered stay of proceeding has an

> obligation to file its statutory remittances when due. As such, the RM has advised Management to file its December 2018 and February 2019 returns forthwith.
>
> Workers' Compensation Filings and Obligation
>
> The RM understands that EII has a Workers' Compensation Board (the "WCB") obligation of $25,226 and that it has not filed WCB reports for the months of October 2018, November 2018, December 2018, January 2019 and February 2019.
>
> The RM advised Management to file the outstanding WCB returns forthwith.

[32] Then, there are the lien claimants. Battlefield Equipment Rentals has filed a lien under the *Builders Lien Act* ("*BIA*") in the amount of $27,304.70 plus interest and costs against Allcrete. One of Eastern's subcontractors, Arrow Construction Products Limited has filed against the Queen's Marque Development Limited project ($16,271.44). Queen's Marque made a $13,287.99 payment directly to Arrow under s. 14 of the *BIA*. (para. 36, second report). All of this on top of Intact's (Eastern's bonding company) earlier noted indication that it has received $222,767.78 in bond claims as of March 27, 2019.

[33] The concerns of the Plaintiff should now be obvious. RBC fears that the Companies will not be in a position to sustain their operations even over the short term, and that creditor interests (including RBC, lien claimants, CRA, Workers' Compensation, and other trade vendors or employees) may be adversely affected while the Companies continue to operate.

[34] The third report of May 10, 2019 continues in the same vein. For example in para. 17:

> The continued reduction of the trade accounts receivable balance further erodes the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist. The RM anticipates the operating lenders security position will continue to erode unless immediate action is taken to discontinue operations as there is no evidence available to suggest that a viable and profitable operating plan is in place.

[35] It also references concerns about additional related party payments which are either being made to Brian Wheaton, who is the controlling mind of both Companies, or to other entities controlled or related to Mr. Wheaton.

[36] At paras. 23 and 24 of the third report, we find again a reference to the fact that the Companies are failing on an ongoing basis to comply with statutory obligations respecting payment of HST and WCB premiums. As we have seen

from the second report, they already had (at the time of that report) accumulated indebtedness of $305,000.00 respecting HST and $25,266.00 for WCB. No evidence of any resolution of the lien claims is noted in the third report, either.

[37] At paras. 27 and 28 of the third report, EY points out:

> There has been further erosion to the security positions of certain affected creditors since the issuance of the Second Report and further erosion is likely to be crystallized if the Company is permitted to continue to operate. The RM remains concerned that the Company's access to cash may run out should accounts receivable collections fail to materialize and that creditor interests (including but not limited to RBC, Lien Claimants, CRA, Workers' Compensation Board and/or other trade vendors or employees providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> Management has not responded to various RM information requests and accordingly our ability to monitor the operations has been challenging. Absent the Company immediately securing profitable projects and adequate financing to complete same a liquidity crisis may be inevitable. In the interim, the security positions of the affected creditors are deteriorating.

Issues

[38] In order to determine whether to grant the relief sought it is necessary to consider:

(i) the nature of the receivership sought,

(ii) whether the Companies are "insolvent persons" within the meaning of the *BIA* and,

(iii) if it is "just or convenient" that the remedy sought be granted.

Analysis

(i) The nature of the receivership sought.

[39] At the outset, I observe that RBC has the power to appoint a receiver pursuant to its security documents. Some reference to these documents has earlier been made. It is important, however, to appreciate the distinction between a privately appointed receiver and one appointed by the court.

[40] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128, Justice Edwards put it this way:

> The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed ...
>
> The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in *Houlden, Morawetz and Sarra* at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> [Emphasis added]

[41] Obviously, there are myriad creditors beside RBC in this case. We have heard of lien claimants, and significant amounts owed pursuant to both HST and WCB legislation, to name just some. This would, in my view, tend to favour a court appointed receiver, accountable to the court, who will be able to offer protection to all of the various interests involved, as opposed to one appointed privately by the Plaintiff pursuant to its security documents. To be fair (and to repeat), this is in accord with RBC's position.

[42] As to whether it is appropriate to make such an appointment, the legislation itself must be considered. As section 243(1) of the *BIA* states:

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

(ii) Are the Companies "insolvent persons" within the meaning of the BIA?

[43] The Companies are clearly insolvent within the meaning of s. 243(1) of the *BIA*. Consider that the legislation defines "insolvent person" to mean:

> ... a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this act amount to $1,000, and
>
> (i) Who is for any reason unable to meet his obligations as they generally become due
>
> (ii) Who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) The aggregate of whose property is not at a fair valuation, sufficient or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;"

[44] The evidence of the receiver-monitor, EY, is uncontradicted. The Companies are indebted to and/or cannot meet their "obligations as they generally become due" with respect creditors including CRA (on account of HST), WCB (second report para. 30), Battlefield Equipment Rentals and Arrow Construction (second report paras. 35-36) not to mention RBC itself, to whom they have significant financial obligations that have long been outstanding. There are also the performance bond claims which have been brought by some other creditors of the Companies, as reported by Intact Insurance and noted in the second report (para. 37). Also troubling is the forecasted cash deficiency position of the Companies posited by EY in its reports.

[45] Criteria (i) and (ii) of the characteristics which define an "insolvent person" pursuant to the *BIA* have been established. Also, the third criterion has likely been established as well. In any event, given the disjunctive nature of the definition of "insolvent person" in the legislation, the threshold specified in s. 243(1) is easily met in this case.

(iii) Is it "just or convenient" that the remedy sought by RBC be granted?

[46] The seemingly innocuous words "just or convenient" do not, of course, clothe the court with *carte blanche* to do as it pleases. There is authority as to what they mean within the current lexicon. Consider, for example, the following excerpt from *Enterprise Cape Breton* (supra) at pp. 13 - 16:

> In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell: Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) The risk to the security holder taking into consideration the size of the debtor s equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;
>
> (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) The effect of the order on the parties;
>
> (l) The conduct of the parties;

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

(n) The cost to the parties;

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

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

The author's further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument – appoint a receiver.

[Emphasis added]

[47] It is not necessary that RBC or EY demonstrate irrevocable harm in order to succeed. Certainly, one may agree with RBC's contention that its position is being harmed or seriously compromised on the basis of what is contained in EY's reports, without necessarily accepting that this harm is irrevocable. I will state, however, that the failure by the Companies to bring forward or lead a single piece of evidence at this hearing, in the face of significant evidence that their capital position is relentlessly deteriorating, is very troubling.

[48] Certainly, there is significant risk to RBC and the other creditors. The Companies' capital positions have inexorably and precipitously declined, particularly during the period from November 2018 to the present. The powers provided under the first Order have proven inadequate to the job with which EY has been tasked. The overall tenor of EY's three reports is that cash reserves and assets are being depleted. That pool is shrinking and it not being replenished. Related party transactions are also taking place.

[49] Many of the Companies' assets are mobile. Some of these assets consist of equipment that is used at many different construction sites, some in different provinces. If equipment is being used by the Companies without adequate payments being received by them to maintain operations, this equipment could be damaged (as RBC argues) or dissipated, along with the cash reserves.

[50] As we continue to consider the apprehended or actual waste of the debtor's assets, it is also difficult to overlook the decrease in accounts receivable and cash balances, and the steady increase in liabilities having statutory priority outside of a bankruptcy (including the HST and WBC amounts). We have earlier discussed the related party transactions reported by EY. Even if the submissions of the Defendants' counsel are accepted (which is to the effect that they were repayments of monies earlier loaned by Mr. Wheaton to the Companies), these would still constitute "preferences" under virtually every relevant or potentially relevant

statutory regime. Further, neither company has offered one iota of evidence on this point, or with respect to any of the other concerns raised by the Plaintiff and/or EY.

[51] As to the balance of convenience between the parties, I first note that the court has been provided with no plan by the Companies to repay or pay down their obligations. Justice Rosinski in *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, at para. 33 treated such as a factor to be considered under this rubric.

[52] I also note that an order for a court appointed receiver will not necessarily "dictate the financial end" of the Companies (to borrow from the language used in *Enterprise Cape Breton*, at page 23). Indeed, it would be expected that the Companies would continue in their efforts to cooperate with the receiver in order to maximize the returns, even though their previous efforts to keep the businesses afloat since the first Order was granted have generated such unencouraging results.

Conclusion

[53] It is not necessary to "check all the boxes" with respect to the factors noted in *Enterprise Cape Breton* in order for the Plaintiff to succeed. Indeed, not all of these factors will be applicable to every case. Those that do apply in a given situation will also vary to some extent in the weight to be assigned to them. Conversely, in some cases, there will be additional factors which may militate for or against the remedy sought. The list is not exhaustive.

[54] It is correct to observe that a receivership is an extraordinary remedy, and is often sparingly granted. This concern is significantly attenuated, however, by the fact that RBC has a contractual right to appoint a receiver.

[55] I have concluded that the totality of the relevant factors noted in the *Enterprise Cape Breton* case, as well as the significant efforts made by RBC to accommodate the Companies since at least January 2019, shows that the decision to approach the court for relief in the present context has not been made precipitously.

[56] Moreover, the futility of other alternatives has been exposed over the period of time from at least November 2018 to the present. A private receivership was attempted, the Companies resisted. A limited receivership-monitoring regime was put in place by the first order as a result. Moreover, the Companies have cooperated only sparingly with provisions in the second order to supply EY with information that it needed to do its job. The present limited receivership/monitoring powers contained in the first Order, which were

anticipated to culminate in a mutually acceptable sales process, instead saw the Companies' fortunes continuously decline while their operations continued.

[57] The Companies are, at their best, presently stagnant. However, an analysis of all relevant factors demonstrates that if the order sought by RBC is not granted, Eastern and Allcrete will soon likely hit the proverbial "wall". The prejudice to existing creditors will be exacerbated. In all likelihood, new creditors will come into being. The status quo is untenable. The order sought is necessary. More to the point, it is both "just" and "convenient", given the present factual matrix.

[58] There are a number of problems with which EY will have to contend. Most are obvious, and include the need to collect mobile equipment, come up with a sales process that maximizes returns, and seek court approval. I will grant the receivership Order sought without security, and without specifying a limited time period for the appointment.

Gabriel, J.

CITATION: Ashcroft Urban Developments Inc. (Re), 2024 ONSC 7192
COURT FILE NO.: CV-24-98508
(Ottawa)
DATE: 20241220

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED	*David Mann K.C.*, *Alexander Bissonette* and *Sarah DelVillano*, for the Applicants
AND IN THE MATTER OF ASHCROFT URBAN DEVELOPMENTS INC., 2067166 ONTARIO INC., 2139770 ONTARIO INC., 2265132 ONTARIO INC., ASHCROFT HOMES – LA PROMENADE INC., 2195186 ONTARIO INC., ASHCROFT HOMES – CAPITAL HALL INC. and 1019883 ONTARIO INC. Applicants	*Randal Van de Mosselaer* and *Stephen Kroeger* for Grant Thornton Limited (the court-appointed monitor) *Alan Merskey, Jeremy Bornstein* and *Jamie Arabi* for ACM Advisors Ltd. *Sanjeev Mitra* and *Calvin Horsten* for CMLS Financial Ltd. and Equitable Bank *Monique J. Jilesen* and *Adam Davis* for Institutional Mortgage Capital Inc. in its capacity as general partner of IMC Limited Partnership *Haddon Murray* and *Heather Fisher* for Central 1 Credit Union *Patrick Corney* for Canadian Western Bank *Raj Sahni* for Peoples Trust Company *Fraser Mackinnon Blair* for MNP Ltd. in its capacity as court-appointed receiver of Ashcroft Homes – Eastboro Inc. and Ashcroft Homes – 108 Richmond Road Inc. *Sara-Ann Wilson*, for BDO Canada Limited in its capacity as the court-appointed receiver

) of Ashcroft Homes – 101 Richmond Road
) Inc., Ashcroft Homes - 108 Richmond Road
) Inc. and Ashcroft Homes – 111 Richmond
) Road Inc.
)
) *Fozia Chaudary*, for Canada Revenue
) Agency
)
) *Jennifer Stam*, for KSV Restructuring Inc. in
) its capacity as proposed interim receiver

)
)
) **HEARD at Ottawa:** 12 December 2024 (by
) videoconference)

REASONS FOR DECISION

MEW J.

[1] On 5 December 2024, the applicants sought and obtained from me an initial order under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"). The stay of proceedings secured by that initial order was sought by the applicants primarily to stay and prevent enforcement actions that had been, or were anticipated to be, taken by certain secured lenders of the applicants, and potentially other creditors, thereby enabling the applicants to advance their restructuring efforts, and continue to operate their businesses as going concerns.

[2] The initial order was obtained without advance notice to all but one of the secured creditors affected by the order. The exception, Central 1 Credit Union ("Central 1"), a secured creditor of 2139770 Ontario Inc., received less than an hour's notice of the hearing, as a result of which, although counsel attended the hearing at which the initial order was obtained, Central 1 took no position on the appropriateness of the initial order and fully reserved its rights. Central 1 also advised the court that there was already in existence an order by MacLeod RSJ that if there were further breaches by 2139770 Ontario of its forbearance agreement with Central 1, an order would be made for the appointment of a receiver and manager over the property, assets and undertakings of 2139770 Ontario Inc.

[3] A comeback hearing date was set for 12 December 2024, seven days after the date of the initial order.

[4] Because the initial order was obtained without notice, the onus rests "solely and squarely" with the applicants to prove that the initial order was appropriate and that the protection afforded by the initial order should be continued through an amended and restated initial order (the "ARIO"): *General Chemical Canada Ltd. (Re)*, 2005 CanLII 1079 (ON SC), at para. 2.

[5] At the comeback hearing, secured creditors representing 84% of the secured debt opposed the continuation of the CCAA proceeding, and sought instead orders for the appointment of interim receivers to protect their interests.

[6] At the conclusion of the comeback hearing, I advised the parties that, pending the release of these reasons for decision, the initial order made by me on 5 December 2024 would remain in effect on an interim basis.

Background

[7] The eight applicant companies are part of a broader group of more than 55 affiliated entities known as the Ashcroft Homes Group. The founder and controlling mind of the Ashcroft Homes Group is David Choo. The business of the Group is the purchase, development and operation of residential communities in the Ottawa area for seniors, students, and general residential markets, and the lease or sale of accommodations in those communities.

[8] The companies and communities which comprise the Ashcroft Homes Group operate through four key brands as follows:

a. "Ashcroft Homes" – general residential, comprising master planned communities with single dwelling house areas, infill townhome neighbourhoods and condominium communities;

b. "Alavida Lifestyles" – retirement apartment and seniors' suites communities that allow for transition from independent to assisted living, with on-site health care and personal care services, amenities and other offerings and events;

c. "Envie" – student residential communities comprised of condominium platforms for lease, sale or investment; and

d. "REstays" – luxury short term rentals and hotel-like accommodation.

[9] Seven of the applicants own and operate separate residential properties, each within its own segregated operations, bank accounts, books and records, and assets. The applicants engage in inter-company transactions within the Ashcroft Homes Group, resulting in inter-company receivables and payables. Certain administrative services are provided on a centralised basis, but each entity pays for its respective share of those services. The eighth applicant is Ashcroft's head office.

[10] Four of the single purpose applicants are owned by David Choo, while three are owned by Mr. Choo and Envie Enterprises Inc., which is owned by Mr. Choo and the David and Chanti Choo Family Trust 2016.

[11] According to Mr. Choo, despite a history of generating significant revenues and having significant net equity holdings, in recent years various members of the Ashcroft Homes Group have encountered liquidity issues related to rising interest rates and a decline in occupancy rates. This has left the applicants finding themselves in a position of insufficient liquidity to meet their current debt obligations.

[12] The applicants' current dilemma is summed up in paragraph 14 of Mr. Choo's affidavit sworn in support of the initial order:

> From late 2023 the Applicants began working with their respective lenders to address these shortfalls. That has resulted in a series of forbearance agreements and cross-guarantees being established that were designed to buy time to restore occupancy rates, including in some cases by the finalisation of construction, refinance existing lenders, and sell assets in order to pay down debt. One company in the Group recently entered in a sale for a project property for $183,000,000, resolving not only the financial position of that company, but also assisting with other debts across the Group. In recent months, however, we have received increasing numbers of demands from our lenders that make private, individual arrangements increasingly difficult to achieve.

[13] The applicants assert that the combined value of the applicants' real estate property is approximately $460,490,030, encumbered by approximately $284,511,617 in secured debt, leaving an estimated net equity of $175,978,413. As will be discussed below, the secured lenders challenge the reliability of the applicants' estimates which, they say, are based on dated appraisals that do not reflect current market values.

[14] The following table summarises the applicants, their related projects and locations, and the secured lenders for each:

Applicant	**Project**	**Location**	**Secured Lender(s)**	**Secured Debt**
Ashcroft Urban Developments	**REStays**	101 Queen Street & 110 Sparks Street, Ottawa	CMLS (EQ Bank is a "major participant" in the mortgage	$50,600,000
2067166 Ontario	**Park Place Senior**	120 Central Park Drive, Ottawa	(1) ACM (2) IMC	$26,396,895

2139770 Ontario	**Ravines Retirement**	626 Prado Private, Ottawa	Central 1	$38,173,696
2265132 Ontario	**Ravines Senior**	636 Prado Private, Ottawa	(1) ACM (2) IMC	$45,234,932
AH – La Promenade	**Promenade Seniors Suites**	130 & 150 Rossignol Drive, Ottawa (plus vacant land at 100 Rossignol Drive)	IMC	$37,000,000
2195186 Ontario	**Envie I**	101 Champagne Rd, Ottawa	Peoples Trust Company ACM	$57,853,430
AH – Capital Hall	**Envie II**	105 Champagne Avenue, Ottawa	Equitable Bank	$24,000,000
1019883 Ontario	**Head Office**	18 Antares Drive, Nepean	Canadian Western Bank	$4,134,370
			CRA	$1,118,294
TOTAL				**$284,511,617**

Lender Recovery Actions

[15] Lender recovery actions associated with the applicants are as follows:

Ashcroft Urban Developments (REStays)

[16] The financing term with CMLS Financial Ltd. ("CMLS") matured on 1 September 2023. CMLS made a demand and notice to enforce security on 15 November 2023, for failure to pay out the loan on maturity, and a further demand on 18 December 2023.

[17] A forbearance agreement was entered into on 23 February 2023, and an amended forbearance agreement on 3 July 2024, extending the time for compliance with the loan agreement to 30 September 2024, with a further extension granted on 19 November 2024 extending the time for compliance to 31 March 2025, and obliging the borrower to procure a mortgage in the amount

of $20,000,000 charging the property of 2195186 Ontario Inc. (Envie I Project) and a guarantee from 219586 Ontario Inc. up to that amount, limited in recourse to its property. This further mortgage was a condition precedent to the second forbearance extension. As the mortgage was never received, CMLS takes the position that the second forbearance extension has not taken effect.

[18] When the original forbearance agreement was entered into, the borrower also provided a consent to a receivership in respect of the REStays property in the event that the borrower failed to refinance by the specified deadline. But for the stay of proceedings pursuant to the initial order, CMLS takes the position that the receiver consent that it obtained could have been activated.

[19] As at August 2024, Ashcroft Urban Developments indirectly paid the salaries of 53 employees through a related company, Ashcroft Homes – Central Park Inc.

2067166 Ontario Inc. (Park Place Senior)

[20] A first ranking mortgage was provided in November 2022 by ACM Advisors Ltd. ("ACM"), with a principal amount of $21,000,000. Security for this loan was agreed to be cross-defaulted and cross-collateralised with security under a parallel loan being provided to 2265132 Ontario Inc. (Ravines Senior). Institutional Mortgage Capital Canada Inc. ("IMC") holds a second ranking mortgage, originally for the principal amount of $11,500,000 with 2265132 Ontario Inc. (Ravines Senior) as co-borrower and jointly and severally liable under the loan agreement. As of the end of October 2024, the balance of the combined debts secured by these mortgages stood at $26,396,895. As at 16 October 2024, this borrower had other outstanding obligations of $551,590, including $391,590 in property tax arrears.

[21] On 19 July 2024, a demand letter and notice of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, was sent to 2067166 Ontario and to related guarantors in respect of the Park Place mortgage.

[22] On 5 November 2024, the parties entered into a forbearance agreement. Conditions precedent to ACM's forbearance obligations included the execution of forbearance agreements between ACM and 2265132 Ontario Inc. (for Ravines Senior) and 2195186 Ontario Inc. (for Envie I). At the time of the initial order in this proceeding, negotiations with respect to the finalisation and execution of those other forbearance agreements were ongoing.

[23] As at August 2024, 2067166 Ontario Inc. paid the salaries of 38 employees directly, and paid 50% of the salaries of five management staff through 1230172 Ontario Inc. for Park Place Retirement.

2139770 Ontario Inc. (Ravines Retirement)

[24] Central 1 Credit Union provided mortgage financing on 16 March 2015 for the principal amount of $27,500,000, which was extended to $43,500,000 on 15 October 2019. The balance of

the loan debt at the end of October 2024 was $38,173,696. The loan was scheduled to mature on 24 November 2024.

[25] The borrower has other outstanding obligations totalling $1,292.300, of which $406,300 is in property tax arrears, $394,000 in debts to various vendors, and $492,000 for income tax.

[26] On 9 August 2024, Central 1 issued a final demand to 2139770 Ontario Inc. as borrower, and to Mr. Choo as guarantor, demanding payment of $38,373,232.02 by 19 August 2024. Central 1 issued a notice of application to appoint a receiver with the demand correspondence.

[27] On 25 September 2024, a forbearance agreement was signed in relation to the Central 1 loan. On 7 October 2024, Central 1 issued an amended notice of application to appoint a receiver over the property, assets and undertakings of 213977 Ontario Inc. That application was heard by Regional Senior Justice MacLeod on 17 October 2024 and resulted in the issuance of a decision on 29 October 2024, granting a postponement of the receivership application upon compliance by 2139770 Ontario Inc. with court imposed terms, together with the other terms of the forbearance agreement: *Central 1 Credit Union v. 2139770 Ontario Inc.*, 2024 ONSC 5988.

[28] As at August 2024, 2139770 Ontario Inc. paid the salaries of 100 employees directly, including salaries of management staff for the Ravines community, which are shared equally between 2139770 Ontario Inc. for Ravines Senior, and 2265132 Ontario Inc. for Ravines Retirement.

2265132 Ontario Inc. (Ravines Senior)

[29] This is another of the properties financed by ACM and IMC. As of the end of October, the net debt on the Ravines Senior loans was $45,234,932. Other outstanding obligations of the borrower totalled $473,000 as of 16 October 2024, including $330,000 in property tax arrears.

[30] On 19 July 2024, a demand letter and notice of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act* was sent to 2265132 Ontario Inc. and its related guarantors in respect of the Ravines Senior mortgage.

[31] On 5 November 2024, the parties entered into a forbearance agreement, one of the conditions precedent to ACM's forbearance obligations being the execution of forbearance agreements between ACM and, *inter alia*, 2195186 Ontario Inc. (Envie I). That forbearance agreement had not yet been finalised and executed at the time of the initial order.

[32] As at August 2024, 2265132 Ontario Inc. paid the salaries of 41 employees directly, plus 50% of the costs of the management staff whose salaries are paid directly by 2139770 Ontario Inc. (Ravines Retirement).

Ashcroft Homes – La Promenade Inc. (Residences Promenade Seniors Suites)

[33] The borrower obtained mortgage finance from IMC on 24 September 2024 for an initial advance of $37,000,000 and a maximum loan amount of $42,000,000. An extension of the loan agreed on 22 December 2022 provided for maturity on 1 February 2024. The loan has not been repaid and the balance, as at the end of October 2024, is said to be $37,000,000.

[34] On 29 October 2024, Ashcroft Homes – La Promenade became guarantor on a $17,800,000 credit facility from Pillar Capital Corp. to another company in the Ashcroft Homes Group, 2181291 Ontario Inc. IMC was asked for its consent to the credit arrangement made with Pillar, but had not provided that consent at the time that credit facility was entered into.

[35] As at August 2024, Ashcroft Homes – La Promenade paid the salaries of 41 employees directly and paid for 50% of the salaries of five management staff with 1971446 Ontario Inc. for Promenade Retirement.

2195186 Ontario Inc. (Envie I)

[36] The first mortgage on this property was provided by Peoples Trust Company for the principal sum of $55,634,035, maturing 1 March 2028. A second priority loan was obtained from ACM Commercial Mortgage Fund in the principal amount of $11,200,000. As of the end of October 2024, the current balance of those loans was $57,853,430.

[37] The property is currently listed for sale. According to Mr. Choo, based on the broker's underwriting value, the net equity after all closing costs and repayment for secure debts is expected to be in excess of $50,000,000. There are, however, other outstanding obligations, totalling $7,480,470, of which $7,210,000 is said to be owing to the Canada Revenue Agency (although this debt is contested and listed for hearing in the Tax Court of Canada in 2025).

[38] As of August 2024, 2195186 Ontario Inc. paid the salaries of 47 employees through Ashcroft Homes – Central Park Inc.

Ashcroft Homes – Capital Hall Inc. (Envie II)

[39] This borrower obtained first mortgage financing from Equitable Bank on 1 September 2022 in the amount of $23,200,000. The current balance of the loan as at October 2024 is $23,200,000 plus outstanding interest of approximately $800,000.

[40] Equitable Bank issued a letter of demand on 9 October 2024 demanding payment of $24,296,447 forthwith and serving a notice of intention to enforce security. The loan is set to mature in January 2025.

1019883 Ontario Inc. – Head Office

[41] On 21 April 2022, 1019883 Ontario obtained mortgage financing from Canadian Western Bank ("CWB") in the amount of $4,500,000. The current debt owing on the loan is $4,134,370. There is also a lien registered on the title of the property for $1,029,987 in favour of the Canada Revenue Agency.

[42] On 16 August 2024, Canada Western Bank wrote to the borrower advising of defaults under the loan, including in respect of reporting requirements and payments of principal and interest. On 19 November 2024, Canada Western Bank offered to amend the loan terms with payment required in full by February 2025, approximately two years before the loan was set to mature.

[43] CWB sent a letter to 1019883 Ontario on 19 November 2024 advising that it wished to exit its banking relationship and proposing to amend its commitment letter. That proposed amending agreement was signed back by Mr. Choo (on behalf of 1019883 Ontario Inc. and as personal guarantor and, on behalf of Ashcroft Homes Inc., as corporate guarantor) on 29 November 2024, four business days before the applicants applied for CCAA protection. On 11 December 2024, CWB made a written demand for repayment of the indebtedness and provided 1019883 Ontario with notice of its intention to enforce CWB's security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*.

[44] As of October 2024, there were 50 employees providing support and administrative services to the Ashcroft Homes Group, including administration, finance and accounting, marketing and sales, human resources, payroll and construction management services.

CCAA Application

[45] The notice of application in this matter was filed with the court on 3 December 2024.

[46] The affidavit of Mr. Choo, filed in support of the application, explained how, beginning in early 2023, the applicants had begun working with their lenders in an effort to address developing liquidity shortfalls. While some of those discussions had been successful, others had not. Ongoing cross-collateralisation requirements and pressure from existing lenders for more security, were stressing the projects. Further, what were described as significantly enhanced reporting requirements to lenders under forbearance terms had added a further burden on the applicants' infrastructure.

[47] The applicants proposed the appointment of Grant Thornton Limited as Monitor and Hawco Peters and Associates Inc. ("Hawco Peters") as Financial Advisor. In addition to a stay of proceedings against the applicants, stays were also sought in respect of certain "Additional Stay Parties" (all either affiliates, or directors and officers of one or all of the applicants).

[48] The applicants also sought approval of an initial Administration Charge up to a maximum amount of $200,000 over the applicants' properties to secure the fees and disbursements of the

Monitor, the Financial Advisor, and their – and the applicants' – respective lawyers, to rank in priority after the existing secured lenders of any applicants in respect, and to the extent, of such lender's registered mortgage; and any taxing authority in respect, and to the extent, of such authority's statutory charge.

[49] Under the proposal, Mr. Choo would provide a debtor-in-possession credit facility (the "DIP Facility") of $1,500,000 without fees or interest, and with the proviso that the DIP lender's charge would rank in priority behind the securities of the secured lenders, any taxation authority to the extent of their statutory charge, and the Administration Charge, and would not secure obligations prior to these proceedings.

Initial Order Hearing

[50] Counsel for the applicants, for the proposed monitor, and for Central 1, appeared by video conference at 2:00 p.m. on 5 December 2024 (although in the case of counsel for Central 1, she advised that she had received less than an hour's notice of the hearing).

[51] At the 5 December hearing, counsel for the applicants advised the court that it had been his intention to get application materials out to the affected parties earlier in the week. However, this had been thwarted by the need for the proposed monitor to clear a potential conflict of interest, which had only been achieved shortly before the hearing began. As a result, for all intents and purposes, the initial order hearing proceeded *ex parte*.

[52] The applicants submitted that the CCAA proceedings and the stays of proceedings sought were the only viable means by which the applicants' businesses could be preserved and maximised for the benefit of all of the applicants' stakeholders, including not only secured lenders and other creditors, but also over 1,000 residents in the communities, over 500 employees, and the equity holders. Counsel described the relief sought as "surgical", only doing what was necessary, in order to preserve the *status quo* and continue the businesses in the ordinary course and to enable the applicants' retained financial advisors, Hawco Peters, to continue their work assisting the applicants with the financing and restructuring efforts. The court was advised that none of the secured creditors would be primed by the proposed arrangements. Nor, it was submitted, were the applicants seeking to "get a jump" on any of the secured lenders.

[53] The applicants had retained Hawco Peters on 26 July 2024 to assist in the sourcing and securing of additional capital for refinancing and restructuring within the Ashcroft Homes Group (including the applicants), and to provide advisory services, and sought a continuation of that retainer during the CCAA creditor protection process.

[54] After hearing the submissions of counsel, reviewing the materials filed, and considering the jurisdiction provided to the court by s. 11.02 of the CCAA to impose a stay of proceedings for a period of not more than ten days if satisfied that circumstances exist to make that order appropriate, I made the initial order as requested, setting a comeback date of 12 December 2024. I was satisfied that the applicants were insolvent and had liabilities in excess of $5 million and

therefore eligible for the protection afforded by the CCAA. My order included, for the reasons articulated by this court in *Timminco Limited (Re)*, 2012 ONSC 506, at para. 66, provision for a charge over the applicants' property in the amount of up to $200,000, to secure the professional fees and disbursements of the proposed monitor, along with the lawyers of the Monitor, the lawyers of the applicants, and the Financial Advisors.

Comeback Hearing

[55] At the comeback hearing, the applicants sought an extension and expansion of the relief provided under the initial order to facilitate and advance the CCAA proceedings, through an ARIO providing, among other things, for:

a. Extension of the initial stay period up to and including 21 February 2025;

b. Authorising, but not requiring, the applicants to pay, with the consent of the Monitor, certain amounts owing for goods and services supplied to the applicants prior to the date of the initial order;

c. Expanding the applicants' restructuring authority, and the respective ability of the Financial Advisor and the Monitor, to assist with the applicants' restructuring efforts, beyond the limited required relief included in the initial order to ensure the applicants' ability to make payments and enter into contracts necessary to continue the normal course of operations and complete, or otherwise deal with, the applicants' projects;

d. Granting the applicants the right to:

    i. Dispose of redundant or non-material assets not exceeding $20,000 in any one transaction, or $100,000 in the aggregate;

    ii. Close the sale of any residential and commercial units to arm's length third parties for fair market value in the ordinary course of business, subject to the approval of the Monitor;

    iii. Continue or establish such listings for sale of subject properties for fair market value in the ordinary course of business, subject to the approval of the Monitor;

    iv. Enter into any new contractual arrangements for sale and thereafter close the sale of, parts of any property to arm's length third parties for fair market value in the ordinary course of business, which the applicable secured lender(s) and the Monitor, each acting reasonably, deem necessary or appropriate;

v. List the whole of the Envie II property for sale on such terms and conditions as may be agreed by the secured lender, Equitable Bank, and the Monitor;

vi. List the whole of the Promenade Seniors' Suites property for sale, separately or in conjunction with the property owned by affiliated corporation 1971446 Ontario Inc., at 110 Rossignol Drive, Ottawa (the Promenade Retirement Residence property) on such terms and conditions as may be agreed to by Ashcroft Homes-La Promenade Inc. (a secured lender to the Promenade Seniors' Suites property) and the Monitor;

e. Continuing the appointment of Hawco Peters and Associates Inc. as financial advisor to the applicants until further order of the court and securing the financial advisor's fees and costs under the Administration charge;

f. Approving the applicants' ability to borrow under a DIP Facility to be provided by Mr. Choo to finance their work and capital requirements and other general corporate purposes, post-filing expenses and costs, including granting a charge over the property to secure all amounts advanced under the DIP Facility;

g. Increasing the maximum amount of the Administration Charge from $200,000 to $700,000;

h. Approving milestones to advance the refinancing of the Ravines retirement residence to allow all indebtedness to be paid out to Central 1 by 30 June 2025; and

i. To seek such advice and direction as the applicants may advise to address issues concerning specific projects.

Applicants' Position

[56] The applicants are clear about their purpose in seeking CCAA protection:

> Here, the Stay of Proceedings is intended primarily to stay and prevent enforcement action that has and will be taken by the Secured Lenders and potentially other creditors. The Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to advance their restructuring efforts, in consultation with the Financial Advisors, including seeking approval of a DIP, further developing strategies to increase occupancy levels and/or sales of properties, exploring other restructuring alternatives and/or developing a plan of compromise or arrangement.

[57] The applicants further submit that the continuation of the creditor protection provided for under the initial order is essential, having regard to the current financial circumstances of the applicants; the "devastating effects" that bankruptcy, liquidation or uncoordinated enforcement actions would have on the projects and their residents, employees and other stakeholders; and, the

value and potential value of each project and for the head office company to the applicants and the Ashcroft Homes Group as a whole.

[58] The applicants claim that, with the assistance of Hawco Peters, they have sourced replacement funding for two of the group's projects (non-applicant affiliates) and "anticipate" receipt of multiple term sheets by mid-December with a cumulative value in the range of $100,000,000 to $230,000,000 to replace multiple lenders. The stated goal and structure of this financing is to provide the applicants with sufficient time to complete started projects, improve occupancy numbers and "settle the waters currently muddied with demands and forbearances". The applicants continue:

> It is envisaged that this strategy will allow sufficient time to allow for the continued sell down of assets which will further deleverage the Ashcroft Homes Group, including the Applicants, and with the continuation of reducing interest rates will lead to traditional long term financing for the remaining real estate portfolio.

[59] According to the applicants, since the initial order was made, they have engaged in communication with various parties, including the secured lenders, either directly or through lawyers and the Financial Advisor related to:

a. Continuing commitment to a timeline for refinancing to allow Central 1 to be paid out and exit as secured lender to 2139770 Ontario Inc. (Ravines Retirement);

b. The proposed sale of the Promenade properties together and as a going concern with the secured lender to AH Ashcroft Homes – La Promenade, IMC, and the secured lender to 197446 Ontario Inc. (RBC); and

c. With CMLS on the REStays loan and in relation to the sale of the whole of the Envie II property.

[60] The applicants argue that the extension of the stay of proceedings will preserve the *status quo* and allow them to, among other things:

a. Operate the business in the ordinary course without disruption;

b. Avoid uncoordinated and stress sales or forced liquidations of the subject properties and projects, which would be value deteriorative and contrary to the best interests of the applicants' stakeholders, employees, tenants and other residents;

c. Preserve their existing tenant relationships and protect such tenants from "forced entries and other improper and disruptive conduct which might be taken by or on behalf of aggressive lenders";

d. Continue to pursue compensatory financing, sale and restructuring transactions capable of underpinning a consensual plan of compromise or arrangement and

advance ongoing discussions related thereto, free of interruption caused by enforcement actions against the applicants and/or the properties; and

e. Continue to liaise with the secured lenders and other stakeholders in relation to the foregoing efforts, and also with the secured lender to the Promenade Retirement Residence property in relation to the proposed sale of the Promenade properties.

[61] Anticipating (and then responding to) opposition by a number of the secured creditors to restructuring proceedings under the CCAA, the applicants argue that the proposed extension of the stay of proceedings is appropriate given that:

a. Since the granting of the initial order they have acted in good faith and with due diligence to stabilise and continue the ordinary course operations of the businesses, to develop strategies, increase occupancy levels, and advance their restructuring objectives;

b. It is desirable to prevent uncoordinated and value destructive enforcement efforts by the secured lenders;

c. The CCAA process will best facilitate the maintenance of the residential communities, facilities and services comprising the projects (as compared to uncoordinated enforcement actions, such as the appointment of separate receivers to individual applicants and their projects, which will come at significant social and economic costs in the circumstances);

d. There is very significant equity in each of the properties, and therefore no risk that secured lender funds will not ultimately be recoverable;

e. The capital of the secured lenders will not be tied up for a longer period of time under the CCAA (as compared to receivership, having regard in particular to the sales and refinancing strategies already under way on behalf of the applicants);

f. The costs of up to eight separate receivers to the applicants and their respective advisors will far outweigh the costs of the continuing appointment of the Monitor and the Financial Advisor under the CCAA;

g. The stay of proceedings will preserve the *status quo* and afford the applicants "the breathing space and stability" required to continue the businesses in their ordinary course operations;

h. A stay is necessary to enable the continuations of engagement with the secured lenders and other stakeholders;

i. The revised cash flow forecast prepared by the Monitor demonstrates that the applicants, separately and together, have sufficient liquidity to fund their obligations and the costs of the CCAA proceedings; and

j. The Monitor is supportive of the proposed extension and stay of proceeding.

The Position of the Secured Lenders

[62] All but one of the secured lenders responding to the comeback motion oppose continuation of CCAA protection.

[63] ACM, CLMS Financial Ltd., Equitable Bank and IMC hold, between them, approximately $194,000,000 in secured debt, representing 68% of the total. Each of these lenders seeks the appointment of KSV Restructuring Inc. ("KSV") as interim receiver.

[64] CWB also supports the ACM motion and the appointment of KSV as interim receiver.

[65] Collectively, I will refer to ACM, CLMS Financial Ltd., Equitable Bank, IMC and CWB as the "ACM Group".

[66] Central 1, representing another approximately $38,000,000 of secured debt, supports the ACM Group, but with BDO Canada Limited as receiver and manager, as previously directed by MacLeod RSJ.

[67] The ACM Group and Central 1 together represent $232,000,000, or 84%, of the applicants' secured indebtedness.

[68] Peoples Trust, as the first priority lender on the Envie I project, does not oppose the CCAA order sought. The Envie I property is in the midst of a sale process. Peoples Trust's main concern is that whatever is determined appropriate by the court should not impede that sale. Accordingly, so long as Peoples Trust continues to receive monthly payments, it sees no reason to oppose the creditor protection that has been sought.

[69] The ACM Group argued that the test established by s. 11.02(2) has not been met. Section 11.02(2) provides that the court may extend a stay order for any period necessary, if the court is satisfied that: (a) circumstances exist to make the order appropriate; and (b) the applicants have acted, and are acting, in good faith, and with due diligence.

[70] In respect of the first of these elements, the secured creditors say that it is unusual (although not completely unheard of) to order creditor protection under the CCAA for real property-centric entities, due to the nature of their security structures and operations. Rather, those entities and their stakeholders more commonly benefit from simpler receivership proceedings.

[71] On the second element, the secured lenders assert that the applicants proceeded to obtain a stay without notice to their major lenders, representing a marked departure from usual restructuring

practices and the applicants' obligations under the CCAA to act in good faith and with diligence. These concerns were compounded by the failure of the applicants to serve their comeback hearing materials until less than 24 hours before the comeback hearing.

[72] Just as the making of orders under s. 11.02 of the CCAA are discretionary, so is the appointment of a receiver. Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver where it is just or convenient to do so. While a court must have regard to all of the circumstances when determining whether it is appropriate to appoint a receiver, the applicants submit that particular regard is to be had to the nature of the property and the rights of interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC). Accordingly, as Osborne J. observed in *Antibe Therapeutics Inc. (Re)*, unreported, 22 April 2024, at para. 59:

> [W]here…there are competing applications for a continued insolvency proceeding under the CCAA, or the appointment of a receiver, the Court must consider all of the relevant factors in the exercise of its discretion to determine the most appropriate path forward.

[73] The secured creditors focus on a number of points, which they ask the court to consider in the exercise of its discretion.

[74] First, the proposed interim receiver, KSV, is already providing financial advice to CMLS Financial Ltd. regarding its loans to Ashcroft Urban Developments Inc. and has also provided advisory services to IMC in respect of its mortgages registered on title to certain of the applicants' real properties. KSV has ongoing experience as the receiver and manager of a seniors' residence in Oshawa, Ontario, where it has worked with a specialist property manager, Brightwater Senior Living Group LLC, to stabilise the performance of the seniors' residence and improve its financial results. If appointed as interim receiver of the Ashcroft entities, KSV intends to engage Brightwater to review and oversee the operations of the retirement properties owned by the applicants. With respect to the student housing residences, KSV intends to engage Varsity Properties Inc. to oversee their operations, having previously worked with Varsity on a prior student residence receivership in Kingston, Ontario. KSV's plan envisages similarly engaging a party with expertise in the hospitality sector to review and provide recommendations on improving the performance of the hotel property owned by Ashcroft Urban (REStays).

[75] The secured creditors contrast KSV's plan with what they describe as the absence of a restructuring pathway put forward by the applicants. To the extent that there is a path forward by the applicants, it comprises what the secured creditors consider to be unrealistic marketing plans. Furthermore, the cash flow projections provided by the monitor show that after thirteen weeks, there would be almost no DIP financing left.

[76] Another concern is that the values relied upon by the applicants are based on what the secured lenders regard as obsolete appraisals, some dating as far back as 2017. For example, in relation to the Park Place property, while Mr. Choo claims that there is $24.6 million of net equity

after secured debt, the secured lender, ACM's internal valuation estimates reflect that there may not be any equity in that property.

[77] Second, and closely connected to the secured lenders' misgivings about the lack of a cogent road map for the restructuring, is a mounting loss of confidence in the applicants' management.

[78] For example, Promenade Senior Suites, a relatively new senior suite facility built in 2020, has a 65% occupancy rate. Yet the appraisal relied upon by the applicants assumes a stabilised 90% occupancy rate.

[79] There have also been regulatory and reputational concerns, and associated negative publicity, with respect to the management and operation of the Ashcroft seniors' and retirement facilities.

[80] The secured creditors say that trust has also been undermined as a result of what they regard as a lack of candour and straight dealing. IMC offers two examples.

[81] IMC had asked Ashcroft to keep it apprised about material developments on Ashcroft's whole portfolio of assets. IMC expressed concern when it was informed by Ashcroft that Central 1 was proposing a forbearance agreement or a receiver on the $43,000,000 facility related to the Ravines Retirement project. Significantly, Ashcroft did not disclose to IMC that one of the conditions of the forbearance agreement proposed by Central 1 was that La Promenade was to sign as a guarantor of the outstanding $38,000,000 in debt owed by Ashcroft to Central 1. Notwithstanding IMC's known concerns, Ashcroft then entered into a forbearance agreement with Central 1, doing so without notice to or approval of IMC, and contrary to Ashcroft's loan agreement with IMC.

[82] Subsequent to that, Ashcroft caused La Promenade to be amalgamated with another Ashcroft-controlled entity, again without IMC's consent (Ashcroft did originally request IMC's consent, which it knew was contingent upon completion of due diligence, but, when told by IMC on 25 October 2024 that providing the consent by a drop-dead date of 31 October was unrealistic, Ashcroft immediately proceeded, the same day, with the amalgamation). The secured lenders' concerns were further deepened by the immediate pre-filing conduct (i.e., lack of notice) of the applicants, to which reference has already been made.

[83] There are also claims that Ashcroft has exaggerated occupancy rates of some of the subject buildings. For example, ACM claims that on 18 September 2024, Ashcroft reported that Envie I was 80% leased but when ACM's Vice-President – Investments toured Envie I on 18 November 2024, the property manager advised that the building was only 70%-73% leased.

[84] A third generalised cause for concern is that proceeding without sensitivity to the legal and practical separation between each of the eight projects, and their isolated contractual relations with the lenders, will prejudice the secured creditors.

[85] Although the applicants assert that each of the projects is managed separately, with segregated operations, including bank accounts, books and records, and assets, and with intercompany transactions effected at arm's length, the merger of the properties into what the secured creditors call an "asset melting pot" under the CCAA order, would force lenders to rescue properties to which they had no contractual relation.

[86] Despite the involvement, since August, of Hawco Peters, the investment advisors' efforts have not, to date, contributed to meeting the applicants' obligations to their secured lenders. Furthermore, the engagement of Hawco Peters relates to projects both outside and within the CCAA application.

[87] While the applicants' draft proposed ARIO has been amended to respond to the secured creditors' concerns about the lack of ringfencing on a project by project basis (a provision has been added which would prevent the applicants from making payments or other transfer of assets to any affiliated entities or related parties), as well as to limit the engagement of Hawco Peters to the applicants only, the secured creditors remain concerned that their interests will be prejudiced as a result of effected *de facto* extensions of their loan or forbearance agreements, coupled with a concomitant loss of ability to control the process and the possibility that their loans may not be fully covered by the projects they are secured against.

[88] Fourth, factors which might otherwise favour a CCAA process are, at best, neutral in the present case. There is no clear threat to the employees of the applicants. There are no duelling receiverships. The suggestion by Mr. Choo that tenants need to be protected from forced entries and disruptive conduct which might be taken by or on behalf of aggressive lenders is strongly refuted by the secured creditors.

[89] Finally, the secured creditors do not share Mr. Choo's belief that the prospects of successful refinancing, sale and restructuring efforts will be enhanced by providing CCAA protection. Some of the creditors are sanguine about the state of distress in the current commercial real estate market in general, and the Ottawa area market in particular.

[90] Ishbel Buchan, the Executive Vice President – Investments at ACM deposes that:

> ACM, and many other lenders I have spoken to, are dealing with multiple distressed assets. These lenders have in many instances, elected to make efforts to negotiate out-of-court arrangements with their commercial mortgage borrowers, similar to how ACM has unsuccessfully attempted to resolve matters with the Ashcroft.

She continues:

> Not surprisingly, the challenging macro-economic factors and market conditions described above have had a snowball effect where the relatively high number of distressed real assets has further led to depressed valuations and sales volumes. For example, Bobby Kofman of KSV, the proposed

> interim receiver, has advised me that in KSV's experience as the court-officer of dozens of real property projects across Canada, real property valuations are currently impaired, and transactions are limited, except at distressed pricing, including for industrial, development, residential, multi-family and hospitality properties.

Ms. Buchan concludes by stating that ACM is concerned that its secured indebtedness in relation to the Ashcroft projects will similarly be affected by the current state of the commercial real estate market in terms of property values and related sales velocity, such that the properties may sell for "significantly below estimated values and/or take much longer to sell than anticipated".

[91] Ultimately, the secured creditors regard the applicants as having sought CCAA protection in order to buy time to continue their hitherto ineffective attempt to raise meaningful amounts of new funding.

Discussion

[92] As D. M. Brown J. observed in *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781, at para. 61, both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders. The specific factors taken into account by the court will, as a consequence, vary from case to case.

[93] Further, and as noted by Justice Osborne in *Antibe Therapeutics*, at para. 55:

> In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

No Presumption in Favour of Receivership

[94] Although, as commentators have observed, there is a presumption among insolvency practitioners that, when it comes to real property, in a contest between a receivership and the CCAA, the receivership is bound to emerge victorious (see Jeremy Opolsky, Jacob Babad and Mike Noel, *Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis* (2020), 18 Annual Review of Insolvency Law 199, 2020 CanLIIDocs 3602), there is no hard and fast rule to that effect. The nature of the security and the secured creditor's views are not fully determinative of whether a CCAA proceeding will be preferred: *BCIMC Construction Fund Corporation v. The Clover on Yonge Inc.*, 2020 ONSC 1953, per Koehnen J. at para. 104.

The Secured Creditors' Opposition

[95] As is the case in many real estate driven CCAA proceedings, the secured creditors see little incentive for surrendering control over the process of enforcing their security. Circumstances similar to those in the present case pertained in *Octagon Properties Group Ltd. (Re)*, [2009] A.J. No. 936 (Q.B.), where, at para. 17, Kent J. observed:

> This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted *CCAA* relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for *CCAA* relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[96] It is noteworthy that in the present case, fully 84% of the secured creditors not only oppose the CCAA relief sought, but have combined to put forward the nomination of a common receiver to assist with the enforcement of their security. This arrangement significantly dilutes the force of the argument advanced by the applicants that the costs of up to eight separate receivers and their respective advisors will far outweigh the costs of continuing with the appointment of the Monitor and the Financial Advisor under the CCAA. It also renders as far less likely the prospect of "uncoordinated and stress sales or forced liquidations of the subject properties and projects".

Is There a Clear Plan?

[97] In their article *Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis*, Opolsky *et al.* express the following observation, based on a review of real-estate driven CCAA cases:

> An important consideration for the courts in granting a CCAA is the feasibility of a resolution under that CCAA proceeding. If the chances of a successful proposal are low, then a court may decide to order a receivership rather than spend time on a failed CCAA.

[98] The evidence and submissions put forward on behalf of the applicants have a distinctly aspirational quality. Their message is one of hope, despite the failures of the past eighteen months.

The appointment of the Monitor to steady the ship, and bring order to the process of holding the secured creditors at bay will, they hope, allow for a coordinated process, that maximises value and best serves the interests of all concerned parties.

[99] While there is a superficial attraction to the proposition that the applicants, with the assistance and guidance of the Monitor and the Financial Advisor, will succeed in the coming months, the applicants' plans, such as they are, appear to largely rest on a more benign interest rate environment, a more active property market, and improving occupancy rates. Despite changes in the interest environment in the year to date and well publicised public concerns about a lack of affordable housing, the applicants' malaises continue.

[100] I find myself more inclined to the view that the applicants are simply buying time ("[i]t is envisaged that this strategy will allow sufficient time to allow for the continued sell down of assets which will further deleverage the Ashcroft Homes Group, including the Applicants") and not much more.

[101] Specifically, I see nothing markedly better in the plans put forward by the applicants than those articulated by the secured creditors. Indeed, if anything, the plan put forward by KSV, the proposed interim receiver, has more substance, including the engagement of specialist property managers operating in the retirement residence and student residence markets in Ontario.

Confidence in Management

[102] The refrain that secured creditors have "lost confidence in management" of debtor companies is a familiar one in CCAA proceedings. This matter is clearly no exception.

[103] For at least eighteen months or more, the applicants have been engaged in an ongoing juggling act with their secured creditors, culminating in their current insolvent positions.

[104] Furthermore, a number of the secured creditors have raised concerns about the some of the cross-default and cross-collateralisation arrangements that have been made, as well as about the applicants' honesty and forthrightness in their dealings with the secured creditors. These concerns were compounded by what the secured creditors regard as a failure of the applicants to give any notice of their intention to seek an initial order (followed by extremely short service of the materials supporting their motion for an ARIO).

[105] The experience of Central 1 is perhaps indicative. Central 1 commenced receivership proceedings. There was a contested application heard by MacLeod RSJ. He found that it was apparent that the debtor – 2139770 Ontario Inc. – had not been able to comply with all of the terms of the forbearance agreement it had entered into, and that the defaults were not trivial. The debtor had failed to deliver "important information by the deadline it agreed to". He granted a postponement of the receivership order on strict terms, failing which the receivership order "will be made". Despite this, Central 1 complains that there have been numerous further breaches of the terms ordered by MacLeod RSJ. They say that the debtor failed to execute collateral security documents, and refused to pay the professional fees incurred under the forbearance agreement. On

2 December 2024, Central 1's lawyers requested an urgent return of the receivership application. The apparent response to that was the commencement of this proceeding, with the resultant affect of securing a stay of Central 1's receivership proceeding, a stay that it seems highly unlikely could have been obtained in the receivership proceeding itself.

[106] While I would not subscribe to the view that the applicants have acted in bad faith, the secured creditors' expressed lack of confidence in management is understandable.

Outdated Appraisals

[107] The appraisals supporting Mr. Choo's stated valuation of the respective properties vary in their antiquity. The most dated appraisal is from 2017. None of them are from 2024. According to Ms. Buchan of ACM, once an appraisal is aged more than a few months, it is typically no longer relevant given various factors, including macro-economics and market conditions. This is particularly pertinent given the current level of distress in the commercial real estate market.

[108] The applicants concede that some of the appraisals are dated, but nevertheless maintain that they are reliable evidence of the value of the various properties and that, even allowing for some diminution of value due to the state of the current commercial property market, all of the properties have more than adequate net equity and, thus, that the CCAA proceeding poses little risk that the secured creditors will not fully realise their security.

[109] If the concerns about the true value of the properties were the only major objection of the secured creditors, it would probably not be enough to carry the day in favour of the receivership applications. However, viewed alongside other considerations, the concerns about valuation are yet another weight pulling on the receivership side of the scale.

Conclusion

[110] All of the parties agree that there is a need to stabilise the applicants' businesses. The question is whether that is best achieved through a receivership or a CCAA proceeding.

[111] The secured creditors have lost patience with the management of the applicants. Despite having brought on board investment advice from Hawco Peters, progress has been modest. Expectations that term sheets will shortly be presented for refinancing have yet to be realised. Unpaid taxes have mounted. Unsecured creditors have gone unpaid. Occupancy rates have remained sub-optimal. Regulators have even become involved due to concerns about the way in which one of the retirement residences is being run, with attendant poor publicity and reputational damage.

[112] Secured creditors representing 84% of the secured debt oppose the CCAA application. With the exception of Central 1, they all propose to use the same receiver. Their collaborative approach largely neutralises the usual concerns that an applicant for CCAA protection raises concerning uncoordinated and stress sales or forced liquidation. Nor is there any convincing

evidence that the remedy proposed by the secured creditors will damage the interests of employees or tenants.

[113] The receivership remedy gives effect to the bargain made between the secured lenders and the applicants, and transfers control of the process from debtors in whom confidence has been lost to creditors who should be entitled to make good on their security while there are still good prospects of them being made whole.

[114] Mr. Choo candidly acknowledges that the applicants have found themselves in a "difficult position to address their current liquidity obligations". Yet, to use the terminology of C. Campbell J. in *Dondeb Inc. (Re)*, 2012 ONSC 6087, at para. 25, to some extent the applicants have, by the manner in which they have (sometimes chaotically) played insolvent projects and their secured creditors off against each other and eroded the confidence of the creditors, been the authors of their own misfortune.

[115] It could, potentially, have been otherwise. Counsel for Peoples Trust submitted that one option that could have been considered would be to impose a shorter stay of proceedings to see if the other parties' concerns about the applicants' proposal could be resolved by the monitor, perhaps with a "super monitor order" to allay concerns about the applicants' management continuing to have control of the restructuring. And in *Dondeb Inc.*, Campbell J. observed, at para. 26, that had there been full and timely communication both the creditors and the court may have concluded that an acceptable CCAA plan could be developed. Because of the way this application has unfolded, that has not occurred. With the benefit of hindsight, that might be seen by the applicants as a missed opportunity.

Decision

[116] For the foregoing reasons, the motion to extend the stay of proceedings granted by the initial order is dismissed. The motion made by ACM Advisors Ltd., and supported by CMLS Financial Ltd., Equitable Bank, Institutional Mortgage Capital Canada Inc. and Canadian Western Bank for the appointment of a receiver and associated relief is granted.

[117] The receivership order and transition order requested by Central 1, in accordance with the order of MacLeod RSJ in Court File No. CV-24-00097134-0000 is granted.

[118] If the parties are unable to agree on any of the terms of the orders resulting from this decision, I may be spoken to.

Mew J.

Released: 20 December 2024

KeyCite treatment

Most Negative Treatment: Distinguished

Most Recent Distinguished: Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd. | 2021 BCCA 382, 2021 CarswellBC 3174, 336 A.C.W.S. (3d) 221, 54 B.C.L.R. (6th) 250, 93 C.B.R. (6th) 3, 18 C.L.R. (5th) 41, 462 D.L.R. (4th) 488 | (B.C. C.A., Oct 8, 2021)

2008 BCCA 327
British Columbia Court of Appeal

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

2008 CarswellBC 1758, 2008 BCCA 327, [2008] 10 W.W.R. 575, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, [2008] B.C.J. No. 1587, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 46 C.B.R. (5th) 7, 83 B.C.L.R. (4th) 214

Cliffs Over Maple Bay Investments Ltd. (Respondent / Petitioner / Respondent) and Fisgard Capital Corp. and Liberty Holdings Excel Corp. (Appellants / Respondents / Applicants)

Frankel, Tysoe, D. Smith JJ.A.

Heard: August 12, 2008
Judgment: August 15, 2008
Docket: Vancouver CA036261

Counsel: G.J. Tucker, A. Frydenlund for Appellants
H.M.B. Ferris, P.J. Roberts for Respondent
M. Sennott for Century Services Inc.
M.B. Paine for Monitor, Bowra Group

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under

s. 11 of CCAA is not free standing remedy that court may grant whenever insolvent company wishes to undertake restructuring — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — Stay of proceedings freezing rights of creditors should only be granted in furtherance of CCAA's fundamental purpose — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — Chambers judge failed to take this important factor into account.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 is not free standing remedy that court may grant whenever insolvent company wishes to undertake "restructuring" — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — If stay under CCAA should not be extended because debtor is not proposing arrangement or compromise with creditors, it followed that DIP financing should not have been authorized to permit debtor to pursue restructuring plan that did not involve arrangement or compromise with its creditors.

Table of Authorities

Cases considered by *Tysoe J.A.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — considered

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12 (N.S. T.D.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — followed

Reza v. Canada (1994), 1994 CarswellOnt 1158, 1994 CarswellOnt 675, 24 Imm. L.R. (2d) 117, 21 C.R.R. (2d) 236,

116 D.L.R. (4th) 61, (sub nom. *Reza v. Canada (Minister of Employment & Immigration)*) 72 O.A.C. 348, 22 Admin. L.R. (2d) 79, [1994] 2 S.C.R. 394, (sub nom. *Reza v. Canada (Minister of Employment & Immigration)*) 167 N.R. 282, 18 O.R. (3d) 640 (note) (S.C.C.) — considered

Skeena Cellulose Inc., Re (2001), 29 C.B.R. (4th) 157, 2001 BCSC 1423, 2001 CarswellBC 2226 (B.C. S.C.) — considered

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — considered

Ursel Investments Ltd., Re (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.) — considered

Ursel Investments Ltd., Re (1992), (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*) [1992] 3 W.W.R. 106, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*) 89 D.L.R. (4th) 246, 10 C.B.R. (3d) 61, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*) 97 Sask. R. 170, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*) 12 W.A.C. 170, 1992 CarswellSask 19 (Sask. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 2 "debtor company" — referred to

s. 3(1) — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — considered

s. 11(3) — referred to

s. 11(6) — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

APPEAL by creditors from order of chambers judge granting debtor's application to extend stay of proceedings and to authorize debtor-in-possession financing.

***Tysoe J.A.* (orally):**

1 The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the *CCAA*, no notice was given to the appellants or any other

of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the *CCAA*, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant — the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000	— trade creditors
1,700,000	— equipment leases
1,135,000	— loans from related parties
45,000	— unpaid source deductions
$7,340,000	

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the *CCAA* proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the *CCAA* and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the *CCAA* (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation — $10 million;

(b) liquidation value with a source of water for irrigation — $28 million;

(c) going concern value with completion of the development — $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the *CCAA* because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the *CCAA*, which reads as follows:

> The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the

Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the *CCAA* proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In *Reza v. Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61 (S.C.C.), the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

22 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1 (S.C.C.), the Court quoted the following statement in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (U.K. H.L.) at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the *CCAA*, *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.) at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in *New Skeena* were directed at ongoing *CCAA* matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of *CCAA* proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the *CCAA* should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the *CCAA* applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the *CCAA* and it satisfies the criterion contained in s. 3(1) of the *CCAA* of having liabilities in excess of $5 million. The *CCAA* clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the *CCAA*. The real question is whether a stay of proceedings should have been granted under s. 11 of the *CCAA* for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:

> An Act to facilitate compromises and arrangements between companies and their creditors.

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141 (B.C. C.A.). The first is *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 (S.C.C.), where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

30 Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at ¶ 7 and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at ¶ 11), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.) at ¶ 32. I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in *Skeena Cellulose Inc., Re* (2001), 29 C.B.R. (4th) 157 (B.C. S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the *CCAA* proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or

extended under s. 11 of the *CCAA*. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

37 The failure of the chambers judge to consider the fundamental purpose of the *CCAA* and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the *CCAA* should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements,

including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

Frankel J.A.:

42 I agree.

D. Smith J.A.:

43 I agree.

Frankel J.A.:

44 The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

Appeal allowed.

End of Document