2026 Hfx No.

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: The Receivership of Kooshie Cushions of Canada Limited

Between:

Business Development Bank of Canada

Applicant

and

Kooshie Cushions of Canada Limited

Respondent

BOOK OF AUTHORITIES
OF THE APPLICANT

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Service List.

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Ronald Elwyn Lister Limited, Ronald E. Lister and Joan C. Lister *Appellants*;

and

Dunlop Canada Limited *Respondent.*

File No.: 15955.

1981: November 3, 4; 1982: May 31.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Franchise agreement — Debenture and personal guarantees securing corporate debt — Seizure of assets, including those held personally, without notice — Subsequent agreement settling financing difficulties — Damages sought for unlawful seizure, improper disposition of company's assets, and negligent misrepresentation prior to granting of personal guaranties.

Appellants claim damages arising out of a franchise agreement between Dunlop and the appellant company, and a subsequent agreement. Moneys had fallen due under the franchise agreement and associated security. Dunlop appointed a receiver under the debenture collaterally securing the company's debt and also demanded payment under the personal guaranty of Lister and of his wife. Among the assets seized were assets personally owned by Lister pursuant to a franchise agreement with Chrysler Canada. All outstanding differences between the Listers and Dunlop, and between Mr. Lister and Chrysler, were purportedly settled by the agreement.

The plaintiffs/appellants claimed damages for: (a) the unlawful seizure of assets personally owned by Lister, (b) the wrongful seizure and improper disposition of the company's assets, and (c) Dunlop's negligent representation to the Listers prior to their guaranteeing the company's debt. The trial judge allowed the claims for wrongful seizure, but refused to set aside the Listers' personal guaranties. The Court of Appeal only considered, and reversed the judgment with respect to, those claims flowing from wrongful seizure.

Held: The appeal should be allowed.

Ronald Elwyn Lister Limited, Ronald E. Lister et Joan C. Lister *Appelants*;

et

Dunlop Canada Limited *Intimée.*

N° du greffe: 15955.

1981: 3, 4 novembre; 1982: 31 mai.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Contrats — Contrat de concession — Débenture et cautionnements personnels garantissant la dette de la société — Saisie de biens, y compris des biens personnels, sans préavis — Compromis réglant les difficultés financières — Action en dommages pour saisie illégale, pour disposition illégitime des biens de la société et pour les déclarations inexactes faites par négligence avant que les cautionnements personnels ne soient consentis.

Les appelants réclament des dommages-intérêts découlant d'un contrat de concession entre Dunlop et la société appelante et d'un compromis intervenu par la suite. Des sommes étaient devenues exigibles en vertu du contrat de concession et de la sûreté connexe. Dunlop a nommé un séquestre aux termes de la débenture émise comme garantie subsidiaire de la dette de la société et a en outre exigé de M. Lister et de sa femme, en leur qualité de cautions, le paiement de la dette. Parmi les biens saisis figuraient des biens personnels appartenant à M. Lister en vertu d'un contrat de concession avec Chrysler Canada. Tous les différends qui existaient entre les Lister et Dunlop et entre M. Lister et Chrysler étaient censés avoir été réglés par le compromis.

Les demandeurs appelants réclament des dommages-intérêts pour: a) la saisie illégale de biens personnels de Lister, b) la saisie et la disposition illégitimes des biens de la société et c) les déclarations inexactes que Dunlop a faites par négligence aux Lister avant que ceux-ci ne se rendent cautions de la dette de la société. Le juge de première instance a fait droit aux réclamations pour saisie illégale, mais a refusé d'annuler les cautionnements personnels des Lister. La Cour d'appel n'a examiné le jugement que sous l'aspect des réclamations découlant de la saisie illégitime et l'a rejeté seulement dans la mesure où il se rapporte à cet aspect.

Arrêt: Le pourvoi est accueilli.

Dunlop was entitled to enforce its debenture provided adequate notice on which the debtor could act was given. Dunlop did not give this notice. Statements made by Lister in the course of negotiating for some means to save the undertaking and the Listers' allowing the receiver to take possession of and to liquidate the company's assets did not create any waiver of this right to notice. The appellants are therefore entitled to damages for trespass and conversion on the part of Dunlop, and the facts provide a sufficient basis for the exercise by the trial judge of his discretion to award exemplary damages. The Listers, by their entry into a performance of the settlement agreement, were foreclosed, however, from asserting that the guaranties made by them were unenforceable at law or unenforceable because of Dunlop's misrepresentations.

Lloyds Bank Ltd. v. Bundy, [1974] 3 All E.R. 757; *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Miles v. New Zealand Alford Estate Company* (1886), 32 Ch.D. 266; *Magee v. Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507; *Massey v. Sladden* (1868), L.R. 4 Ex. 13; *Toms v. Wilson and Another* (1863), 4 B. & S. 442, 122 E.R. 524; *Moore v. Shelley and Another* (1883), 8 A.C. 285; *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198; *Royal Bank of Canada v. Cal Glass Ltd. and Coopers & Lybrand Limited* (1979), 18 B.C.L.R. 55; *J. & E. Hall, Ltd. v. Barclay*, [1937] 3 All E.R. 620; *Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited* (1958), 26 W.W.R. 721; *Yukon Southern Air Transport Limited et al. v. The King*, [1942] Ex. C.R. 181; *Brodt v. Wearmouth and Pyle*, [1937] 1 W.W.R. 777, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1979), 105 D.L.R. (3d) 684, 27 D.R. (2d) 168, allowing an appeal and dismissing a cross-appeal from a judgment of Rutherford J. Appeal allowed.

D. K. Laidlaw, Q.C., and *P. H. Griffin*, for the appellants.

R. M. Loudon, Q.C., and *H. W. Sterling*, for the respondent.

The judgment of the Court was delivered by

ESTEY J.—This is a claim by a corporate plaintiff/appellant (hereinafter referred to as the Com-

Dunlop avait le droit de liquider sa débenture moyennant un préavis suffisant au débiteur. Dunlop n'a pas donné ce préavis. Les déclarations faites par Lister dans le cadre de négociations en vue de trouver un moyen de sauver l'entreprise et le fait que les Lister ont permis au séquestre de prendre possession et de procéder à la liquidation des biens de la société ne constituent aucunement une renonciation au droit à un avis. Par conséquent, les appelants ont droit à des dommages-intérêts pour atteinte à la possession et appropriation illégale de la part de Dunlop et les faits fournissent une justification suffisante pour que le juge de première instance puisse exercer son pouvoir discrétionnaire d'accorder des dommages-intérêts exemplaires. De par leur acceptation d'exécuter le compromis, les Lister n'ont toutefois pas le droit d'affirmer que les cautionnements consentis par eux sont non exécutoires en droit ou non exécutoires en raison des déclarations inexactes de Dunlop.

Jurisprudence: *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757; *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Miles v. New Zealand Alford Estate Company* (1886), 32 Ch.D. 266; *Magee v. Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507; *Massey v. Sladden* (1868), L.R. 4 Ex. 13; *Toms v. Wilson and Another* (1863), 4 B. & S. 442, 122 E.R. 524; *Moore v. Shelley and Another* (1883), 8 A.C. 285; *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198; *Royal Bank of Canada v. Cal Glass Ltd. and Coopers & Lybrand Limited* (1979), 18 B.C.L.R. 55; *J. & E. Hall, Ltd. v. Barclay*, [1937] 3 All E.R. 620; *Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited* (1958), 26 W.W.R. 721; *Yukon Southern Air Transport Limited et al. v. The King*, [1942] R.C. de l'É. 181; *Brodt v. Wearmouth and Pyle*, [1937] 1 W.W.R. 777.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1979), 105 D.L.R. (3d) 684, 27 D.R. (2d) 168, qui a accueilli un appel et rejeté un appel incident d'un jugement du juge Rutherford. Pourvoi accueilli.

D. K. Laidlaw, c.r., et *P. H. Griffin*, pour les appelants.

R. M. Loudon, *c.r.*, et *H. W. Sterling*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE ESTEY—Il s'agit d'une action en dommages-intérêts déposée par la société demandepany) and its two shareholders, the co-appellants (hereinafter referred to as the Listers), for damages arising out of a franchise agreement between the defendant/respondent (hereinafter referred to as Dunlop) and the Company and a settlement agreement between the Listers and Dunlop. The action arises out of three main events:

(a) The franchise agreement whereby Dunlop granted to the Company exclusive rights within a defined area to market the wares of Dunlop;

(b) The demand by Dunlop for moneys due under the franchise agreement and the associated security and the appointment by Dunlop at the same time of a receiver under the debenture issued to collaterally secure the indebtedness of the Company. At the same time, Dunlop demanded payment from Mr. Lister on his guaranty of the Company's debt. About a month later a similar demand was made upon Mrs. Lister.

(c) All outstanding differences between the Listers and Dunlop and between Mr. Lister and Chrysler Canada Ltd. (hereinafter referred to as Chrysler) concerning a franchise agreement between Chrysler and Mr. Lister, were purportedly settled by a contract dated 31 May 1972 but apparently executed on 6 June 1972. The Company was not a party to this settlement agreement presumably because it was in receivership and nothing remained to be settled with respect to that process as it was covered by the debenture itself.

The plaintiffs appellants claim damages for:

(a) unlawful seizure of the assets of Mr. Lister personally relating to an Autopar parts business carried on by Mr. Lister personally under the franchise agreement with Chrysler (hereinafter referred to as the Chrysler franchise);

resse appelante (ci-après appelée la société) et ses deux actionnaires, les coappelants (ci-après appelés les Lister), qui résulte d'un contrat de concession intervenu entre la défenderesse intimée (ci-après appelée Dunlop) et la société, et d'un compromis intervenu entre les Lister et Dunlop. L'action découle de trois événements principaux:

a) le contrat de concession par lequel Dunlop a accordé à la société le droit exclusif de commercialiser les marchandises de Dunlop dans un territoire donné;

b) la réclamation par Dunlop des sommes dues en vertu du contrat de concession et de la sûreté connexe et la nomination par Dunlop, au même moment, d'un séquestre aux termes de la débenture émise comme garantie subsidiaire de la dette de la société. Au même moment, Dunlop a exigé de M. Lister à titre de caution* le paiement de la dette de la société. Environ un mois plus tard, une réclamation semblable a été adressée à Mme Lister.

c) Tous les différends qui existent entre les Lister et Dunlop et entre M. Lister et Chrysler Canada Ltd. (ci-après appelée Chrysler) à propos d'un contrat de concession entre Chrysler et M. Lister sont censés avoir été réglés par un compromis en date du 31 mai 1972, mais apparemment signé le 6 juin 1972. La société n'est pas partie à ce compromis probablement parce qu'elle était sous séquestre et que plus rien ne pouvait faire l'objet d'un compromis à l'égard de cette façon de procéder qui était déjà prévue dans la débenture elle-même.

Les demandeurs appelants réclament des dommages-intérêts pour:

a) la saisie illégale des biens personnels de M. Lister relativement à un commerce de pièces d'automobile appelé Autopar que M. Lister exploitait personnellement en vertu d'un contrat de concession avec Chrysler (ci-après appelé la concession Chrysler);

* Dans les présents motifs, le mot «cautionnement» désigne la convention par laquelle une personne s'engage à remplir l'obligation d'une autre, et le mot «caution» désigne la personne qui souscrit cet engagement.

(b) wrongful seizure of the Company's assets including the merchandise delivered by Dunlop to the Company under the franchise agreement;

(c) negligent misrepresentation made by Dunlop to the Listers prior to the giving of the guaranties* of the Company indebtedness.

The trial judge awarded damages with respect to the seizure of both the goods of the Company and the Autopar parts goods which were the property of Mr. Lister, (and which goods are hereinafter referred to for the sake of brevity as the Autopar assets), to be assessed on the basis of:

1. In the case of the Company:

(a) the difference between the amount realized by the receiver on the assets of the Company and the amount that would have been realized had their disposition been on a proper basis;

(b) the loss of future income resulting from the destruction of the business of the Company by the wrongful seizure of its assets; and

(c) exemplary damages by reason of the wilful nature of Dunlop's trespass as manifest in the decision to seize without reasonable time for compliance together with the circumstances of the seizure itself.

2. In the case of Mr. Lister the damages for the wrongful seizure of the Autopar assets were calculated in the same manner as in paragraphs 1(a),(b) and (c) above.

The plaintiffs claimed damages for breach of representation made in the negotiation for the franchise agreement by Dunlop. The trial judge found these claims were barred by paragraph 4(11) of the franchise agreement and dismissed them. This was not appealed to the Court of Appeal. Similarly the trial judge dismissed the

* In these reasons "guaranty" (plural, guaranties) is employed as a noun and refers to the agreement guaranteeing something to somebody; guarantee is used both as a verb to give a guaranty and as a noun, the correlative of guarantor.

b) la saisie illégitime des biens de la société, notamment les marchandises livrées par Dunlop à la société conformément au contrat de concession;

c) les déclarations inexactes que Dunlop a faites par négligence aux Lister avant que ceux-ci ne se rendent cautions de la dette de la société.

Le juge de première instance a accordé des dommages-intérêts à l'égard de la saisie tant des marchandises de la société que des pièces constituant la marchandise d'Autopar, propriété de M. Lister (laquelle marchandise, par souci de concision, est appelée ci-après les biens d'Autopar), dont le montant serait fixé en fonction de:

1. Quant à la société:

a) la différence entre la somme que le séquestre a tirée des biens de la société et la somme qui en aurait été tirée s'ils avaient été aliénés de façon appropriée;

b) la perte de revenus futurs résultant de l'anéantissement du commerce de la société par suite de la saisie illégitime de ses biens; et

c) des dommages-intérêts exemplaires en raison du caractère délibéré de l'acte illicite de Dunlop comme le démontrent sa décision de saisir sans accorder un délai raisonnable pour s'exécuter et les circonstances de la saisie elle-même.

2. Quant à M. Lister, les dommages-intérêts relatifs à la saisie illégitime des biens d'Autopar sont calculés de la même manière que dans les alinéas 1a),b) et c) ci-dessus.

Les demandeurs ont réclamé des dommages-intérêts en raison du non-respect par Dunlop des engagements pris au moment de la négociation du contrat de concession. Le juge de première instance a conclu que ces demandes étaient irrecevables à cause du paragraphe 4(11) du contrat de concession et les a rejetées. Cela n'a pas fait l'objet claim that the personal guaranties given by the Listers at the time of the franchise agreement be set aside. Neither was this refusal by the trial judge included in the appeal to the Court of Appeal.

I propose to review the facts and the law and ultimately the legal position of the parties in the context of:

1. the seizure of the Company's assets;
2. the Autopar seizure;
3. the settlement contract; and
4. the alleged misrepresentation made with reference to the franchise agreement and the associated personal guaranties of the Listers.

1. The Seizure of the Company's Assets

Negotiations for a dealership agreement (as it is termed in the agreement itself) were undertaken by the Listers and Dunlop and ultimately a franchise agreement was signed by the Company (which was incorporated by the Listers during these negotiations) and Dunlop. The Listers were the sole shareholders of the Company and signed the agreement as its officers in June 1970, Mr. Lister as President and Mrs. Lister as Secretary-Treasurer of the Company. The Listers were not personally parties to the agreement.

Unhappily the succeeding commercial venture did not measure up to the participants' hopes. The debt to Dunlop mounted, sales were below expectations and eventually the parties fell into a correspondence over claims of overdue debts and accusations of inadequate support. Strangely enough, during this period the Company opened a branch store in Orangeville, Ontario.

After an exchange of letters over a period of about four months concerning the moneys owed by the Company to Dunlop, Dunlop appointed a receiver under the debenture, and the receiver, a representative of Dunlop and a security guard arrived on the Guelph premises of the Company on

d'un appel à la Cour d'appel. De même, le juge de première instance a rejeté la demande d'annulation des cautionnements personnels consentis par les Lister au moment de la signature du contrat de concession. Le rejet de cette demande par le juge de première instance n'a pas fait non plus l'objet d'un appel à la Cour d'appel.

Je me propose d'examiner les faits et le droit et, en dernier lieu, la situation juridique des parties relativement:

1. à la saisie des biens de la société;
2. à la saisie des biens d'Autopar;
3. au compromis; et
4. aux prétendues déclarations inexactes concernant le contrat de concession et les cautionnements personnels connexes des Lister.

1. La saisie des biens de la société

Les Lister et Dunlop ont entrepris des négociations d'un contrat de distribution (selon le terme utilisé dans le contrat lui-même) qui ont abouti à la signature d'un contrat de concession par la société (constituée juridiquement par les Lister pendant ces négociations) et Dunlop. Les Lister étaient les seuls actionnaires de la société et ils ont signé le contrat à titre d'administrateurs en juin 1970, M. Lister agissant comme président et M^{me} Lister comme secrétaire-trésorier de la société. Les Lister n'étaient pas personnellement parties au contrat.

Malheureusement, l'entreprise commerciale ne devait pas répondre aux espérances des parties. Les montants dus à Dunlop se sont accumulés, les ventes furent inférieures à ce qui avait été prévu et finalement, les parties en sont venues à échanger de la correspondance concernant des réclamations de dettes échues et des accusations d'appui insuffisant. Assez curieusement, la société a ouvert, pendant cette période, une succursale à Orangeville (Ontario).

Après un échange de correspondance qui a duré environ quatre mois au sujet des sommes dues à Dunlop par la société, Dunlop a nommé un séquestre aux termes de la débenture et le séquestre, un représentant de Dunlop et un agent de sécurité se sont présentés aux locaux de la société à Guelph the morning of March 20, 1972. Mr. Lister resisted the claim for possession of the premises by the receiver, but a few hours later, after being assured by an officer of Dunlop that the personal guaranties would not be enforced, Mr. Lister withdrew his opposition and the receiver took possession of the premises at Guelph and Orangeville.

The state of the business of the Company under the franchise agreement was described by the learned trial judge:

During the latter part of 1971, the evidence indicated increasing concern by Dunlop as to the financial situation of the Lister dealership, especially in respect of its failure to reduce its indebtedness to Dunlop. ... It was decided by, at latest, the beginning of March, 1972 that this situation had become intolerable and a decision was taken by the defendant to terminate the Lister franchise and realize on its security.

At the time of the entry into possession by the receiver, $127,160.84 was owing (as of February 29, 1972, made up of $77,117.27 on the trade account and $50,043.57 on the loan account) by the Company to Dunlop. The debenture is silent as to any requirement of notice on default, section 6 providing only:

SECTION 6. Default and Enforcement

6.1 Notwithstanding anything to the contrary contained in the Debenture and without prejudice to the right of the holder of this Debenture to demand payment at any time of the principal and interest hereby secured, all unpaid principal and interest owing under this Debenture shall forthwith become due and payable and the security hereby constituted shall become enforceable in each and every of the events following:

(i) if the Company makes default in the payment of the principal of the Debenture when the same becomes payable;

...

(xix) if the Company fails to pay to Dunlop any monies due to Dunlop as and when they become due and payable;

6.2 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may proceed to realize the security hereby constituted and to enforce his rights by entry; or by proceedings in any court ....

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dans la matinée du 20 mars 1972. M. Lister s'est d'abord opposé à la prise de possession des lieux par le séquestre, mais quelques heures plus tard, après avoir obtenu l'assurance d'un dirigeant de Dunlop que l'on ne se prévaudrait pas des cautionnements personnels, M. Lister a cédé et le séquestre a pris possession des lieux à Guelph et à Orangeville.

Le savant juge de première instance décrit comme suit l'état du commerce que la société exploitait en vertu du contrat de concession:

[TRADUCTION] Il ressort de la preuve qu'au cours des derniers mois de 1971, Dunlop était de plus en plus préoccupée par la situation financière de la concession des Lister, spécialement en ce qui avait trait à son incapacité de réduire sa dette contractée avec Dunlop ... On a conclu, dès le début de mars 1972, que la situation était devenue intolérable et la défenderesse a décidé de résilier la concession des Lister et de réaliser la sûreté.

Au moment de la prise de possession par le séquestre, la société devait à Dunlop $127,160.84 (au 29 février 1972, soit $77,117.27 au titre des marchandises livrées et $50,043.57 au titre du prêt). La débenture ne précise aucune obligation de faire une mise en demeure de payer, l'article 6 ne prévoyant que ceci:

[TRADUCTION] ARTICLE 6. Défaut de paiement et exécution forcée

6.1 Nonobstant toute disposition contraire de la débenture et sans préjudice du droit du détenteur de cette débenture d'exiger en tout temps le paiement du principal et des intérêts garantis par la présente, tout montant impayé au titre du principal et des intérêts dus en vertu de la présente débenture deviendra immédiatement payable et la sûreté constituée par la présente, exécutoire dans chacun des cas ci-après:

(i) si la société omet de payer à échéance le principal de la débenture;

...

(xix) si la société omet de payer à échéance toute somme due à Dunlop;

6.2 Si la sûreté constituée par la présente devient exécutoire et dans la mesure où elle demeure exécutoire, le détenteur de la présente débenture peut réaliser cette sûreté et faire valoir ses droits en prenant possession des lieux ou en exerçant un recours judiciaire ...

6.3 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may by instrument in writing appoint any person to be a receiver (which term shall include a receiver and manager) of the charged premises including any rents and profits thereof and may remove any receiver and appoint another in this stead, and such receiver so appointed shall have power to take possession of the property and assets charged and to carry on or concur in carrying on the business of the Company and to sell or concur in selling any of all of such property and assets .... The holder of the Debenture in appointing or refraining from appointing such a receiver shall not incur any liability to the receiver, the Company or otherwise.

On the arrival of the aforementioned three persons on the premises on the morning of the 20th the representative of Dunlop presented to the Listers:

(a) a letter dated March 16, 1972 being a demand by Dunlop's solicitors directed to the Company for payment of the aforementioned $127,160.84 subject to any increase necessary to reflect transactions after February 29, 1972 together with interest at the rate of 12 per cent per annum. The demand required payment "to our client forthwith". The letter concluded that in the event of failure to pay "we shall take such action as we deem advisable to protect our client's interest on the debenture".

(b) a letter dated March 16, 1972 from Dunlop's solicitors addressed to Mr. Lister announcing default by the Company and that the total sum of $127,160.84 "is now due and payable by ..." the Company. Demand is then made for payment "forthwith" by Mr. Lister and concluded:

> Unless payment is received forthwith, we shall take such action as we deem advisable to protect our client's interest under the said guarantee.

(c) a formal notice by Dunlop to the Company and its directors under section 6 of the debenture as quoted above and further notifying the Company of the appointment of a receiver-manager under the debenture "to enter upon and take possession of the undertaking, property and assets of ..." the Company

whereupon the receiver took possession and remained in possession. The receiver did not

6.3 Si la sûreté constituée par la présente devient exécutoire et dans la mesure où elle demeure exécutoire, le détenteur de la présente débenture peut nommer par écrit un séquestre (lequel terme comprend un administrateur séquestre) des immeubles nantis, y compris de tout loyer ou profit tirés de ceux-ci, il peut destituer tout séquestre et le remplacer par un autre, et le séquestre ainsi nommé a le droit de prendre possession des biens et de l'actif nantis, de poursuivre l'exploitation de la société ou d'approuver la poursuite de cette exploitation et de procéder à la vente ou de consentir à la vente de la totalité ou d'une partie desdits biens et actif ... Le détenteur de la débenture n'encourt aucune responsabilité envers le séquestre, la société ou quiconque en nommant ou en s'abstenant de nommer un tel séquestre.

Lors de l'arrivée des trois personnes susmentionnées dans les locaux de la société, dans la matinée du 20, le représentant de Dunlop a présenté aux Lister:

a) une lettre en date du 16 mars 1972 dans laquelle les avocats de Dunlop exigent de la société le paiement de la somme susmentionnée de $127,160.84, sous réserve de toute majoration nécessaire pour tenir compte des opérations ultérieures au 29 février 1972, avec intérêts selon un annuel taux de 12 p. 100. La demande exige de payer [TRADUCTION] «notre cliente immédiatement». La lettre se termine en précisant qu'en cas de défaut de paiement, [TRADUCTION] «nous prendrons les mesures que nous jugerons nécessaires pour protéger les droits de notre cliente en vertu de la débenture».

b) une lettre en date du 16 mars 1972 adressée à M. Lister par les avocats de Dunlop indiquant que la société est en défaut et que la somme totale de $127,160.84 [TRADUCTION] «est maintenant payable par ...» la société. Puis on enjoint à M. Lister de payer «immédiatement» et on conclut:

> [TRADUCTION] A moins d'un paiement immédiat, nous prendrons toutes les mesures que nous jugerons nécessaires pour protéger les droits de notre cliente en vertu de ladite sûreté.

c) un avis formel de Dunlop à la société et à ses administrateurs conformément à l'article 6 précité de la débenture, dans lequel on avise la société de la nomination d'un administrateur séquestre en vertu de la débenture [TRADUCTION] «qui prendra possession de l'entreprise, des biens et de l'actif de ...» la société

après quoi le séquestre a pris possession et est demeuré en possession des lieux. A aucun moment, attempt at any time to carry on the business but simply proceeded to liquidate the assets of the Company. No accounting had been made by the receiver to the Company or the Listers at the date of trial.

That Dunlop was entitled to enforce its debenture by reason of the default of the Company under the promissory note and demand obligation secured by the debenture there is no doubt and no argument. The issue raised by the appellants in respect to the enforcement of the debenture is that Dunlop adopted a wrongful procedure in these enforcement proceedings in that no reasonable time was afforded the Company to pay up the moneys secured by the debenture. Both courts found that demand obligations of the type with which we are here concerned entitled the obligor to "[be] given a reasonable time to make payment of the amount due" *per* Weatherston J.A. in the Court of Appeal, and "a demand for payment must be reasonable and a reasonable time given to meet it" *per* Rutherford J. at trial. The learned trial judge found that "there was no intention of allowing the plaintiffs any reasonable time to make payment" and that "from the evidence before the Court as to the assets at the disposal of the plaintiffs, it is reasonable to presume that such funds could have been obtained in fairly short order". The majority of the Court of Appeal concluded that under the circumstances of the case "Dunlop was not required to give time to the Company to borrow money with which to pay up the indebtedness, unless time had been asked for, and it was not". In reaching this conclusion Weatherston J.A. observed:

So, by early March the situation facing Dunlop was that the Company was heavily in debt and insolvent; it was faced with future losses; no proposal had been made for reduction of the indebtedness to Dunlop and the principal officer of the Company had already said he would not invest more of his own money in the Company.

and concluded:

But it was the individual plaintiffs who had assets at their disposal, so it would have been necessary for them to borrow money, and in turn lend it to the Company.

le séquestre n'a tenté de poursuivre l'exploitation de l'entreprise, il a simplement procédé à la liquidation des biens de la société. A la date du procès, il n'avait rendu compte ni à la société ni aux Lister.

Sans conteste, Dunlop avait le droit de réaliser sa débenture en raison du défaut de paiement de la société aux termes du billet à ordre et de l'obligation à demande que la débenture garantissait. La contestation des appelants quant à la réalisation de la débenture porte que Dunlop a procédé de manière erronée en n'accordant pas à la société un délai raisonnable pour payer les sommes garanties par la débenture. Les deux cours ont conclu que les obligations à demande du genre de celle dont il est question ici accordent au débiteur le droit de [TRADUCTION] «disposer d'un délai raisonnable pour effectuer le paiement de la somme due», selon le juge Weatherston de la Cour d'appel, et que [TRADUCTION] «une demande de paiement doit être raisonnable et un délai raisonnable doit être imparti pour y satisfaire», selon le juge Rutherford en première instance. Le savant juge de première instance a conclu que [TRADUCTION] «il n'y avait pas eu d'intention d'accorder aux demandeurs un délai raisonnable pour faire le paiement» et que [TRADUCTION] «d'après la preuve soumise à la cour quant aux biens disponibles des demandeurs, il est raisonnable de supposer que ces fonds auraient pu être réunis à assez brève échéance». La Cour d'appel a conclu, à la majorité, qu'en l'espèce, [TRADUCTION] «Dunlop n'était pas tenue d'accorder un délai afin de permettre à la société d'emprunter l'argent nécessaire pour payer la dette à moins d'en avoir reçu la demande, ce qui n'a pas été fait». En tirant cette conclusion, le juge Weatherston souligne:

[TRADUCTION] Donc au début de mars, Dunlop était en présence de la situation suivante: la société était lourdement endettée et insolvable; elle envisageait des pertes; aucune proposition n'avait été soumise en vue de réduire la somme due à Dunlop et l'administrateur principal de la société avait déjà affirmé qu'il ne placerait plus aucune somme personnelle dans la société.

et il termine:

[TRADUCTION] Mais ce sont chacun des demandeurs qui avaient des biens disponibles de sorte qu'il leur aurait fallu emprunter eux-mêmes l'argent et le prêter

The reasonableness of the demand must be judged according to the facts as they appeared at the time of the seizure. Here, Lister had already, in September 1971, told an official of Dunlop that he would not borrow money from the bank, and that if any further investing was to be done it should be done by Dunlop.

2. Seizure of Autopar Assets of Mr. Lister

At the time of seizure there were on the premises at the two locations of the Company, the Autopar assets which were owned by Mr. Lister personally. Furthermore the Autopar parts business was carried on by Mr. Lister independently of the business of the Company, albeit from the same premises, and indeed the accounts were maintained in the same set of books. Nevertheless it is clear that at the time of the seizure Mr. Lister informed Dunlop's representative that the Autopar assets were the personal property of Lister. The learned trial judge found:

> But even if there were any real doubt on the defendant's part at the time of the seizure as to whether the parts belonged to Mr. Lister (and I find on the evidence that there was no such doubt), Mr. Lister's ownership thereof had to have become apparent to Dunlop and to Mr. Young [Dunlop's representative] at sometime shortly thereafter, and in any case prior to the execution of the agreement of May 31, 1972 [the settlement agreement]. ...

The trial judge in referring to events after the seizure was probably referring to correspondence passing between the solicitors for Dunlop, Chrysler and the Company wherein by letter dated three days after the seizure Chrysler's solicitors stated that the Autopar assets were supplied by Chrysler to Mr. Lister personally. The solicitors for Dunlop in response to this information advised Chrysler's solicitors that no steps would be taken by the receiver in respect of Autopar assets until such time as he received an opinion from the solicitors for Dunlop as to the ownership of those parts. No such opinion was ever received.

Notwithstanding the knowledge of Dunlop that the Autopar assets had been improperly seized under the debenture, which of course was a grant of security only in respect of the assets of the

ensuite à la société. Le caractère raisonnable de la demande doit s'apprécier en fonction de la situation au moment de la saisie. En l'espèce, M. Lister avait déjà dit à un représentant de Dunlop, en septembre 1971, qu'il n'emprunterait aucune somme de la banque et que si d'autres placements se révélaient nécessaires, ils devraient être faits par Dunlop.

2. La saisie des biens d'Autopar appartenant à M. Lister

Au moment de la saisie, les biens d'Autopar appartenant à M. Lister personnellement se trouvaient dans les deux établissements de la société. De plus, M. Lister exploitait le commerce de pièces Autopar indépendamment de celui de la société, même si les deux entreprises occupaient les mêmes locaux, et, en fait, les comptes étaient tenus dans les mêmes livres. Néanmoins, il est clair qu'au moment de la saisie, M. Lister a informé le représentant de Dunlop que les biens d'Autopar lui appartenaient personnellement. Le savant juge de première instance a conclu:

> [TRADUCTION] Mais même si la défenderesse avait vraiment douté, au moment de la saisie, que les pièces appartenaient à M. Lister (et je conclus, d'après la preuve, à l'absence de tels doutes), Dunlop et M. Young [le représentant de Dunlop] avaient dû nécessairement constater qu'elles étaient la propriété de M. Lister, peu après et, en tout état de cause, avant la signature du contrat du 31 mai 1972 [le compromis] ...

En mentionnant les événements survenus après la saisie, le juge de première instance se réfère probablement à la correspondance échangée entre les avocats de Dunlop, de Chrysler et de la société, qui comporte une lettre adressée trois jours après la saisie, dans laquelle les avocats de Chrysler affirment que les biens d'Autopar ont été fournis par Chrysler à M. Lister personnellement. En réponse à cette lettre, les avocats de Dunlop ont avisé ceux de Chrysler que le séquestre ne prendrait aucune mesure à l'égard des biens d'Autopar avant d'avoir reçu l'avis des avocats de Dunlop concernant la propriété de ces pièces. Il n'a jamais reçu cet avis.

Même si Dunlop savait que les biens d'Autopar avaient été saisis irrégulièrement aux termes de la débenture qui, évidemment, avait été émise à titre de sûreté applicable aux biens de la société seule-

Company, the receiver remained in possession and declined to deliver the goods in question either to Chrysler or to Mr. Lister the owner. Under the Chrysler franchise agreement these parts could be returned by Mr. Lister for a full refund of the price which would have retired the indebtedness of Mr. Lister to Chrysler and would have forestalled the institution of the bankruptcy proceedings later taken by Chrysler.

On about April 12, Chrysler filed a petition in bankruptcy in the Supreme Court of Ontario against Mr. Lister by reason of its claim for indebtedness in the amount of $82,927.36 for automotive parts and equipment sold to Mr. Lister. This petition was adjourned repeatedly from April 26 onwards until its ultimate withdrawal on June 9, 1972 pursuant to the settlement agreement.

In the course of these proceedings Mr. Lister swore an affidavit in paragraph 8 of which it was provided:

> 8. Dunlop Canada Limited has agreed to permit the said inventory to be returned to Chrysler Canada Ltd. provided my wife and I deliver to Dunlop Canada Limited collateral security by way of land mortgages on the three real properties above mentioned. My wife and I have both agreed to meet the demands of Dunlop Canada Limited and the petitioning creditor but my auditor has not been able to verify the amount owing to Dunlop Canada Limited and my wife and I are not therefore able to execute the collateral land mortgages until such verification is available.

It is also important to note that long after Chrysler had demanded the delivery to it of the Autopar assets the solicitors for Dunlop stated in evidence:

> A. I said basically I had considered that our position was weak with retention of the parts at that time, yes.

In response to a further question:

> Q. ... why didn't you ask or advise Mr. McAuley they should withdraw their bankruptcy proceeding and the parts could go back to Chrysler?

ment, le séquestre est demeuré en possession des marchandises en question et a refusé de les remettre à Chrysler ou à leur propriétaire M. Lister. En vertu du contrat de concession de Chrysler, M. Lister pouvait retourner ces pièces et obtenir le remboursement intégral de leur prix, ce qui aurait permis d'effacer la dette de M. Lister envers Chrysler et prévenu l'engagement ultérieur de procédures de faillite par Chrysler.

Vers le 12 avril, Chrysler a déposé une pétition en faillite à la Cour suprême de l'Ontario contre M. Lister en raison d'une réclamation de $82,927.36 pour des pièces d'automobile et du matériel vendus à M. Lister. Cette pétition a été reportée à maintes reprises depuis le 26 avril jusqu'à son retrait définitif le 9 juin 1972 par suite du compromis.

Au cours de ces procédures, M. Lister a produit une déclaration faite sous serment dont le paragraphe 8 se lit ainsi:

[TRADUCTION]

> 8. Dunlop Canada Limited accepte que ledit stock soit retourné à Chrysler Canada Ltd. à la condition que mon épouse et moi-même consentions une garantie subsidiaire en faveur de Dunlop Canada Limited en hypothéquant les trois immeubles susmentionnés. Mon épouse et moi-même avons tous les deux accepté de satisfaire à ces exigences de Dunlop Canada Limited et du créancier pétitionnaire, mais mon comptable a été incapable de vérifier la somme due à Dunlop Canada Limited et mon épouse et moi-même ne sommes donc pas en mesure de signer les hypothèques immobilières offertes en garantie subsidiaire tant que cette vérification n'aura pas été effectuée.

Il est aussi important de souligner que longtemps après que Chrysler eut exigé la remise des biens d'Autopar, les avocats de Dunlop ont témoigné ce qui suit:

> [TRADUCTION] R. Essentiellement, j'ai affirmé que j'avais considéré que notre situation quant à la rétention des pièces était précaire à l'époque, oui.

En réponse à une autre question:

> [TRADUCTION] Q. ... pourquoi n'avez-vous pas demandé ou conseillé à M. McAuley d'abandonner la procédure de faillite de manière à pouvoir retourner les pièces à Chrysler?

A. Because we have the right to share in those parts as a creditor of Mr. Lister. We were a personal creditor of his as well.

While Dunlop realized the retention of the Autopar assets was "weak" nevertheless Dunlop insisted on the right to share in Mr. Lister's personal assets with Chrysler, presumably under the guaranty by Mr. Lister of the Company's debt. Of course any such alleged right would require judicial determination in appropriate proceedings against Mr. Lister. Eventually, on the settlement of all the claims between Dunlop and the Listers, the Autopar assets were delivered to Chrysler and Chrysler released all claims against Mr. Lister. It is not at all clear from the record why the Chrysler claims against Mr. Lister were woven into and made dependent upon the settlement of the Dunlop claims against the Company and the Listers.

The appellants asked that two conclusions be drawn from the seizure of these Autopar assets by Dunlop:

(1) that the seizure was a wrongful conversion and trespass against the goods of Mr. Lister and that damages including exemplary damages should flow therefrom as awarded at trial; and

(2) that the wrongful retention after wrongful seizure amounted to duress or coercion of the Listers by Dunlop which resulted in the execution of the settlement agreement of May 31, 1972, which agreement and the securities delivered thereunder should be set aside.

3. The Settlement Contract—May 31, 1972

When the receiver went into possession and took over all the assets of the Company at the premises in Guelph and Orangeville, and took over the Autopar assets of Mr. Lister as well, there was some discussion about the personal guaranties given to Dunlop by the Listers. The trial judge found that some assurance was given to Mr. Lister that these guaranties would not be enforced at least for the moment. Faced with a complete cessation of the Company's business, the seizure of all

R. . . . Parce que nous avons droit à une part de ces pièces en tant que créancier de M. Lister. Nous étions aussi l'un de ses créanciers personnels.

a Même si Dunlop se rendait compte que la rétention des biens d'Autopar était «précaire», elle n'en a pas moins insisté sur le droit de partager avec Chrysler les biens personnels de M. Lister, probablement en vertu du cautionnement par M. Lister b de la dette de la société. Il va de soi que ce prétendu droit devrait être établi par une décision judiciaire dans une procédure appropriée contre M. Lister. Finalement, par suite du règlement de toutes les réclamations entre Dunlop et les Lister, c les biens d'Autopar furent remis à Chrysler qui a renoncé à toutes réclamations contre M. Lister. Le dossier n'indique pas clairement pourquoi les réclamations de Chrysler contre M. Lister ont été d liées et subordonnées au règlement de celles de Dunlop contre la société et les Lister.

Les appelants ont demandé que l'on tire deux conclusions de la saisie par Dunlop des biens e d'Autopar:

(1) que la saisie constitue une appropriation illégitime et une atteinte à la possession des biens de M. Lister et qu'en conséquence, les dommages-intérêts accordés en première instance, f dont des dommages-intérêts exemplaires, devraient être maintenus; et

(2) que la rétention illégitime qui a suivi la saisie illégitime équivaut à une contrainte ou à une g coercition exercée par Dunlop sur les Lister, qui a donné lieu à la signature du compromis du 31 mai 1972, et que ce compromis et les sûretés consenties en vertu de celui-ci doivent être annulés.

h 3. Le compromis du 31 mai 1972

Au moment où le séquestre a pris possession de la totalité de l'actif de la société dans les locaux de Guelph et d'Orangeville, de même que des biens i d'Autopar appartenant à M. Lister, il a été question des cautionnements personnels consentis à Dunlop par les Lister. Le juge de première instance a conclu que les Lister avaient reçu une j certaine assurance que l'on ne se prévaudrait pas de ces cautionnements pour l'instant du moins. Confrontés à la cessation complète des activités de its assets by Dunlop, the seizure by Dunlop of the Autopar assets of Mr. Lister, the termination of the lease to the Guelph store by Dunlop the owner, the pending petition by Chrysler under the *Bankruptcy Act* against Mr. Lister personally, and the notice by Dunlop to Mr. Lister requiring payment by him on his guaranty of the Company debt, and a similar notice to Mrs. Lister on April 14, 1972 calling upon her for the performance of her personal guaranty, the Listers negotiated a settlement of all these matters embracing not only the Dunlop but the Chrysler claims. The agreement was said to have been reached in mid-April but was reduced to writing on May 31, 1972 and executed on June 9, 1972. The Company of course was then without assets and does not appear as a party to the agreement. The parties were Dunlop, Chrysler and the Listers personally. It is this agreement which the Listers must set aside to succeed against Dunlop in respect to the mortgages granted by themselves thereunder. In order to escape the personal guaranties it is also necessary to void the settlement agreement as well as to circumvent the provisions of paragraph 4(11) of the franchise agreement of 1970, if it applies to the Listers personally.

After reciting the history of the indebtedness of the Company to Dunlop and its default on repayment, and the guaranty of the Company's obligations to Dunlop by the Listers, and the demand by Dunlop for the performance of those guaranties by the Listers, the agreement recites that the Listers requested Dunlop and Chrysler to enter into the settlement agreement rather than pursue their respective rights under the personal guaranties and under the *Bankruptcy Act*. The agreement then provided for:

(1) an acknowledgement by Mr. and Mrs. Lister of the indebtedness of the Company to Dunlop and by Mr. Lister of his personal indebtedness to Chrysler;

(2) the granting of three mortgages by the Listers on real estate owned by them personally, to Dunlop to secure the personal guaranties of

la société, à la saisie de tout son actif par Dunlop, à la saisie par Dunlop des biens d'Autopar appartenant à M. Lister, à la résiliation du bail du magasin de Guelph par Dunlop, la propriétaire, à la pétition déposée par Chrysler contre M. Lister personnellement en vertu de la *Loi sur la faillite*, à l'avis de Dunlop à M. Lister exigeant le paiement par ce dernier en vertu de son cautionnement de la dette de la société et à un avis semblable adressé à M[me] Lister le 14 avril 1972, la requérant d'honorer son cautionnement personnel, les Lister ont négocié un compromis visant toutes ces questions et applicable à la fois aux réclamations de Dunlop et à celles de Chrysler. On a affirmé qu'on en est arrivé à ce compromis vers la mi-avril, mais que ce dernier n'a été rédigé que le 31 mai 1972 et signé le 9 juin 1972. La société n'avait plus d'actif à cette époque et n'a donc pas été partie au compromis. Les parties sont Dunlop, Chrysler et les Lister à titre personnel. C'est ce compromis que les Lister doivent faire annuler s'ils veulent avoir gain de cause contre Dunlop quant aux hypothèques qu'ils ont consenties en vertu de celui-ci. Pour se soustraire aux cautionnements personnels, il est également nécessaire d'obtenir l'annulation du compromis et de contourner les dispositions du paragraphe 4(11) du contrat de concession de 1970, dans la mesure où il s'applique aux Lister personnellement.

Après avoir fait l'historique de la dette contractée par la société avec Dunlop et de son omission de rembourser, des cautionnements des obligations de la société consentis à Dunlop par les Lister et de la demande de Dunlop aux Lister d'honorer ces cautionnements, le compromis précise que les Lister ont demandé à Dunlop et à Chrysler d'être parties au compromis plutôt que de faire valoir leurs droits respectifs en vertu des cautionnements personnels et de la *Loi sur la faillite*. Le compromis prescrit ensuite:

(1) la reconnaissance par M. et M[me] Lister de la dette contractée par la société avec Dunlop et la reconnaissance par M. Lister de sa dette personnelle envers Chrysler;

(2) l'attribution à Dunlop par les Lister de trois hypothèques sur des immeubles qu'ils possèdent personnellement, afin de garantir les

the Listers to pay the net indebtedness of the Company to Dunlop;

(3) Dunlop agreed not to enforce the personal guaranties of the Listers so long as these mortgages were not in default;

(4) Dunlop and Mr. Lister agreed to the immediate delivery of the Autopar assets to Chrysler who agreed to accept them as payment in full of Mr. Lister's debt to Chrysler.

By a further provision Mrs. Lister was required to provide a certificate of independent legal advice with respect to her signature of the mortgages to be given by the Listers to Dunlop under the settlement agreement. This was completed by a solicitor practising in Guelph (not the same solicitor who delivered the certificate with reference to the personal guaranties of the Listers under the franchise agreement in 1970) and was delivered on final execution of the settlement agreement. The most surprising term of the agreement is found in paragraph 5 thereof:

5. Subject to prior compliance by RONALD and JOAN with paragraph three of this agreement, DUNLOP and CHRYSLER agree not to oppose the application for a dismissal of the Petition for a Receiving Order filed by CHRYSLER against RONALD.

On June 9, Chrysler obtained leave of the court to withdraw the petition in bankruptcy against Mr. Lister. Nowhere in the record is there any explanation of the joining together of the Chrysler claims against Mr. Lister with those of Dunlop against the Company. This apparently innocent combination of action is all the more unusual when one considers that Dunlop and Chrysler took diametrically opposed views after the seizure of the contents of the Company's stores as to the ownership of the Autopar assets. While Dunlop did undertake not to dispose of them until its solicitors had come to a decision as to the true ownership of these assets, nevertheless Dunlop never did instruct the receiver to release them to Chrysler so as to pay off the indebtedness which was the subject of the bankruptcy petition. The result of making the Chrysler settlement concerning the Autopar assets

cautionnements personnels consentis par les Lister au titre du paiement du montant net dû à Dunlop par la société;

(3) l'engagement de Dunlop de ne pas se prévaloir des cautionnements personnels consentis par les Lister aussi longtemps que ces hypothèques ne seront pas en souffrance;

(4) la convention entre Dunlop et M. Lister visant la remise immédiate des biens d'Autopar à Chrysler qui les accepte en paiement total du montant dû à Chrysler par M. Lister.

En vertu d'une autre disposition, M^{me} Lister est tenue de fournir un document attestant qu'elle a consulté un conseiller juridique neutre au sujet de sa signature des hypothèques que les Lister doivent consentir à Dunlop en vertu du compromis. L'attestation a été fournie par un avocat de Guelph (différent de celui qui avait fourni l'attestation relative aux cautionnements personnels consentis par les Lister en vertu du contrat de concession de 1970) et elle a été produite lors de la signature du compromis. La condition la plus surprenante du compromis se trouve au paragraphe 5:

[TRADUCTION] 5. A la condition que RONALD et JOAN se conforment préalablement au paragraphe 3 des présentes, DUNLOP et CHRYSLER acceptent de ne pas s'objecter à la demande de rejet de la pétition en vue d'une ordonnance de séquestre, déposée par CHRYSLER contre RONALD.

Le 9 juin, Chrysler a obtenu la permission de la cour de retirer la pétition en faillite contre M. Lister. Nulle part dans le dossier, on n'explique pourquoi les réclamations de Chrysler contre M. Lister ont été jointes à celles de Dunlop contre la société. Cette réunion d'actions apparemment inoffensive est d'autant plus étonnante si l'on considère que Dunlop et Chrysler ont adopté des points de vue diamétralement opposés au sujet de la propriété des biens d'Autopar après la saisie du contenu des magasins de la société. Même si elle s'était engagée à ne pas les aliéner avant que ses avocats aient pris une décision concernant la propriété légitime de ces biens, néanmoins Dunlop n'a jamais enjoint au séquestre de les rendre à Chrysler en paiement de la dette visée par la pétition en faillite. Le compromis réalisé avec Chrysler quant aux biens d'Autopar appartenant à M. Lister a eu of Mr. Lister was, of course, to increase the pressure on Mr. Lister personally to settle the Dunlop claims. There is no finding or even a suggestion that the two creditors had conspired to bring about this result but in fact the Lister family difficulties were considerably increased by this procedure.

The trial judge scrutinized the settlement agreement and the events preliminary thereto and concluded that the Listers entered into the settlement agreement "when their bargaining power was grievously impaired", using the terminology of the judgment in *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, on which he relied. However, by reason of the fact that the Listers had independent legal advice throughout the franchise transaction and later during the settlement negotiations, including additional independent legal advice with respect to Mrs. Lister's position at both stages of this entire matter, the trial judge concluded:

> ... with some reluctance, that the presumption that the agreement and mortgages in question were not freely consented to by the Listers has been rebutted ... And in the circumstances of this case, I would find that notwithstanding the pressure upon the Listers, they were able to make an independent and informed judgment in the light of the advice they received. Indeed, in the case of Mr. Lister, given his experience with commercial matters, such a finding might well have been justified even in the absence of independent advice.

The Court thereupon declined to void the settlement agreement and the mortgages. The majority of the Court of Appeal, speaking through Weatherston J.A., concluded, "There is no reason to interfere with this finding of fact."

4. Alleged Misrepresentation by Dunlop to Listers with reference to 1970 Franchise Agreement and Associated Personal Guaranties of Listers

The Listers contend that they are entitled to have their personal guaranties set aside because of alleged misrepresentations by Dunlop prior to the 1970 transactions. Rutherford J., without expressly making a finding of misrepresentation, appears to have been prepared to do so but found that

pour effet, cela va de soi, de presser davantage M. Lister à régler les réclamations de Dunlop. On n'a pas conclu, ni même insinué, que les deux créanciers s'étaient entendus pour parvenir à ce résultat mais, en réalité, cette façon de procéder a contribué à accroître considérablement les difficultés de la famille Lister.

Le juge de première instance a analysé en détail le compromis et les événements qui l'ont précédé et il a conclu que les Lister ont signé ce compromis [TRADUCTION] «alors que leur pouvoir de négociation était gravement affaibli», reprenant ainsi les termes de l'arrêt *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, sur lequel il s'appuyait. Cependant, parce que les Lister avaient eu recours aux services d'un conseiller juridique neutre tout au long des négociations relatives à la concession et plus tard durant celles relatives au compromis, et notamment à une consultation supplémentaire d'un conseiller juridique neutre quant à la situation de M^me^ Lister aux deux étapes de l'affaire, le juge de première instance a conclu:

> [TRADUCTION] ... avec certaines réticences, que la présomption selon laquelle le compromis et les hypothèques en question n'ont pas été consentis librement par les Lister a été repoussée ... En l'espèce, je suis d'avis que, malgré les pressions exercées sur les Lister, ils étaient en mesure de se former une opinion libre et éclairée à partir des avis reçus. En réalité, pour ce qui est de M. Lister, vu son expérience du commerce, on pourrait fort bien tirer la même conclusion même en l'absence de consultation d'une personne neutre.

Sur ce, la cour a refusé d'annuler le compromis et les hypothèques. La Cour d'appel a conclu, à la majorité, par l'intermédiaire du juge Weatherston: [TRADUCTION] «Il n'y a aucune raison de modifier cette conclusion de fait.»

4. Les prétendues déclarations inexactes faites par Dunlop aux Lister concernant le contrat de concession de 1970 et les cautionnements personnels connexes des Lister

Les Lister soutiennent qu'ils ont droit à l'annulation des cautionnements personnels qu'ils ont consentis à cause des déclarations inexactes que Dunlop aurait faites avant les opérations de 1970. Sans conclure expressément à l'existence de déclarations inexactes, le juge Rutherford semble avoir

Dunlop's liability would be excluded in any case by paragraph 4(11) of the franchise agreement which provides as follows:

Dunlop and the Dealer agree that, except as herein expressly stated, no representation, statement, understanding or agreement has been made or exists, either oral or in writing, and that in entering into this Agreement the Dealer has not relied upon any presumption of fact or of law which in any way affects this Agreement, or any provision of the consideration for, or the validity of, this Agreement, or which relates to the subject matter hereof or which imposes any liability upon Dunlop in connection with this Agreement.

The trial judge appears to have dealt with all claims springing from the 1970 transactions, including the personal guaranties, on the same basis as the dismissal of the Company's claims under the 1970 agreement, namely that paragraph 4(11) of the agreement forecloses any claim of misrepresentation. The Listers' guaranties are not mentioned in the agreement nor does the guaranty mention the agreement.

There was no direct discussion of any plea to set aside the guaranty of the Listers on the basis that it was obtained by misrepresentation made by Dunlop to the Listers. The contract paragraph 4(11) for example is cited as "being fatal to the plaintiffs' claim for damages for negligent misrepresentation". The conclusion is later stated more broadly when the trial judge, dealing with paragraph 4(11), states that such clause

... acts as an effective bar, in the circumstances of this case, to recovery on the basis of any pre-contractual representation other than one made fraudulently.

In the Court of Appeal the distinction between the Listers and the Company was drawn but the majority found that the Listers were bound by the above-quoted paragraph of the 1970 agreement because they were aware of it when they delivered their guaranties. In dissent Madam Justice Wilson concluded otherwise.

été disposé à le faire, mais il a conclu que, de toute façon, le paragraphe 4(11) du contrat de concession écartait la responsabilité de Dunlop. Voici le texte de ce paragraphe:

a [TRADUCTION] Dunlop et le concessionnaire conviennent que, à moins d'une disposition expresse contenue aux présentes, il n'y a pas eu et il n'existe pas de représentation, déclaration, affirmation, engagement ou entente, de vive voix ou par écrit, et qu'en concluant le b présent contrat, le concessionnaire ne s'est appuyé sur aucune présomption de fait ou de droit qui puisse de quelque façon porter atteinte à ce contrat, à sa validité ou à toute disposition en matière de contrepartie, ou qui a trait à son objet ou impose une responsabilité quelcon- c que à Dunlop relativement au présent contrat.

Le juge de première instance semble avoir statué sur toutes les réclamations issues des opérations de 1970, y compris les cautionnements personnels, en d se fondant sur le même motif pour lequel il a rejeté les demandes de la société en vertu du contrat de 1970, savoir le paragraphe 4(11) du contrat qui exclut toute réclamation en raison de déclarations inexactes. Les cautionnements des Lister ne sont e pas mentionnés dans le contrat et les cautionnements ne font pas état du contrat.

Il n'y a pas eu de débat portant directement sur f une demande d'annulation du cautionnement consenti par les Lister pour le motif qu'il aurait été obtenu par suite de déclarations inexactes de la part de Dunlop. Par exemple, le paragraphe 4(11) du contrat est cité comme [TRADUCTION] «entraî- g nant le rejet définitif de la demande de dommages-intérêts pour déclarations inexactes faites par négligence». Le juge de première instance énonce plus loin cette conclusion en termes plus généraux lorsqu'il affirme que le paragraphe 4(11)

h [TRADUCTION] ... constitue vraiment, en l'espèce, une fin de non-recevoir au recouvrement fondé sur des déclarations antérieures au contrat, à moins qu'il ne s'agisse de déclarations frauduleuses.

i La Cour d'appel a établi une distinction entre les Lister et la société, mais elle a conclu, à la majorité, que les Lister étaient liés par le paragraphe précité du contrat de 1970 parce qu'ils en connais- j saient la substance quand ils ont consenti leurs cautionnements. En dissidence, M[me] le juge Wilson a conclu dans le sens contraire.

Whether the personal guaranties should be set aside is not necessary to be decided if the 1972 settlement agreement can be enforced notwithstanding the alleged invalidity of the guaranties. The settlement agreement recites in part:

AND WHEREAS RONALD and JOAN have requested DUNLOP to enter into this agreement, rather than pursue its rights under their personal guarantee to DUNLOP of the indebtedness of Ronald Elwyn Lister Limited and its rights as an unsecured creditor of RONALD under the provisions of the Bankruptcy Act.

By several provisions in the Agreement the Listers acknowledge and agree that the Company is indebted to Dunlop in the specific amounts therein set forth and that the Listers will grant mortgages to secure the net amount of this indebtedness after the assets of the Company "have been realized". The provisions for the final payments under the mortgage are somewhat confusing but not here in issue. In the result the agreement seems to provide for a discharge of the mortgages when the net debt owing by the Company to Dunlop has been paid in full by the Listers together with interest as stipulated, whatever that may be. The operative sentence appears to be that found at the end of paragraph 4 which states:

RONALD and JOAN will be entitled to discharges of their mortgages when the lesser of the balance of the principal and interest owing pursuant to the said mortgages or the indebtedness of Ronald Elwyn Lister Limited and RONALD and JOAN to DUNLOP has been paid.

In return, Dunlop agrees elsewhere in the agreement not to take proceedings to enforce the guaranties of the Listers as long as the mortgages are not in default.

The agreement provides, without any explanation, that the Company indebtedness (and again it is noted the Company is not a party to the contract) to Dunlop "will become due and payable" to Dunlop on June 1, 1974. No reservation of any kind is asserted by the Listers in this 1972 agreement from the acknowledgment of responsibility for the Company's debt to Dunlop. I find no reason in fact and none has been advanced in law

a Il n'est pas nécessaire de décider s'il faut annuler les cautionnements personnels si le compromis de 1972 peut être appliqué nonobstant la prétendue invalidité de ces cautionnements. Le compromis stipule notamment ce qui suit:

b [TRADUCTION] ET ATTENDU QUE RONALD et JOAN ont demandé à DUNLOP de signer le présent compromis plutôt que de faire valoir ses droits en vertu du cautionnement personnel qu'ils ont consenti à DUNLOP relativement à la dette de Ronald Elwyn Lister Limited et ses droits à titre de créancier non garanti de RONALD en vertu des dispositions de la *Loi sur la faillite*.

c A plusieurs endroits dans le compromis, les Lister admettent et reconnaissent que la société doit à Dunlop les sommes précises qui y sont inscrites et qu'ils consentiront des hypothèques pour garantir le montant net de cette dette après d que les biens de la société [TRADUCTION] «auront été liquidés». Les dispositions relatives au paiement définitif aux termes de l'hypothèque sont assez ambiguës mais elles ne sont pas en cause ici. En définitive, le compromis semble prévoir la maine mainlevée des hypothèques dès que les Lister auront complètement remboursé la somme nette due à Dunlop par la société, ainsi que les intérêts stipulés, quel qu'en soit le montant. La phrase-clé f semble se trouver à la fin du paragraphe 4 qui se lit comme suit:

[TRADUCTION] RONALD et JOAN auront droit à la mainlevée de leurs hypothèques après avoir remboursé le moindre du solde du principal et des intérêts dus en g vertu desdites hypothèques ou du montant dû à DUNLOP par Ronald Elwyn Lister Limited, RONALD et JOAN.

h En contrepartie, Dunlop s'engage, ailleurs dans le compromis, à ne pas se prévaloir des cautionnements consentis par les Lister aussi longtemps que les hypothèques ne seront pas en souffrance.

i Le compromis prescrit, sans aucune explication, que la dette de la société (et je souligne de nouveau que la société n'est pas partie au contrat) envers Dunlop «deviendra payable» à Dunlop le 1er juin 1974. Dans ce compromis de 1972, les j Lister n'expriment aucune réserve à l'acceptation de la responsabilité de la dette contractée par la société avec Dunlop. Je ne vois aucun motif sur le plan des faits, et aucun motif n'a été soumis sur le for any construction of the settlement agreement other than giving it its plain meaning, namely that the Listers undertook on this new basis to pay in 1974 the indebtedness of the Company to Dunlop.

Even if the claims as they arose in the Listers survived paragraph 4(11) of the franchise agreement they were, to the extent the Listers are made liable under the settlement agreement, embraced in the acknowledgment of liability therein as guarantors of the Company's indebtedness. By the strongest possible inference, paragraph 6 of the settlement agreement evidences the understanding by the Listers that at the time of the settlement agreement the personal guaranties remained outstanding. Paragraph 6 provides:

> 6. DUNLOP agrees not to take proceedings to enforce the guarantees of RONALD and JOAN of the indebtedness of Ronald Elwyn Lister Limited to DUNLOP as long as the said mortgages are not in default.

There is no qualification in the settlement agreement of this recognition of liability in the Listers both under the personal guaranties and under the mortgages.

In the result the settlement agreement is the crux and climax of these successive transactions and the relationship which arose between the plaintiffs/appellants and Dunlop. If that agreement can stand independently of the alleged invalidity of the personal guaranties, the setting aside of the guaranties need not be considered.

5. Consideration for the 1972 Settlement Agreement

This agreement in law was produced by the parties jointly for the purpose of composing their recited differences. The consideration moving to the Listers was the response by Dunlop to the request for time to realize on their assets in an orderly fashion so as to reduce the debt to Dunlop. Dunlop benefitted from the receipt of mortgages to secure the performance of the Listers of their previously unsecured undertaking. The adequacy of consideration supporting a contract has not been the subject of court scrutiny for several centuries: *Cheshire and Fifoot's Law of Contract*, 10th ed.,

plan du droit, qui permettrait d'interpréter le compromis autrement qu'en lui donnant son sens clair, savoir que les Lister se sont engagés, aux termes de cette nouvelle entente, à payer en 1974 le montant dû à Dunlop par la société.

Même si les réclamations des Lister subsistaient malgré le paragraphe 4(11) du contrat de concession, elles étaient, dans la mesure où les Lister sont liés par le compromis, assujetties à l'acceptation de responsabilité qu'il y font à titre de cautions de la dette de la société. On suppose fortement que le paragraphe 6 du compromis témoigne de la reconnaissance par les Lister qu'à la date du compromis les cautionnements personnels étaient encore impayés. Le paragraphe 6 se lit comme suit:

> [TRADUCTION] 6. DUNLOP s'engage à ne pas se prévaloir des cautionnements consentis par RONALD et JOAN à l'égard du montant dû à DUNLOP par Ronald Elwyn Lister Limited aussi longtemps que lesdites hypothèques ne seront pas en souffrance.

Le compromis ne comporte aucune réserve applicable à cette acceptation de responsabilité par les Lister tant aux termes des cautionnements personnels qu'aux termes des hypothèques.

En définitive, le compromis est le noeud et l'aboutissement de ces opérations successives et des rapports entre les demandeurs appelants et Dunlop. Si ce compromis demeure valide malgré la prétendue invalidité des cautionnements personnels, il n'est pas nécessaire d'examiner la demande d'annulation de ces cautionnements.

5. La contrepartie pour le compromis de 1972

Sur le plan juridique, les parties ont dressé ensemble ce compromis dans le but de régler les différends qui y sont énoncés. La contrepartie accordée aux Lister est la réponse de Dunlop à leur demande de délai en vue de liquider systématiquement leur actif de manière à réduire le montant dû à Dunlop. Dunlop bénéficie des hypothèques consenties pour garantir l'exécution par les Lister de leur engagement qui jusque-là n'était assorti d'aucune garantie. Le caractère suffisant de la contrepartie sur laquelle repose un contrat n'a pas fait l'objet d'un examen judiciaire depuis at p. 70. The comments of the learned authors of *Chitty on Contracts*, 24th ed., at pp. 82-83 are directly on point:

> But if the validity of the claim is doubtful, forbearance to enforce it can be good consideration. And the same rule applies even if the claim is clearly invalid in law, so long as it was in good faith and reasonably believed to be valid by the party forbearing.

The old authority of *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449, is cited in support. Bowen L.J. may be seen to the same effect in *Miles v. New Zealand Alford Estate Company* (1886), 32 Ch.D. 266, at p. 291:

> It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.

Even if this principle were not to be found embedded in the basic concepts of the law of contracts, where would the equities lie here? In *Magee v. Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507 (C.A.), a case of common mistake in the absence of fraud, the parties entered into a compromise agreement in settlement of an insurance claim which both parties, under common fundamental mistake, believed was enforceable. The majority of that court of appeal found in all the equities that the settlement contract could not stand after the discovery by the parties of the falsity of the application for insurance on which the alleged settlement contract arose. Lord Denning, Master of the Rolls, for the majority concluded at p. 515:

> ... but I cannot shut my eyes to the fact that Mr. Magee had no valid claim on the insurance policy: and, if he had no claim on the policy, it is not equitable that he should have a good claim on the agreement to pay £385, seeing that it was made under a fundamental mistake. It is not fair to hold the insurance company to an agreement which they would not have dreamt of

plusieurs siècles: *Cheshire and Fifoot's Law of Contract*, 10[e] éd., à la p. 70. Les observations des savants auteurs de *Chitty on Contracts*, 24[e] éd., aux pp. 82 et 83, sont très justes:

> [TRADUCTION] Mais si la validité de la réclamation est incertaine, l'abstention de la faire valoir peut être une contrepartie valable. La même règle s'applique même si la réclamation est clairement invalide sur le plan juridique, pourvu qu'elle ait été faite de bonne foi et que la partie qui s'abstient ait raisonnablement cru qu'elle était valide.

Le vieil arrêt *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449, est cité à l'appui. On peut considérer que le lord juge Bowen abonde dans le même sens dans l'arrêt *Miles v. New Zealand Alford Estate Company* (1886), 32 Ch.D. 266, à la p. 291:

> [TRADUCTION] Il me semble que si un plaideur éventuel s'abstient de bonne foi d'exercer son droit de plaider une question de droit ou de fait qui n'est ni vexatoire ni futile, il renonce à quelque chose qui a une valeur. Il est erroné de supposer que ce n'est pas un avantage, qu'un requérant peut apprécier, d'être en mesure de soumettre sa réclamation aux tribunaux, même s'il s'avère qu'il a tort.

Même si ce principe ne se trouvait pas enchâssé dans les notions fondamentales du droit des contrats, quelle serait la solution en *equity?* Dans l'arrêt *Magee v. Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507 (C.A.), où il est question d'une erreur commune en l'absence de toute fraude, les parties ont signé un compromis en règlement d'une réclamation d'assurance que les deux parties, en raison d'une erreur commune sur un point essentiel, croyaient exécutoire. La Cour d'appel a statué à la majorité que selon l'equity le compromis ne pouvait demeurer valide après la découverte par les parties de la fausseté de la demande d'assurance sur laquelle reposait le prétendu compromis. Lord Denning, maître des rôles, conclut au nom de la majorité, à la p. 515:

> [TRADUCTION] ... mais je ne puis ignorer le fait que M. Magee n'avait pas de réclamation valide aux termes de la police d'assurance: et s'il n'avait pas de réclamation aux termes de la police, il n'est pas équitable qu'il puisse avoir une réclamation valide en vertu de l'engagement de payer la somme de £385, vu que cet engagement résulte d'une erreur sur un point essentiel. Il n'est

making if they had not been under a mistake.

pas juste de lier la compagnie d'assurances à un engagement qu'elle n'aurait jamais eu l'idée de souscrire si elle n'avait pas commis une erreur.

Here the equities run in the other direction. The Listers, it will be remembered, negotiated a franchise agreement, incorporated a Company to take the agreement, and then guaranteed that Company's account with Dunlop. The venture foundered. The parties eventually composed their differences in a settlement contract in 1972. At every stage of both agreements in 1970 and 1972 both parties proceeded with the assistance of legal advice, including independent legal advice for Mrs. Lister in connection with the guaranties and the mortgages. The settlement agreement recites the Listers' request that Dunlop join the agreement rather than pursue its remedies against them. Reference is also made of the need to dispose of the proceedings under the *Bankruptcy Act* concerning Mr. Lister. The agreement was executed and performed by June 9. The bankruptcy proceedings were terminated, and the securities were delivered by the Listers to Dunlop as the agreement required. In short, the agreement was fully executed by the parties. No reservation of right was effected in the agreement by the Listers to allow them to attack on other grounds the validity of the Company note or their personal guaranties of 1970 or their mortgages of 1972. The Listers achieved their obvious goal of gaining time to pay off the Company debt to Dunlop without the necessity of selling the mortgaged assets or other property on a forced sale basis. In all the circumstances it would be inequitable for the law now to allow them to disown the agreement that they solicited and entered into on full knowledge of all the facts and supported by legal counsel throughout.

Ici l'*equity* va dans l'autre sens. Les Lister ont, faut-il le rappeler, négocié un contrat de concession, constitué juridiquement une société pour exécuter ce contrat et ensuite cautionné la dette contractée par cette société avec Dunlop. Le commerce s'est effondré. Les parties ont finalement réglé leurs différends par un compromis en 1972. Lors du contrat de 1970 et du compromis de 1972, les deux parties ont bénéficié des services de conseillers juridiques et notamment de ceux d'un conseiller juridique neutre dans le cas de M^{me} Lister, quant aux cautionnements et aux hypothèques. Le compromis précise que les Lister demandent à Dunlop d'adhérer à ce compromis plutôt que d'exercer ses recours contre eux. On y mentionne aussi la nécessité de régler les procédures entamées contre M. Lister en vertu de la *Loi sur la faillite*. Le compromis a été signé et mis à exécution dès le 9 juin. Les procédures de faillite ont été arrêtées et les Lister ont consenti les sûretés à Dunlop conformément au compromis. En bref, les parties ont fidèlement respecté le compromis. Les Lister ne se sont pas réservé, dans le compromis, le droit de contester, pour d'autres motifs, la validité du billet de la société, leurs cautionnements personnels de 1970 ou leurs hypothèques de 1972. Les Lister ont atteint leur objectif évident, soit l'obtention d'un délai permettant de rembourser le montant dû par la société à Dunlop sans être forcés de vendre les biens hypothéqués ou d'autres biens. En tout état de cause, il ne serait pas juste que la loi leur permette de répudier le compromis qu'ils ont demandé et signé en parfaite connaissance de cause et après avoir bénéficié de l'avis de conseillers juridiques à toutes les étapes.

It would be contrary to the basic principles of equity to allow the guarantors to request and to obtain from Dunlop a postponement of liability under the guaranty in the form of the 1972 agreement and thereafter to assert, allegedly by reason of circumstances known by the Listers at the time of the 1972 agreement, that the guaranties had never been enforceable at law; or alternatively, if originally enforceable were rendered unenforce-

Il serait contraire aux principes fondamentaux de *l'equity* de permettre aux cautions de demander et d'obtenir de Dunlop un sursis, quant à leur responsabilité aux termes du cautionnement, qui prendrait la forme du compromis de 1972, et d'affirmer par la suite, présumément à cause d'une situation connue des Lister au moment du compromis de 1972, que les cautionnements n'ont jamais été exécutoires en droit ou encore, à supposer able by reason of Dunlop's misrepresentations, a circumstance known to the Listers in their allegations long before the time of the execution of the 1972 agreement.

Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need not warrant for the intervention of the courts to remake or set aside these contracts.

In the end, therefore, the outcome does not turn on the narrow fact that the Listers, not being parties to the franchise agreement, are not bound by its exclusionary terms relating to representations outside the agreement. Nor does the outcome turn on the collateral issue (in the sense it could not be and was not litigated in these proceedings) of the validity of the 1970 guaranty. Dunlop had its right in law to proceed against the Listers but forbore from doing so. The Listers, by their entry into a performance of the settlement agreement, are foreclosed from the remedies now sought to be enforced by them.

qu'ils l'étaient à l'origine, qu'ils sont devenus non exécutoires par suite des déclarations inexactes de Dunlop, situation dont les Lister, suivant leurs allégations,étaient conscients bien avant la signature du compromis de 1972.

Lorsque des parties expérimentées en affaires ont conclu une opération commerciale et qu'elles ont ensuite entrepris de cristalliser leurs droits et obligations respectifs dans un contrat rédigé par leurs avocats respectifs, il est très difficile de trouver ou d'espérer trouver dans le droit des contrats un principe juridique qui rend nulles les conventions qui en découlent. Certes, lorsque les parties ont la capacité juridique de contracter, lorsque les modalités du contrat sont claires et précises, lorsqu'il y a eu contrepartie valable entre les parties, en l'absence de preuve d'abus d'autorité ou de déclarations inexactes, le droit ne reconnaît aucun principe qui permet d'annuler un tel contrat. Il n'y a pas de doute que le droit des contrats, sur ce point, reflète le besoin de certitude en matière commerciale. Cela est particulièrement vrai lorsque, comme ici, au moment d'intenter l'action, les deux contrats n'étaient pas des contrats à exécuter mais des contrats que les parties ont mis à exécution et exécutés. Lorsque, comme en l'espèce, les personnes engagées dans le commerce en question ont été en contact constamment avec leurs conseillers juridiques, il n'est ni nécessaire ni justifié que les tribunaux interviennent pour remanier ces contrats ou les annuler.

Donc, en définitive, l'issue ne dépend pas du simple fait que les Lister, qui n'ont pas été partie au contrat de concession, ne sont pas liés par les clauses qui excluent les déclarations qui ne figurent pas dans le contrat. L'issue ne tient pas non plus à la question accessoire (dans le sens qu'elle n'a pas été et ne pouvait être débattue dans ces procédures) de la validité du cautionnement de 1970. Dunlop était légalement habilitée à poursuivre les Lister mais elle s'est abstenue de le faire. De par leur acceptation d'exécuter le compromis, les Lister n'ont pas droit aux recours qu'ils cherchent maintenant à exercer.

6. Validity of the Seizure

The principal difference between the courts below was on the right of the Company and the Listers to reasonable notice from Dunlop when enforcing its claims under the note, the debenture and the guaranties. Both courts below agreed that the debtor had the right to reasonable notice but, as quoted above, the majority of the Court of Appeal found that the debtor must ask for time to make the payment claimed to be due and none was asked for by the plaintiff-appellants. The facts of the demand have been set out. The debenture and note signed and delivered by the Company provide for payment "on demand". By its terms the debenture further provides that the principal and interest shall "forthwith become due and payable" on the happening of any of nineteen specified events such as a default in payment of interest and principal by the Company. The security thereby constituted by the debenture likewise becomes enforceable at the same time. The guaranty by the Listers is performable upon "notice in writing" delivered personally or by mail.

The rule has long been that enunciated in *Massey v. Sladen* (1868), L.R. 4 Ex. 13, at p. 19: the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.

This authority (*Massey*) relates back to the *dictum* of Cockburn C.J. in *Toms v. Wilson and Another* (1863), 4 B. & S. 442, 122 E.R. 524, at p. 529. Blackburn J., in concurring, put the matter directly:

> But, when, by the express terms of the instrument creating the debt, payment is to be made "immediately

6. La validité de la saisie

La principale divergence d'opinions entre les cours d'instance inférieure porte sur le droit qu'avaient la société et les Lister à un préavis raisonnable de Dunlop lorsque celle-ci a exercé ses droits en vertu du billet, de la débenture et des cautionnements. Les deux cours d'instance inférieure ont reconnu que le débiteur avait droit à un avis raisonnable mais, tel que précité, la Cour d'appel a conclu, à la majorité, que le débiteur doit demander un délai pour faire le paiement qu'on prétend échu, ce qui n'a pas été fait par les demandeurs appelants. Les faits relatifs à la demande de paiement ont été exposés. La débenture et le billet signés et émis par la société prévoit un paiement «à demande». De par sa formulation, la débenture prévoit également que le principal et les intérêts [TRADUCTION] «deviendront payables immédiatement» dans l'un ou l'autre des dix-neuf cas énumérés, notamment en cas de défaut de paiement du principal et des intérêts par la société. La sûreté ainsi constituée par la débenture devient aussi exécutoire au même moment. Le cautionnement des Lister est exécutoire sur avis écrit donné personnellement ou par courrier.

La règle depuis longtemps applicable est celle énoncée à l'arrêt *Massey v. Sladen* (1868), L.R. 4 Ex. 13, à la p. 19: il faut accorder au débiteur [TRADUCTION] «un avis qui puisse raisonnablement lui permettre de s'exécuter». L'application de cette règle simple est fonction des faits et circonstances de chaque espèce. L'omission de donner un avis raisonnable place le débiteur dans une situation de contrainte financière qui souvent n'est pas moins réelle qu'une contrainte physique contre la personne et c'est sans doute ce qui explique l'empressement des tribunaux à considérer que les pièces qui constatent ou créent une dette comportent dans tous les cas l'obligation de donner un préavis raisonnable aux fins du paiement.

Cette jurisprudence (l'arrêt *Massey*) se rapporte à l'opinion incidente du juge en chef Cockburn dans l'arrêt *Toms v. Wilson and Another* (1863), 4 B. & S. 442, 122 E.R. 524, à la p. 529. Le juge Blackburn qui est du même avis s'exprime ainsi:

> [TRADUCTION] Mais quand, d'après le texte de l'instrument qui crée la dette, le paiement doit être fait «immé-

upon demand in writing," it must be construed to mean within a reasonable time.

Baron Pigott, in *Massey, supra*, stated (at p. 19):

It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act.

See also *Moore v. Shelley and Another* (1883), 8 A.C. 285 (P.C.), and for a modern summation of the rule and its particular application see *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198 (H.Ct.) and *Royal Bank of Canada v. Cal Glass Ltd. and Coopers & Lybrand Limited* (1979), 18 B.C.L.R. 55 (S.C.)

Mr. Lister said before the seizure that he did not intend to advance further money to the venture and that if any such money were required, Dunlop should provide it. This is something quite different from a waiver of a right to reasonable notice. This was something said by one party to another in a failing venture, incidental to continuing bargaining or negotiating for some means to save the undertaking and their respective investments in it. If Dunlop relied on this statement in seizing the assets without notice, as they did, they were in my view quite wrong. The Listers remained entitled to reasonable notice. The majority of the Court of Appeal concluded that the appellants were required either on these facts or generally to ask for time to pay. No authority was cited for the proposition and none was advanced in this Court. Here the Listers allowed the receiver to enter into possession and to proceed to liquidate Mr. Lister's assets and those of the Company on behalf of Dunlop. This technical or mechanical acquiescence in no way eliminated, by waiver, acquiescence or otherwise, the appellants' entitlement to reasonable notice. In the result therefore, Dunlop and its agents, its employees and the receiver were guilty

diatement sur demande écrite,» on doit l'interpréter comme devant être fait dans un délai raisonnable.

Le baron Pigott, dans l'arrêt *Massey*, précité, affirme (à la p. 19):

[TRADUCTION] Il n'est pas nécessaire de spécifier le délai qui aurait dû s'écouler entre l'avis et la saisie. C'est une question de circonstances et de rapports entre les parties, et il serait difficile, peut-être impossible, d'énoncer une règle de droit sur la question, sinon que le délai doit être raisonnable. Cependant, il est très clair que le demandeur n'a pas voulu convenir d'un avis simplement illusoire, mais d'un avis qui puisse raisonnablement lui permettre de s'exécuter.

Voir également *Moore v. Shelley and Another* (1883), 8 A.C. 285 (C.P.), et, pour un résumé récent de la règle et de son application particulière, voir les arrêts *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198 (H.C.) et *Royal Bank of Canada v. Cal Glass Ltd. & Coopers & Lybrand Limited* (1979), 18 B.C.L.R. 55 (C.S.)

M. Lister avait déclaré avant la saisie qu'il n'avait pas l'intention de placer d'autres sommes dans l'entreprise et que si d'autres sommes étaient nécessaires, il reviendrait à Dunlop de les fournir. Cela est tout à fait différent d'une renonciation au droit à un avis raisonnable. Ce sont les paroles dites par une partie à une entreprise défaillante à une autre, dans le cadre de négociations soutenues en vue de trouver un moyen de sauver l'entreprise et leurs placements respectifs dans cette dernière. Si Dunlop s'est fondée sur cette déclaration pour saisir les biens sans préavis, comme elle l'a fait, elle a eu, à mon avis, tout à fait tort. Les Lister avaient toujours droit à un avis raisonnable. La Cour d'appel a conclu, à la majorité, que les appelants étaient tenus, soit en fonction de ces faits, soit généralement, de demander un délai de paiement. On n'a pas cité, ni même invoqué devant cette Cour, de jurisprudence à l'appui de cette thèse. En l'espèce, les Lister ont permis au séquestre de prendre possession et de procéder à la liquidation des biens de M. Lister et de ceux de la société pour le compte de Dunlop. Cet acquiescement technique ou automatique n'a aucunement éliminé, par renonciation, acceptation ou autre-of trespass and conversion.

7. Damages

The trial judge assessed the damages firstly with reference to the loss arising from the inadequate realization on the assets by the receiver, and secondly, the loss of future profits because of the destruction of these two businesses by the wrongful seizure. Illustrations of similar applications of this principle are to be found in *J. & E. Hall, Ltd. v. Barclay*, [1937] 3 All E.R. 620 (C.A.); *Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited* (1958), 26 W.W.R. 721 (Man. C.A.); *Yukon Southern Air Transport Limited et al. v. The King*, [1942] Ex. C.R. 181; *Brodt v. Wearmouth and Pyle*, [1937] 1 W.W.R. 777 (B.C.C.A.)

The circumstances here arising have been set out above and were reviewed in detail at trial. There appears to be no error of application of law inviting appellate intervention. The Court of Appeal neither awarded nor dealt with the issue of damages for destruction of the two businesses although this claim was raised by all plaintiffs in the statement of claim. The extent of the damages will be assessed on the reference according to the duration of the wrongful retention of assets in the case of the Autopar seizure, the magnitude of the inadequate realization occurring (if any) in the case of the company assets, the prospect of loss of profits in the case of each of the businesses, and the impact of the wrongful conduct on the part of Dunlop on the appellants. Because the computation and assessment of damages will now proceed before the Master, no more need be said about the process.

The Court of Appeal made no mention of the issue of exemplary damages as awarded by the trial judge other than to observe that such an award was "not appropriate" in the case of the

ment, le droit des appelants à un avis raisonnable. En conséquence, Dunlop et ses représentants, ses employés et le séquestre se sont rendus coupables d'atteinte à la possession et d'appropriation illégitime.

7. Les dommages-intérêts

Le juge de première instance a évalué les dommages-intérêts en fonction, premièrement, de la perte découlant de la liquidation inappropriée des biens par le séquestre et, deuxièmement, de la perte des profits à venir attribuable à l'anéantissement de ces deux commerces par suite de la saisie illégitime. On trouve des exemples d'application semblables de ce principe dans les affaires suivantes: *J. & E. Hall, Ltd. v. Barclay*, [1937] 3 All E.R. 620 (C.A.); *Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited* (1958), 26 W.W.R. 721 (C.A. Man.); *Yukon Southern Air Transport Limited et al. v. The King*, [1942] R.C. de l'É. 181; *Brodt v. Wearmouth and Pyle*, [1937] 1 W.W.R. 777 (C.A.C.-B.)

Les circonstances de l'espèce ont été énoncées plus haut et elles ont été examinées en détail en première instance. Il ne semble y avoir aucune erreur dans l'application du droit qui justifie une intervention en appel. La Cour d'appel n'a pas accordé de dommages-intérêts pour l'anéantissement des deux commerces, ni même abordé cette question, bien que tous les demandeurs l'aient soulevée dans l'exposé de cause. Les dommages-intérêts seront évalués lors du renvoi, en fonction de la durée de la rétention illégitime des biens en ce qui concerne la saisie d'Autopar, de l'amplitude de la liquidation inappropriée (s'il y a lieu) en ce qui concerne les biens de la société, de la possibilité de perte de profits dans le cas de chacun des commerces et de l'incidence sur les appelants du comportement préjudiciable de Dunlop. Puisque l'évaluation et le calcul des dommages-intérêts seront effectués devant le *Master*, il n'est pas nécessaire d'en traiter plus longuement.

La Cour d'appel n'a mentionné la question des dommages-intérêts exemplaires accordés par le juge de première instance que pour faire remarquer qu'une telle adjudication était «inappropriée»

Autopar seizure. In its order the Court of Appeal did not include any exemplary damages for either seizure. The facts and circumstances of the receiver's entry into possession with an armed guard and the protracted delay by Dunlop in replying to the demand for the return of the Autopar parts to Chrysler are a sufficient basis in my view for the exercise of the trial judge's discretion to award exemplary damages here. The place in the law of Ontario of exemplary damages for wrongful seizure was not argued here nor does the record reveal any argument being directed below to the right of a trial judge to make such an award in law. Accordingly, the matter is taken no further than to restore that aspect of the trial judgment.

Therefore, for the reasons stated, I would allow the appeal and restore the judgment at trial with costs here and in the courts below to the appellants; costs of the reference to be reserved for disposition when the Master's report is received.

Appeal allowed with costs.

Solicitors for the appellants: McCarthy & McCarthy, Toronto.

Solicitors for the respondent: Harries, Houser, Toronto.

dans le cas de la saisie d'Autopar. Dans son ordonnance, la Cour d'appel n'a prévu de dommages-intérêts exemplaires pour aucune des saisies. Les circonstances de la prise de possession par le séquestre accompagné d'un garde armé et le fait que Dunlop ait tardé à répondre à la demande de la remise des pièces d'Autopar à Chrysler constitue, à mon sens, une justification suffisante pour que le juge de première instance puisse exercer son pouvoir discrétionnaire d'accorder des dommages-intérêts exemplaires dans le présent cas. En l'espèce, on n'a pas débattu la question des dommages-intérêts exemplaires pour saisie illégitime dans le contexte du droit en Ontario et le dossier ne révèle aucun argument, en Cour d'appel, à l'encontre du droit du juge de première instance d'accorder ces dommages-intérêts. En conséquence, nous nous contenterons de rétablir le jugement de première instance sur ce point.

Donc, pour les motifs énoncés, je suis d'avis d'accueillir le pourvoi, de rétablir le jugement de première instance et d'accorder aux appelants leurs dépens en cette Cour et dans les cours d'instance inférieure; la décision quant aux dépens du renvoi est reportée à la réception du rapport du *Master*.

Pourvoi accueilli avec dépens.

Procureurs des appelants: McCarthy & McCarthy, Toronto.

Procureurs de l'intimée: Harries, Houser, Toronto.

2

CITATION: CBJ Developments Inc. v. 1180554 Ontario Limited, 2023 ONSC 6773
COURT FILE NO.: CV-23-00709788-00CL
DATE: 20231201

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: CBJ DEVELOPMENTS INC., CBJ - CLEARVIEW GARDEN ESTATES INC. and CBJ - BRIDLE PARK II INC., Applicants

AND:

1180554 ONTARIO LIMITED, Respondent

BEFORE: Kimmel J.

COUNSEL: *Steven Graff, Miranda Spence and Samantha Hans*, for the Applicants

Jonathan Kulathungam, for the Respondent

HEARD: November 22, 2023

ENDORSEMENT

KIMMEL J.

The Application

[1] This application seeks a declaration that the Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), sent by the respondent 1180554 Ontario Limited ("118" or "Secured Lender") to the applicants ("CBJ" or "Debtors" or "Borrowers") on September 7, 2023 (the "s. 244 BIA Notice") is void as a result of the Secured Lender having taken an enforcement step prior to the expiry of the ten-day notice period prescribed by s. 244(2) of the BIA by sending Notices of Sale pursuant to the *Mortgages Act*, R.S.O. 1990, c. M.40 (the "*Mortgages Act*"), to the Debtors on September 7, 2023 (the "Notices of Sale") contemporaneously with the delivery of the s. 244 BIA Notice.

[2] The Secured Lender has brought an application seeking the appointment of a receiver/manager over all of the assets, undertakings and properties of the Borrowers, including three parcels of vacant land consisting of approximately 275 acres in Stayner, Ontario ("Stayner Properties") that were the subject of the Secured Lender's mortgage security. The receivership application bears Court File No. CV-23-00707989-00CL ("Receivership Application") and was commenced on October 18, 2023, with a return date of December 19, 2023.

[3] The determination of the issues raised on this application could have implications for the Receivership Application. Accordingly, this application was scheduled to be heard before the Receivership Application. However, the court is not being asked on this application to make any rulings or provide any directions concerning the Receivership Application.

Issues to be Decided

[4] In the Agreed Statement of Facts dated November 17, 2023 (the "ASF"), the parties articulated the issues for the court to decide on this application to be as follows:

a. Can a Notice of Intention to Enforce Security under s. 244 of the BIA and a Notice of Sale under the *Mortgages Act* be issued concurrently, or is a Notice of Sale an enforcement step that cannot be issued until the Notice of Intention to Enforce Security has expired?

b. Is the Section 244 BIA Notice void such that the enforcement proceedings must be re- started?

[5] The applicants broke down the issues for the court's consideration at the hearing to be as follows:

a. What is the purpose of the ten-day notice period s. 244 of the BIA?

b. Was the issuance of Notices of Sale under the Mortgages Act an enforcement step?

c. If an enforcement step is taken during the ten-day notice period does that render the s. 244 BIA Notice void?

d. If the s. 244 BIA Notice is void, is the creditor required to issue a new s. 244 BIA Notice before taking any other enforcement steps?

Summary of Outcome

[6] For the reasons that follow, I find the issuance of the Notices of Sale under the Mortgages Act on September 7, 2023 (concurrently with the s. 244 BIA Notice) was an enforcement step that was taken within the ten-day notice period under s. 244 of the BIA. However, there is no statutory prescription that the s. 244 BIA Notice is void as a result of an enforcement step having been taken within the ten-day notice period. In the absence of any demonstrated actual prejudice to the Borrowers arising from the contemporaneous issuance of the Notices of Sale with the s. 244 BIA Notice, I do not consider it appropriate to exercise my discretion under s. 248 to declare the s. 244 BIA Notice to be void in the circumstances of this case.

[7] The best practice is to wait to issue a notice of sale under the *Mortgages Act* until after the ten-day notice period under s. 244 of the BIA has expired. In a case of demonstrated

prejudice, the court might exercise its discretion differently and could void the s. 244 BIA Notice.

Positions of the Parties

[8] The Borrowers object to 118's enforcement of its security by way of Notices of Sale issued contemporaneously with the s. 244 BIA Notice and, thus, during the ten day period during which enforcement of security is prohibited under the BIA. They ask the court to exercise its discretion under s. 248 of the BIA and to declare the s. 244 BIA Notice to be void as a result. The Borrowers seek to have the issues raised on this application adjudicated in advance of the Receivership Application.

[9] 118 takes the position that:

a. Notices of Sale under the *Mortgages Act* are merely precursors to the enforcement of Mortgage Security and not actual enforcement, which only occurs at the time of the sale and that delivery of the Notices of Sale contemporaneously with the s. 244 BIA Notice does not render the s. 244 BIA Notice to be invalid; and,

b. In the alternative, the relief sought by the Borrowers is premature and ought to be determined when the Receivership Application is heard.

Agreed Facts

[10] The Debtors maintain that the issues on this application can be determined on the basis of the ASF. The following facts have been extracted from the ASF and supplemented with reference to documents and uncontentious facts from the evidence filed by the Secured Lender for ease of reference:

a. The Borrowers own the Stayner Properties.

b. On September 15, 2021, CBJ and 1852773 Alberta Ltd. ("185") entered into a loan agreement (the "Loan Agreement") with 118, pursuant to which 118 granted to CBJ and 185 a first mortgage facility in the principal amount of $16,000,000 (the "118 Loan").

c. The Loan Agreement called for certain security, including, among other things, three first fixed mortgages (the "Mortgages") that were registered against each of the three Stayner Properties owned by each of the Borrowers, respectively (the "Mortgage Security"). Other security was also granted, including assignments of material agreements, licences and other rights, general security agreements and guarantees.

d. Prior existing mortgages on the Stayner Properties were subordinated in favour of 118 as part of the arrangement under the Loan Agreement.

e. CBJ and 185 missed the August 15, 2023 interest payment to 118 under the Loan Agreement as a result of which they were in default under the Loan Agreement.

f. On September 7, 2023, in response to the missed interest payment, 118 issued both a s. 244 BIA Notice and the Notices of Sale in respect of each of the three Stayner Properties. The subsequent encumbrancers to whom the Notices of Sale were required to be sent are listed in the Notices of Sale.

g. Pursuant to the s. 244 BIA Notice, 118 is demanding, as of September 1, 2023, the sum of $27,981,804.70 with a per diem interest thereafter of $9,966.12.

h. The 118 Loan matured on October 15, 2023. The 118 Loan has not been extended. There is no forbearance. The Borrowers were at that time and remain in default of the Loan Agreement.

i. The Receivership Application was commenced on October 18, 2023. It relies upon the s. 244 BIA Notice.

j. The amount claimed owing as of November 22, 2023 is approximately $28,808,992.70. There is a dispute about the amount owing under the Loan Agreement which is not before the court on this application. Notwithstanding accounting for the disputed amounts, the amount claimed to be owing under the Loan Agreement is still in excess of $16 million.

k. One of the issues to be determined on the Receivership Application is the amount of the debt owed.

[11] Importantly, the Borrowers did not file any evidence on this application and contend that it should be determined as a matter of first impression regarding the never before decided question of whether the contemporaneous delivery[1] of a notice of sale under the *Mortgages Act* voids a s. 244 BIA Notice.

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[1] In the written submissions of the parties there was some disagreement about whether the Notices of Sale were delivered after or before the s. 244 BIA Notice, based on the order in which they were attached to the letter from the Secured Lenders to the Borrowers by which both were served. While the Borrowers may have originally been arguing that the s. 244 BIA notice came first, ultimately, they did not press that argument. As a result, the case was presented on the basis of a contemporaneous delivery of the two types of notice under one cover letter and not on the basis of a nuanced distinction about which one of those notices the Borrower might have seen first when the letter and its attachments were received and reviewed.

[12] In the Borrowers' factum, the following is asserted, without evidentiary support. The Secured Lender objects to the court considering these assertions in its determination of this application:

> 17. In response to the Notices of Sale, the Borrowers actively sought to have the Stayner Properties sold or refinanced in order repay the Mortgage Facility to 118 and the other syndicate lenders, rather than focus on the Section 244 Notice and its implications. However, 118's inclusion of the payments purportedly owing under the Participation Agreement in the demands for repayment has frustrated Borrowers' efforts to sell or refinance the Stayner Properties.
>
> …
>
> 27. When the Section 244 Notice and the Notices of Sale were contemporaneously issued to the Borrowers, the "breathing room" they were meant to be afforded was truncated. Rather than being given ten days in which to address the Respondent's intention to enforce, the Borrowers were disadvantaged by having all other mortgagees on title notified of the Notices of Sale being issued on the Stayner Properties. As such, the Borrowers focussed on the consequences of the Notices of Sale.

[13] The Borrowers agreed during oral argument that these assertions are not in evidence before the court, although they do contend that this Court can and should take judicial notice of the fact that, unlike the s. 244 BIA Notice that was and only is required to be sent to the Debtors, the Notices of Sale must be (and were in this case) sent to all subsequent encumbrancers on the Stayner Properties.

Analysis

[14] Under the BIA, a secured creditor that intends to enforce security on all or substantially all of the inventory, accounts receivable or other property of an insolvent person is required to provide notice of such intention, and shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

[15] The *Mortgages Act* similarly requires (under s. 31(1)) that a mortgagee provide notice to the mortgagor prior to exercising its power of sale. Such notice is not to be given until a certain default has continued for at least fifteen days, and the sale shall not be made for at least thirty-five days after the notice has been given (see s. 32).

The Purpose of the s. 244 BIA Ten-Day Notice

[16] The ten-day notice period imposed on a creditor seeking to enforce its security under s. 244 of the BIA was codified into the BIA in 1992. (RSC 1992, c-B-3). The notice period was added as a way to safeguard debtors from abuses of power by secured creditors.

[17] The cases that led to the enactment of s. 244 of the BIA (the most commonly referred to case being the Supreme Court of Canada's decision in *R.E. Lister Ltd. v Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1) underscore the concern that that the notice period was intended to address. Namely, to "allo[w] the debtor a reasonable opportunity to pay (it being accepted that in most cases it would be able to do so)": See Kevin P. McGuinness, *Canada Business Corporations Law*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2017) at §25.401.

[18] In their submissions, both sides acknowledge that the purpose of the s. 244 BIA Notice is not just to give the Borrowers time to pay. The purpose of the notice requirement has been recognized over time to be, in broader terms: "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs": See Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2009) at 474. The notice period gives a debtor "breathing room" to see if something can be worked out to avoid enforcement of the creditor's security.

[19] Since the enactment of s. 244, the decision in *Josephine V. Wilson Family Trust v. Swartz* (1993), 16 O.R. (3d) 268, [1993] O.J. No. 2735, at para. 16, has been frequently cited for the proposition that "[t]he purpose of the section 244 notice of intention to enforce security under the BIA is to provide the debtor with an opportunity to react, to negotiate, and to reorganize its financial affairs."

[20] As was stated in *Delron Computers Inc. v. ITT Industries of Canada Ltd. (Receiver of)*, (1995) 31 C.B.R. (3d) 75 (SK Q.B.), at para. 12, "the object of s. 244 is clearly to bring home to a debtor that a creditor intends to enforce a certain security and to afford the debtor some opportunity to forestall or avoid such enforcement." In *Delron*, the court was considering whether a demand letter was an enforcement step or just a request for payment. It was determined to be the latter and thus not offside of s. 244.

Is a Notice of Sale Under the Mortgages Act an "Enforcement Step"?

[21] The question of whether the delivery of the Notices of Sale by the Secured Lender was an enforcement step under the *Mortgages Act* is the core issue to be determined on this application. The parties have been unable to find any authority directly on point, namely whether sending the Notices of Sale under the *Mortgages Act* at the same time as the s. 244 BIA Notice constituted a step taken to enforce the Mortgage Security within the required ten-day notice period in contravention of s. 244(2) of the BIA.

[22] Section 244 (1) of the BIA requires a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person to send to that insolvent person, in the prescribed form and manner, a notice of that intention.

[23] In regard to the notice period, s. 244 (2) of the BIA states as follows:

> Where a notice is required to be sent under subsection (1), *the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice*, unless the insolvent person consents to an earlier enforcement of the security. [Emphasis added.]

[24] The s. 244 BIA Notice was sent to the Borrowers on September 7, 2023. No party has suggested that the s. 244 BIA Notice was not required. The Secured Lender clearly intended to enforce its security over the Stayner Properties which comprise substantially all of the Borrowers' property. The Borrowers did not consent to an earlier enforcement of the Mortgage Security. So, the question that remains is whether, by delivering the Notices of Sale under the *Mortgages Act*, the Secured Lender was enforcing the Mortgage Security, as the Borrowers contend, or simply giving notice of its intention to do so, as the Secured Lender contends.

[25] Section 31(1) of the *Mortgages Act* requires a mortgagee to give a notice of the exercise of the power of sale (pursuant to a right conferred under a mortgage) in the prescribed form to the specified persons (and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property). Section 32 of the *Mortgages Act* requires the mortgagee to wait at least fifteen days after a default before giving its notice exercising the power of sale, and states that the sale shall not be made for at least thirty-five days after the notice has been given. The Notices of Sale were given pursuant to these provisions of the *Mortgages Act* contemporaneously with the s. 244 BIA Notice on September 7, 2023.

[26] Neither the BIA nor the *Mortgages Act* has a definition of "enforce" or "security." This is a matter of first impression which must start with a consideration of the plain and ordinary meaning of the words of the statute (in this case, s. 244 of the BIA) considered in light of the purpose of that statute, which is to provide time to the Borrower to refinance or make other arrangements before enforcement steps are taken that impact the rights and obligations of persons with an interest in the secured property.

[27] A mortgage is a recognized form of security. Undoubtedly, a sale of property pursuant to a right conferred under a mortgage would constitute the enforcement of the mortgage security. The question is whether other steps taken in furtherance of a sale under a mortgage are also part of the enforcement of the mortgage security.

[28] The Court examined the word "enforce" in *MacDougall and Son Transport Ltd. v. Continental Bank of Canada*, 1983 23 BLR, 287, affirmed (1984) 3 OAC, 229 (CA), and relying on the dictionary definitions held: "The whole sense of the word is active, not passive: to realize on an investment, not merely to protect it."

[29] As was previously stated, the court found that issuing a mere demand for payment was not an enforcement step: see *Delron*. However, unlike a mere passive demand for payment, the delivery of the Notices of Sale under the *Mortgages Act* was a step that, once taken by the Secured Lender, triggered the Borrowers' equitable right of redemption and also enhanced the

Secured Lender's ability to deal with the Stayner Properties. The Borrowers also point out that, unlike a passive demand for payment delivered only to the Borrower, the Notices of Sale are required by s. 31 of the *Mortgages Act* to be served on all of the subsequent registered encumbrancers, and they were.

[30] The delivery of a notice of sale under the *Mortgages Act* alters the negotiating landscape for a borrower in terms of the rights and interests in play and in terms of the parties who may be at the negotiating table. Triggering a right to redeem in the borrower affects the borrower's rights in respect of its property as well as the lender's rights.

[31] In a different context, the Court of Appeal for Ontario held that the delivery of a notice of sale under the *Mortgages Act* is a "resort to security" because it triggers the mortgagor's right to redeem. See *Municipal Savings & Loan Corporation v. Wilson,* (1981) 27 127 D.L.R. (3d) 127 (C.A.), at para. 6:

> A mortgagor cannot contract himself out of his equitable right of redemption. It is inherent in the nature of a mortgage and wholly unaffected by any provisions in the document which have the effect of excluding it. A mortgagee cannot resort to the security and at the same time assert his option to prevent redemption. His resort to the security triggers the mortgagor's right to redeem in equity notwithstanding the contractual provision in the document making the acceleration of the principal the option of the mortgagee: *Ex parte Wickins* (1898), 1 Q.B.D. 543; *Ex parte Ellis* (1898), 2 Q.B.D. 79.

[32] In contrast, in *Re Shankman and Mutual Life Assurance Co. of Canada*, (1985) 21 D.L.R. (4th) 131, at para. 19, the court concluded that taking possession of the property for the purposes of collecting rent to cure the borrower's default was not a "resort to the security" that triggered the right to redeem. Similarly, the issuance of a s. 244 BIA Notice has been held to not itself constitute resort to security sufficient to trigger a right to redeem. See *Leby Properties Ltd v. The Manufacturers Life Insurance Company*, 2006 NBCA 14.

[33] The New Brunswick Court of Appeal explained in *Leby*, at para. 58, the reason why a notice of sale under a mortgage constituted a resort to security whereas a s. 244 BIA notice of intention to enforce security did not was because the notice of sale represented an "unequivocal statement that the secured creditor has elected to compel payment of the debt by resorting to the power of sale."

[34] This is consistent with the language in the Notices of Sale issued by the Secured Lender in this case, which each stated as follows:

> AND UNLESS the said sums and applicable per diem interest are paid on or before October 15[2], 2023 together with any further costs and disbursements incurred as may be proper, together with interest thereon at the per diem rate set out above, from September 1, 2023, *the charge[e] shall sell the properties covered by the mortgage under the provisions contained in it.* [Emphasis added.].

[35] In this case, as in *Municipal Savings & Loan*, the Secured Lender clearly did resort to its Mortgage Security by the delivery of the Notices of Sale under the *Mortgages Act* pursuant to the power of sale provisions contained in the Mortgages. Upon the delivery of the Notices of Sale, the Secured Lender could have entered into a binding agreement of purchase and sale in respect of the Stayner Properties, subject to waiting out the thirty-five days' notice period before closing and subject to the Borrowers' right to redeem. As previously indicated, the Borrowers' rights in respect of the Stayner Properties were altered by the Notices of Sale that triggered the equitable right to redeem. This could, in turn, impact the options to be explored during the ten-day notice period under s. 244 of the BIA.

[36] For the Secured Lender to succeed, the court would have to be satisfied that even though the issuance of a notice of sale under the *Mortgages Act* has been held in different contexts to be an act by a secured creditor to "realize on security" and "resort to security", it does not amount to the enforcement of the security. I find this to be an exercise in semantic gymnastics. Having resort to, realizing upon and enforcing security are all active, as opposed to passive, steps taken in respect of security that alter the rights and interests of the Borrowers and the Secured Lender.

[37] As a practical matter, if the Notices of Sale are considered (as they must be based on *Municipal Savings & Loan* and *Leby*) to be acts taken by the Secured Lender to resort to the Mortgage Security, I fail to see how that is not also an enforcement step under the Mortgage Security. It is an active step being taken within the wheelhouse of available remedies under the Mortgage Security upon a default that triggers immediate consequences. Enforcement involves the exercise of rights and that is what a Notice of Sale is: it is the first step in the exercise of the mortgagee's right to sell the property that is secured by the mortgage. The Notices of Sale expressly state that the Secured Lender *...shall sell the properties covered by the mortgage under the provisions contained in it."* The issuance of the Notices of Sale, when viewed in this manner, were enforcement steps.

[38] In *Leby*, at para. 58, the following passage offers some insight into what the court was concerned with in that case: notably, not the question of whether a notice of sale under the New Brunswick equivalent to the *Mortgages Act* was an enforcement step within the meaning of s. 244(2) of the BIA:

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[2] One of the Notices of Sale allowed until October 17, 2023, but this wording is otherwise the same.

> In New Brunswick, two remedial options are available to the secured lender with respect to the enforcement of its security: the right to possession, with or without the appointment of a private or court appointed receiver, and the right to exercise the power of sale in accordance with the terms of the security document and the *Property Act*. However, if the mortgagee who seeks possession does not want to trigger the mortgagor's equitable right to redeem, possession must be taken, for example, for the sole purpose of collecting arrears. On this point, Manufacturers Life points out that the mortgaged property is a rental property for which Leby Properties had given an assignment of rents. Manufacturers Life maintains that it was entitled to enforce its security for the limited purpose of collecting arrears, in which case the equitable right to redeem would not have been triggered, as happened in *Shankman v. Mutual Life Assurance Co. of Canada*. I agree. Accepting this to be so, it follows that there is a substantive difference between issuance of s. 244 notice and a notice of mortgage sale issued under s. 44 of the *Property Act*. The former leaves open the possibility that the secured creditor may elect to pursue a remedial option that does not trigger the debtor's equitable right to redeem. By contrast, a s. 44 notice of mortgage sale always triggers the equitable right.

[39] The Secured Lender focuses on a different passage in *Leby*, at para. 57, in which the court commented, in *obiter*,[3] that "[t]here is no legal impediment to a s. 244 notice issuing concurrently with a notice of mortgage sale, provided the borrower is given the 10 days to reorganize its financial affairs prior to an actual sale taking place." See *Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership* (1994), 18 O.R. (3d) 201 (Gen. Div.), 1994 CanLII 7256 (ON SC), at para. 32, Farley J.; Andrew B. Laidlaw, "Enforcement of Security – The Battle of the Notices" (1996) 37 C.B.R. (3d) 281; and Norman M. Fera, "The New Interloper in Mortgage Remedies: Notice of Intention to Enforce Security" (1993) 21 C.B.R. (3d) 75.

[40] These observations were not focused on the wording of s. 244(2) of the BIA and the question that must be answered in this case, about whether a Notice of Sale under a mortgage could be issued during the ten-day notice period under the BIA. Having had no reason to decide the specific question that the court is grappling with in this case, about whether a Notice of Sale under the *Mortgages Act* can be issued contemporaneously with or immediately following, but in any event within ten days of the issuance of a s. 244 BIA notice of intention to enforce security,

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[3] The ratio of *Leby* was that the s. 244 BIA notice was not a "resort to security" that triggered a right to redeem, as stated, at para. 1: "[t]he central issue in this appeal is whether Parliament intended that the issuance by a secured creditor of a notice of intention to enforce a security to an insolvent debtor pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3[as amended] (the "BIA") would trigger the mortgagor's equitable right to redeem."

the court in *Leby* cannot be taken to have directed itself to this question when it stated baldly (and in *obiter*) that there is "no legal impediment to a s. 244 notice issuing concurrently with a notice of mortgage sale."

[41] I say this because of the determination in this case that the restriction on the enforcement of security under s. 244 of the BIA does proscribe against the concurrent or contemporaneous issuance of a Notices of Sale under the *Mortgages Act* and a notice under s. 244 of the BIA.

[42] Relying on *Leby* and the early academic articles it cites, the Secured Lender seeks to distinguish between a mortgagee stating an intention to do something in the future (i.e., the intention to sell the Stayner Properties after the thirty-five days' notice period under the Notices of Sale expired) and actually doing the intended act (i.e., selling the Stayner Properties). They also try to analogize to the earlier decision of Farley J. *Prudential Assurance*, in which the court concluded that a s. 244 BIA Notice is not an enforcement step, but rather "a preconditioned requirement imposed by the BIA, but it is not in the nature of a proceeding nor is it an action (step) to enforce on a mortgage. The vehicle has been started; its lights have been flashed as a warning; but the vehicle will not move until the expiry of the notices given."

[43] In *Prudential Assurance*, Farley J. contrasted the s. 244 BIA Notice with a notice of sale under the *Mortgages Act*, specifically, describing the latter as "directed to allow persons entitled to redeem to have the time period specified in the Notice of Sale to redeem without proceedings being taken which might hinder or prejudice the right of redemption or increase the costs thereof." In contrast, the s. 244 BIA Notice "does not require any response or action on the Debtors' part. This notice only goes to the Debtor and is not published, registered or made public in any way. It would seem to me that a s. 244 notice cannot be said thereof to burden or prejudice the right of redemption or increase the costs thereof..."

[44] These earlier court decisions can be reconciled conceptually with the conclusion reached in this case, that the delivery of the Notices of Sale at the same time as the s. 244 BIA Notice was an active, not merely passive, step taken by the Secured Lender under its Mortgage Security that impacted the Borrowers' rights. It was not just a heads up of things to come. It was an enforcement step taken under the Mortgage Security within the ten-day notice period contrary to s. 244(2) of the BIA.

[45] The only authority that the Secured Lenders have cited that would suggest a different outcome is found in the early academic writings, cited by the court in *Leby*:

a. Norman F. Fera, "*The New Interloper in Mortgage Remedies: Notice of Intention to Enforce Security*," Canadian Bankruptcy Reports, (Articles) 1993, 21 C.B.R. - Art 75, para. 76 to 77; and

b. Andrew B. Laidlaw, "*Enforcement of Security - The Battle of Notices," Canadian Bankruptcy Reports* (Articles), 1996, 37 C.B.R. - Art 281, at p. 7.

[46] These authors hypothesize that "enforcing" security (the words of s. 244 of the BIA) is something more than "taking action to realize upon security" (s. 21(2) of the *Farm Debt*

Mediation Act, S.C. 1997, c. 21, formerly known as the *Farm Debt Review Act*, R.S.C. 1986, c. 33, requires that a notice be given "at least 15 business days before the taking of *any action* by the secured creditor *to realize on the security*"). In considering this section of the *Farm Debt Review Act*, the Saskatchewan Court of Appeal concluded that it was the inception of the realization process, not its conclusion, which is contemplated by s. 22 of the *Farm Debt Mediation Act*. See *The Rural Municipality of Lomond No. 37 v. Anton Trobert*, (1987) 41 D.L.R. (4th) 573, , at para. 8.

[47] To support this distinction, Fera offers the hypothesis, at para. 58, that "the expression "enforce the security" would seem to suggest the *conclusion*, rather than the *inception*, of the process whereby a mortgagee recovers the debt owed by a mortgagor in default. Interpreted this way, the notice of intention under the BIA need not be given 10 days before giving a notice of sale, but need only be given 10 days *before* the ultimate sale of the mortgaged property, the final event in the power of sale proceedings. Thus, it seems the notices operate concurrently, not consecutively." [Italics in original.]

[48] This does not account for the broader purpose of the ten-day notice period under s. 244 of the BIA, to allow the Borrower time not only to pay but also to explore other options, nor does it account for the consequences of the Notices of Sale and their impact on the Borrowers' rights. The sale of the Stayner Properties may be the ultimate outcome of the Notices of Sale, but the enforcement begins with the issuance of the Notices of Sale. While they may be on a continuum, having resort to or realizing upon security are instances of the enforcement of the security.

[49] I do not consider myself to be bound by or compelled to follow the reasoning in these early academic writings on the question of whether a notice of sale under the *Mortgages Act* is an enforcement step within the meaning of s. 244(2) of the BIA.

[50] In the absence of any decision or direction to the contrary, I accept the representation of both counsel that some secured lenders (or their counsel) may have adopted the practice of issuing these two types of notices contemporaneously. However, that does not mean that it is appropriate or the best practice to follow. It just means (as the research of counsel on this case has demonstrated) that the issue has not come squarely before the court for its consideration. Now that it has, and in light of the court's decision, the best practice should be clearer, that it would be more prudent not to issue these notices together as a matter of course. There are at least some counsel and secured lenders who follow this practice, and wait to issue a notice of sale under the *Mortgages Act* (if one is to be issued) until after the ten-day period under s. 244(2) of

the BIA has expired. In my view that is the best practice having regard to these two statutes and reading them harmoniously.[4]

[51] In fact, notwithstanding the thesis of his article, Fera himself stated at the conclusion, at para. 81:

> Notwithstanding the foregoing, the cautious practitioner may still decide to hoe a conservative course and issue a simple demand letter containing a short deadline (of at least more than one day) and follow this letter with a notice of intention to enforce security sent at least 10 days before issuing a notice of sale.

What Effect Does Taking an Enforcement Step During the Ten (10) Day Notice Period Have on the s. 244 BIA Notice?

[52] Unlike the *Farm Debt Mediation Act* that specifies in s. 22 (1) that "any act done by a creditor in contravention of section 12 or 21 is null and void, and a farmer affected by such an act may seek appropriate remedies against the creditor in a court of competent jurisdiction," there is no corresponding statutory prescription of that outcome under the BIA for contravening the prohibition on enforcing security during the ten-day notice period under s. 244.

[53] However, the court has a broad discretion under s. 248 of the BIA, when satisfied that a secured creditor has failed to carry out a duty imposed by s. 244, to make any order on such terms as it considers proper directing them to carry out the duty or restraining them from realizing or otherwise dealing with the property until the duty has been carried out.

[54] In this case, the Borrowers argue that the Secured Lender failed to carry out its duty not to enforce its Mortgage Security during the ten-day notice period and failed to carry out its duty to give the Borrowers ten days of "breathing room" and the opportunity to negotiate and reorganize their financial affairs to see if something could be worked out to avoid enforcement of the security. The Borrowers say that it is within the court's power to declare the s. 244 BIA Notice to be void and to require it to be reissued to afford the Borrower that opportunity.

[55] This is not a prescribed outcome under the BIA and the exercise of the court's discretion is fact driven. To exercise its discretion in this manner, this court requires some evidentiary foundation. If the Borrowers' efforts to avoid the enforcement of the Mortgage Security had been prejudiced during the ten-day notice period under s. 244 of the BIA by the contemporaneous issuance of the Notices of Sale, the court can reasonably infer that evidence of

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[4] While there is no direct or apparent conflict in the wording of the BIA and the *Mortgages Act* (it being more simply a matter of sequencing and practicality), if there was an actual conflict in the wording of these two statutes, the doctrine of paramountcy would subordinate the effect of the provincial law to the effect of the federal law. See *Multiple Access Ltd. v. McCutheon*, 1982 2 S.C.R. 161, 18 B.L.R. 138, at para. 191.

such prejudice would have been put before the court. There is no such evidence and, therefore, no basis for a finding of prejudice.[5]

[56] I am not prepared to exercise my discretion to declare the s. 244 BIA Notice to be void or to require that it be reissued in the absence of any demonstration that its objectives were undermined by the contemporaneous issuance of the Notices of Sale in the circumstances of this case. Since no other remedy has been requested, none is granted.

If the s. 244 BIA Notice is Void, is the Creditor Required to Issue a New s. 244 BIA Notice Before Taking any Other Enforcement Steps?

[57] The Borrowers acknowledge that they ultimately want the court to require that the Secured Lender re-issue the s. 244 BIA Notice, with the effect that the Borrowers will have ten days under s. 69 of the BIA to make a proposal to their creditors, which will then take precedence over the pending Receivership Application.

[58] The Secured Lender argues that this court should not make any decisions or give any directions regarding the pending Receivership Application.

[59] During oral submissions the Borrowers' counsel seemingly softened their position, stating that the court does not need to do anything in relation to the pending Receivership Application. If the s. 244 BIA Notice is declared to be void, then the Secured Lender could choose to issue a new s. 244 BIA notice of intention. If not, it would be up to the judge hearing the Receivership Application to decide if a receiver should be appointed on the premise of a s. 244 BIA Notice that has been declared to be void.

[60] Either way, I need not decide this question in light of the court's decision not to declare the s. 244 BIA Notice to be void.

Summary of Outcome and Costs

[61] The court's determination of the issues to be decided is that:

a. The purpose of s. 244 of the BIA is broader than simply to give the Borrowers time to pay. It is also intended to allow breathing room to explore options to avoid enforcement of security.

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[5] The Secured Lender casts aspersions on conduct of Borrowers, arguing that not only did they fail to provide any evidence of efforts to re-organize or repay debt, but the evidence from the Secured Lender is to the contrary, that the Guarantor transferred his house into his wife's name. There is no need for the court to consider or make any findings about these assertions on this application.

b. The delivery of the Notices of Sale under the *Mortgages Act* at the same time as the s. 244 BIA Notice was an enforcement step taken during the ten-day notice period under s. 244 of the BIA and in contravention of that section.

c. The consequence of doing so is not prescribed and it does not necessarily follow that the court will declare the s. 244 notice to be void. In the absence of any evidence of actual prejudice to the Borrowers in terms of their ability to take advantage of the s. 244 BIA ten-day notice period, such a declaration is not warranted.

[62] The parties agreed to exchange their Bills of Costs immediately after the hearing. I assume that the exchange has now taken place. They are directed to advise the court within a week of this decision being released whether they are able to agree on the entitlement, scale and/or quantum of costs of this Application, by email correspondence to my judicial assistant at: linda.bunoza@ontario.ca.

[63] If the parties are unable to agree on any aspect of costs, they may each deliver brief cost submissions (not to exceed three pages double spaced) appending their respective Bills of Costs (previously exchanged) on or before December 15, 2023, and may each deliver a brief response to the other side's cost submissions (not to exceed two pages double spaced) on or before December 22, 2023. Once this exchange has taken place, these submissions and appended Bills of Costs and any relevant settlement offers shall be sent by email to my judicial assistant and uploaded onto CaseLines. Costs will be determined by the court in due course after that based on these written submissions.

KIMMEL J.

Date: December 1, 2023

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SUPREME COURT OF NOVA SCOTIA

Citation: *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128

Date: 20140410
Docket: Syd. No. 423486
Registry: Sydney

Between:

Enterprise Cape Breton Corporation, a body corporate, incorporated pursuant to the *Enterprise Cape Breton Corporation Act,* enacted as Part II to the *Government Organization Act, Atlantic Canada, 1987*, R.S., 1985, c. 41 (4th Supp.) ("ECBC")

Applicant

v.

Crown Jewel Resort Ranch, Inc., a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel") **And I.N.K. Real Estate Inc.**, a body corporate incorporated Under the laws of Nova Scotia ("I.N.K.")

Together the Respondents

LIBRARY HEADING

Judge: The Honourable Justice Frank Edwards

Heard: March 5, 2014 in Sydney, Nova Scotia

Written Decision: April 10, 2014

Subject: **Bankruptcy and Insolvency Act**, s. 243. **Judicature Act**, s.

[3]

43 (9) – Application to Appoint Receiver/Manager

Summary: Respondent Companies (RC's) set up to operate high end tourist resort. Husband and wife principals in RC's became embroiled in protracted divorce proceedings which effectively caused resort to cease operation. Loans (secured and unsecured) of almost three quarters of a million dollars seriously in arrears. Monthly payments were just under $19,000.00 per month. Municipal taxes over $70,000.00 in arrears – prospect of tax sale imminent. Remaining principal, Mr. Korem, had no realistic prospect of significantly reducing debt nor refinancing it.

Issue: Whether just and convenient to appoint a receiver/manager.

Result: Receiver/manager appointed. Just and convenient to do so:

1. Need for protection of the assets;
2. Apprehended or actual waste of assets;
3. Creditor had right to appoint a private receiver pursuant to a general security agreement;
4. Court appointed receiver required as cooperation of Mr. Korem with private receiver highly unlikely;
5. Appointment the most practical and prudent approach to maximizing the return to the parties.

Cases Noted: **Bank of Montreal** v. **Sherco Properties Inc.,** 2013 ONSC 7023 (S.C.J.); **Textron Financial Canada Limited** v. **Chetwynd Motels Limited**, 2010 BCSC 477, **Canadian Tire Corp.,** v. **Healy**, 2011 ONSC 4616; **Bank of Montreal** v. **Carnivale National Leasing Ltd.**; **Carnivale Automobile Ltd..**, 2011 ONSC 1007; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J.; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div.) [Commercial List]; **Romspen Investment**

Corp. v. **1514904 Ontario Ltd.**, et al (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.).

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SUPREME COURT OF NOVA SCOTIA

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Together the Respondents

[2]

Judge:	Justice Frank Edwards
Heard:	March 5, 2014, in Sydney, Nova Scotia
Written Decision	April 10, 2014
Counsel:	Robert Risk, for the Applicant Nahman Korem, for the Respondent Companies

By the Court:

The applicant is applying for an order appointing Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. ("MGM") as receiver and manager of all of the undertakings, property and assets of Crown Jewel and I.N.K. pursuant to Section 243(1) of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3, and/or Section 43(9) of the **Judicature Act,** R.S.N.S. 1989, c. 240

Grounds for Order: The applicant is applying for the order on the following grounds:

1. A General Security Agreement made between Crown Jewel Resort Ranch, Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213736 on February 8, 2005, as amended by Registration No. 21915103 on October 11, 2013.

2. A Mortgage made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated February 4, 2005 registered at the Victoria County Registry of Deeds on February 8, 2005 as Document No. 81337157 (PID Nos. 85017614, 85079127 and 85155281), said Mortgage having been assigned to Enterprise Cape Breton Corporation pursuant to a General Conveyance, Assignment and Assumption of Liabilities Agreement dated March 31, 2008 and registered at the Victoria County Registry of Deeds on May 30, 2008 as Document No. 90774226;

3. A General Security Agreement made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213692 on February 8,

[2]

2005, as amended by Registration No. 13924725 on May 23, 2008 (together with the above the "Security")

4. The Respondent Companies (RC's) have defaulted on their payments and failed to honour their obligations pursuant to a Letter of Offer made between Crown Jewel, I.N.K. and ECBC dated on or about October 2, 2003 with respect to Project No. 8600338-1 (the "Letter of Offer").

5. The total amount of indebtedness secured by the Security is $226,134.00 as at October 8, 2013 together with overdue interest on arrears in the amount of $1,738.19 and interest thereafter at a per diem rate of $37.17.

6. The RC's were provided with respective Notices of Intention to Enforce Security pursuant to section 244 of the **Bankruptcy and Insolvency Act** on October 24, 2013.

7. Greg MacKenzie of MGM has agreed to act as the court-appointed receiver and manager of all of the undertakings, property and assets of both Crown Jewel and I.N.K. and the Applicant consents to his appointment.

8. The Applicant, ECBC relies on Section 243(1) of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3, which reads:

> 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.

9. The Applicant, ECBC relies on Section 43(9) of the **Judicature Act**, R.S.N.S. 1989, c. 240, which reads:

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> 43. (9) A mandamus or an injunction may be granted or a receiver 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, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Background: The RC's had obtained financing from the Cape Breton Growth Fund Corporation (CBGF), the Atlantic Canada Opportunity Agency (ACOA), and the Applicant, Enterprise Cape Breton Corporation (ECBC).

ECBC succeeded CBGF when the latter wound up in 2008. ECBC delivers and administers all programs offered by ACOA.

The RC's' intent was to establish an upscale, four-season, fly-in active vacation resort near Baddeck, Nova Scotia. Operations commenced in 2006 but struggled financially from the outset. The financial problems multiplied when the two principals in the RC's, Nahman Korem (Korem) and Iris Kedmi (Kedmi) became embroiled in protracted divorce proceedings. These continued between 2010 and December, 2012 when the Nova Scotia Court of Appeal dismissed Kedmi's appeal.

[2]

The resort essentially ceased to function as of the start of the domestic trouble between Korem and Kedmi in 2010.

By October 8, 2013, the RC's were in serious arrears on their loans. By that date, the total amount of indebtedness was as follows:

1. **ECBC Secured Letter of Offer:** $226,134.00 with overdue interest on arrears of $1,738.19 plus interest of $37.17 per day.

2. **ECBC Unsecured Letter of Offer:** $268,254.86 with overdue interest on arrears of $1,738.19 plus interest of $44.10 per day.

3. **ACOA Unsecured Loan:** $256,642.00 plus arrears of $4,425.80.

Throughout the period of 2005-2009 the RC's were able to make their regular scheduled payments on the ACOA Unsecured Loan, having repaid approximately $234,360.00 of the initial $500,000.00 loan disbursement. (Lane affidavit para. 22)

The RC's have, however, paid only approximately $6,000.00 toward the outstanding principal on the ACOA Unsecured Loan since 2009. Further, no repayments at all have been made on this loan within the 12 month period from December of 2012 to December of 2013. (Lane Affidavit para. 23)

[2]

With respect to both the ECBC Secured and Unsecured Letters of Offer, the RC's have to date made only a combined repayment in the approximate amount of $9,235.00. As noted above, these loans are in significant arrears. Furthermore, overdue interest is due and owing and is accruing daily. (Lane affidavit para. 24)

The Applicant gave the RC's Notices of Intention to Enforce Security on October 24, 2013. Korem knew by November 2013 at the latest that ECBC intended to apply to have a receiver/manager appointed by the Court. A General Security Agreement given to CBGF/ECBC by the RC's provided for the appointment of a private receiver upon default.

Despite the fact that the loans were already overdue, ECBC took a hands-off approach during the divorce proceedings. Korem and Kedmi were making competing claims regarding the assets of the RC's. ECBC thus decided not to enforce its security until the divorce outcome was known. After dismissal of the Kedmi Appeal in December, 2012, Korem became the effective owner of all the assets and liabilities of the RC's.

Korem insists that ECBC is partially responsible for the present situation because it allowed Kedmi to liquidate some of the assets. I reject any such notion. During the 2010 – 2012 period, the resort was clearly in survival mode. The two

[2]

principals were locked in a particularly acrimonious marital dispute. The resort was generating no revenue. Kedmi was living on the resort property and was assuring ECBC that she was doing her best to maintain it.

It was in that context that ECBC allowed Kedmi to liquidate some assets that were not essential to the survival of the resort. ECBC also allowed her to liquidate assets which in fact had actually become liabilities. These included the horses which were very expensive to maintain but had no foreseeable prospect of generating revenue. Korem's grievance with ECBC is misplaced.

Korem now rests his hopes of financial recovery on the possibility of operating a timber cutting business. He presented ECBC with an appraisal of the timber resources on the resort property. The appraisal indicated that the value of the standing timber was 1.5 to 2 million dollars less harvesting costs.

ECBC gave Korem permission to do some limited wood harvesting but insisted upon the presentation of a business plan by July, 2013. The business plan Korem provided did not address how the RC's intended to service the ECBC and ACOA debts. Nor did it indicate how the RC's would finance the start-up of the timber business.

In October, 2013, ECBC again reviewed proposals put forward by Korem. Incidentally, ECBC learned that property taxes for the resort were $80,000.00 in arrears (Korem says it's now $75,000.00) and that a tax sale was imminent. ECBC decided it was time to apply to have a Receiver/Manager appointed.

RC's' Objections to Appointment of Receiver/Manager: Korem acted for the RC's without legal counsel. He put forward three objections to the appointment of a Receiver/Manager:

1. That the Mortgage dated February 4, 2005 is not valid;
2. That I.N.K. Real Estate Inc. is capable of making payments;
3. That it is not "just and convenient" to appoint a receiver.

I will deal with the objections in turn:

1. The Mortgage is Valid: It was properly executed by Korem and was duly recorded. Its repayment terms reflect those agreed to by Korem when he signed as president of I.N.K. Real Estate Inc. on October 2, 2003. Those repayment terms were subsequently modified (in I.N.K.'s favor) on March 23, 2005 and October 30, 2010. On both occasions, Korem signed. (See Lane Affidavit Tabs A & B).

[2]

The Mortgage was given as security for a Promissory Note dated January 21, 2005. Korem's objection seems to be based upon his view that ECBC's counsel at the time questioned the promissory note. On the contrary, the record shows that the lawyer was satisfied with the promissory note and authorized ECBC to disburse funds.

The RC's' obligations and ECBC's rights under the Mortgage remain in full force and effect.

2. The RC's are not Capable of Making Payments: As an aside, Korem seeks to claim that he cannot speak for Crown Jewel Resort Ranch Inc. (CJRR) because Kedmi still owns that company. At the same time Korem acknowledges that all CJRR's assets and liabilities have been transferred to him. Korem is the effective principal of both companies.

To service their debts to ECBC and ACOA, the RC's would have to make monthly payments of just under $19,000.00 per month. (To say nothing of the arrears). As noted they are also in substantial arrears regarding property taxes ($75,000.00) and owe contractor D.W. Matheson about $35,000.00.

[2]

Korem has provided no details to show how he can finance the start-up of the timber business. By his own estimate, he would need one to two years just to pay off the ECBC Secured debt. He give no indication of how much longer it would take to pay off the Unsecured debts. Korem has been given ample opportunity to seek re-financing with another lender. He admits that commercial lenders will not go near him. There is no realistic prospect that the RC's will ever be able to address their debts.

It is Just and Convenient that a Receiver/Manager be Appointed: What follows, I adopt, in large measure from the Applicant's Brief.

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;

[2]

(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 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 –

[2]

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.

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.

As noted at paragraph 33 of the Affidavit of Steve Lane, the General Security Agreement entered into by Crown Jewel provides ECBC with the specific authority to appoint by instrument a receiver or receiver and manager of the assets of the company upon default. The RC's are in default of the obligations owed to ECBC pursuant to the Secured Letter of Offer as referenced in paragraph 4 of the Affidavit of Steve Lane.

Certain other factors to be considered in determining whether it is just and convenient to appoint a receiver are particularly relevant to the case at Bar. These are:

(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;

Mr. Lane states at paragraphs 50 and 51 of his Affidavit that the RC's owe outstanding property taxes to Victoria County, Cape Breton in the approximate

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amount of $80,000.00 as of October, 2013 and that, failing payment, Victoria County intends to put the lands up for tax sale in March of 2014. Permitting this situation to continue will undoubtedly place ECBC's security interest at risk.

Paragraphs 58 and 59 of the Affidavit of Steve Lane sets out the concerns ECBC has with the alleged lease agreements entered into by Korem. Clearly Korem did not have, on behalf of the RC's, any authority to enter into these lease agreements without the consent of ECBC. Further, the lease agreements appear to have been made by the RC's under a different business name, notwithstanding the fact that this entity has no legal standing. Clearly the RC's can no longer be entrusted with protecting and safeguarding their assets and the actions they have taken with respect to these alleged lease agreements clearly places ECBC's security interest at risk.

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

It is apparent that Korem intends to continue with timber harvesting on the lands of the RC's that are subject to the ECBC security interest. Although limited timber harvesting was permitted by ECBC while Korem attempted to resolve the outstanding matrimonial property dispute, ECBC is understandably not confident that Korem will seek such consent in future. Given what appears to be an increasingly desperate financial situation of the RC's, ECBC holds a reasonable apprehension that the assets of the RC's, and in particular the timber resources, may be depleted or wasted.

(e) the preservation and protection of the property pending judicial resolution;

Crown Jewel Resort is no longer in operation and has been closed down for quite some time. ECBC remains concerned as to whether the assets of the resort are being adequately preserved and protected. For instance, ECBC has no way of ensuring that Korem will continue to properly maintain the resort property. Further, ECBC is concerned as to whether the assets of the resort will be properly insured on a continuing basis.

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

As noted above, ECBC has the right to appoint a receiver by instrument under the General Security Agreement entered into by the Respondent, Crown Jewel. ECBC advised the RC's of its intention to appoint a private receiver with respect to this matter during the November 20, 2013 negotiation referenced at paragraph 53 of Mr. Lane's Affidavit.

[2]

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

In **Bank of Nova Scotia v. Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J. granted the motion for appointment by the court of a receiver-manager, holding at paragraph 13:

> [13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1½ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[2]

Mr. Lane, at paragraph 60 of his Affidavit, notes the concerns ECBC has with the ability of MGM to carry out its duties. It is clear from the email stream of correspondences referenced at paragraph 59 of the Affidavit that Korem intends to set up as many road blocks as he can with respect to both the appointment of the receiver and the subsequent carrying out of its duties. As in **Bank of Nova Scotia v. Freure Village of Clair Creek** above, it appears inevitable that Korem will continue to bring costly, protracted and unproductive litigation against both ECBC and its privately appointed receiver. Further, it appears clear that Korem will not agree on the proper approach to be taken to marketing and selling the assets of the RC's subject to the ECBC security interest. Certainly any such attempts to dispose of the property by the privately appointed receiver would be met with further litigious skirmishing.

(l) the conduct of the parties;

It is clear from a reading of Mr. Lane's Affidavit that ECBC has extended the RC's with every opportunity to turn the resort business around. Unfortunately, the business became insolvent and has not been in operation for some time. Ultimately, ECBC had no option other than to enforce its security in an attempt to recover some of the losses it incurred in relation to the loans granted to the RC's.

[2]

Despite the personal investment Korem has made in the resort, as well as the arduous and extremely adversarial divorce proceedings with Kedmi in regard to the assets of the RC's, Korem has not, despite being given ample opportunity to do so, made any reasonable progress in obtaining alternate financing with a view to paying out the ECBC indebtedness. Further, Korem has yet to provide ECBC with a meaningful business plan outlining the timely repayment of the ECBC debt.

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

The most practical and prudent approach to maximizing the return to the parties, including the unsecured debt, would be to proceed with a sale of the resort as soon as possible. In the interim, it remains open to Korem, while the receiver is in place, to obtain alternate financing with a view to paying out the ECBC debt.

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.

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**

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> **Scotia v. Freure Village on Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].

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. (5^{th}) 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.

Conclusion:

[2]

I therefore order the appointment of Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. as the receiver and/or manager of all of the undertakings, property and assets of the RC's, Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Applicant shall also have its costs in the amount of $1500.00 payable forthwith.

Edwards, J.

Sydney, Nova Scotia

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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 thc 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:

> <u>HST Filings and Obligation</u>
>
> 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, <u>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:</u>
>
> (a) <u>take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person</u> 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.

5

SUPREME COURT OF NOVA SCOTIA

Citation: *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235

Date: 20180511
Docket: Hfx No. 474742
Registry: Halifax

Between:

First National Financial GP Corporation and
First National Financial LP

Applicants

v.

3291735 Nova Scotia Limited

Respondent

RECEIVERSHIP AND SALES PROCESS

Judge: The Honourable Justice Christa M. Brothers

Heard: May 11, 2018, in Halifax, Nova Scotia

Oral Decision: May 11, 2018

Written Decision: September 27, 2018

Counsel: D. Bruce Clarke, Q.C. for the Applicants
Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver for the Respondent, 3291735 Nova Scotia Limited)
Brian W. Stilwell, Watching Brief

By the Court:

Overview

[1] This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

[2] The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

[3] The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the

affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

[4] The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

[5] The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

[6] I have reviewed all the materials with regard to the proposed Receivership Order.

[7] I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

[8] I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

[9] Section 243(1) of the BIA provides:

> 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.

[10] In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be <u>just or convenient</u> that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

[11] The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

[12] In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;
2. The Company is in default of its obligations to First National;
3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
4. Both the Demand Letter and the Notice have expired, without payment being made;
5. First National is in a position to enforce its security as against the Company should it choose to do so;

6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and

7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the property is handled expeditiously and in a commercially reasonable manner.

[13] I have reviewed the case law and, in particular, ***Bank of Montreal v. Carnival National Leasing Limited et al.***, 2011 ONSC 1007. In that case, the Court noted that under section 243 of the *BIA* and section 101 of the ***Courts of Justice Act***, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

> 23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[14] In ***Bank of Nova Scotia v. Freure Village on Clair Creek*** (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the

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

[15] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007, spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

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

[16] I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

[17] Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

[18] Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

[19] The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

[20] First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

[21] KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

[22] KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

[23] On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order to maximize the value for creditors and to minimize the risk of losing this

offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

[24] The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308
- **Purchased Assets:**
  - (i) The Real Property
  - (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property
  - (iii) plans
  - (iv) contracts
  - (v) permits in connection with the Real Property, to the extent transferable
  - (vi) all intellectual property, if any, owned by the Company with respect to the project
- **Purchase Price:** $3,708,750, including HST
- **Deposit:** $322,500 being 10% of the purchase price (before HST)
- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds
- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.
- **Closing:** first business day which is five business days after receipt of Sale Approval Order
- **Material Conditions:**
  - (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;
  - (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to

the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

. **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

[25] 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the “stalking horse” sales process.

[26] A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in ***CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.***, 2012 ONSC 1750. While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies’ Creditors

Arrangement Act proceeding: ***Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited,*** Hfx. No. 454744.

[27] Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

[28] D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.*, at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

[29] I must consider the following factors as set forth in ***CCM Master Qualified Fund, Ltd., supra***:

> 1. The fairness, transparency and integrity of the proposed process;
> 2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
> 3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[30] In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding

procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

[31] The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

[32] First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

[33] I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

[34] In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

[35] I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

[36] I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Brothers, J.

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CITATION: Rompsen Investment Corporation v. 1514904 Ontario Ltd., 2000396 Ontario Inc., 1278502 Ontario Inc, 1259121 Ontario Inc., and Almonte Land Management Inc., 2010 ONSC 832

COURT FILE NO.: 09-47115

DATE: 2010-02-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROMPSEN INVESTMENT CORPORATION, Applicant

AND:

1514904 ONTARIO LTD., 2000396 ONTARIO INC., 1278502 ONTARIO INC, 1259121 ONTARIO INC., and ALMONTE LAND MANAGEMENT INC., Respondents

BEFORE: Justice Rick Leroy

COUNSEL: David P. Preger and Elisa Giacomelli, SOLOMON, GROSBERG for the Applicant

Mario Mannarino, BARNES, SAMMON for the respondents

Jahmiah Ferdinand-Hodkin, GOWLING LAFLEUR HENDERSON

HEARD: January 22, 2010

ENDORSEMENT

[1] This is an application by Romspen Investment Corporation (Romspen) for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as amended (BIA) and section 101 of the Courts *of Justice Act,* R.S.O. 1990 c. C.43 as amended (CJA) appointing SF Partners Inc. as receiver and manager (receiver) without security of all the assets, undertakings and properties of the Respondents. SF Partners Inc. consents in writing to act as Receiver.

[2] The application was returnable in Ottawa on December 17, 2009 on short notice. The respondents requested an adjournment to marshal and file materials and conduct cross examinations. The respondent argued that the conduct of Wesley Roitman, the managing general partner of the applicant, displayed animus toward the respondents in his dealings. The appointment of a receiver/manager is a serious matter. A hasty appointment made without proper foundation could cause serious financial harm and prejudice to innocent investors and third parties – Fisher Investments v. Nusbaum (1988), 31 C.P.C. (2d) 158. In the circumstances I granted the respondents an adjournment until January 22, 2010.

The parties graciously agreed to re-attend for argument in Cornwall in order to expedite the hearing.

[3] The issue to be decided on this application is whether the appointment of the receiver is just and convenient having regard to balancing the inconvenience facing the creditor in using the usual means of execution with the cost, ultimately to be borne by the debtors, of appointing a receiver. The appointment of a receiver derives from the court of equity and as such is an equitable remedy. The appointment of a receiver is intrusive and an appointment should be granted sparingly. In exercising its discretion the court should consider the effect of the order on the parties as well as their conduct.

Factual Overview

[4] The applicant is a secured lender to the respondents. The subject loan in the amount of $10 million was made July 18, 2006 and matured July 15, 2008, was not renewed and is in financial default. The aggregate amount owing on the loan on September 29, 2009 was $11,439,197.32. The per diem interest is $3,567.20. The applicant made demand and delivered the section 244(1) BIA notice on October 5, 2009. Payment has not followed. As a term of the adjournment on December 17, 2009 the respondent was ordered to remit all rent income from all of its income property to the applicant pending return of the application for argument on merits. No rent was paid. Mr. Bassile for the respondents in his affidavit deposed January 22, 2010 declared that he paid the expenses and trades, otherwise construction liens might have been registered.

[5] Over the adjournment period the respondents remitted the sum of $1.1 million on account which was paid and received on terms that the transaction and partial discharge do not affect the parties' standings in this application.

[6] The applicant's enforcement situation is complicated. The respondents are engaged in real property development and management in the Almonte area. There are 11 real properties involving four different owners encumbered by the applicant's security interest. They include 6 vacant commercially zoned lots, 1 commercial plaza and 1 commercial retail building – the only current income properties, eighty acres of residentially zoned land designated for a 420 lot residential subdivision, 1 residence and 1 cottage. The applicant discharged the residence and cottage from its charge in return for payment of the $1.1 million on account. While the residential subdivision is laid out services have not been installed.

[7] The applicant's security consist, *inter alia* of first mortgage security over the real properties and a security interest over the personal property of all respondents – first against all respondents but 1259121 Ontario Limited where it holds a fourth ranking charge..

[8] There are other stake holders. There is a second mortgage in favour of 1067278 Ontario Inc. on the eleven real properties securing payment of $2,500,000.00 with interest at the rate of 15% taken out in February 2006 that now stands at $5.5 million. The second

mortgagee consents to the instant application. The applicant's loan is personally guaranteed by three private individuals, namely Wilson Bassile, Jeffrey Jackson and David Simpson. Mr Bassille is the principal of the respondent development corporations. Jackson is the principle of the second mortgagee corporation and Simpson is an investor. The Township of Mississippi Mills has a direct option to purchase interest in two lots in the subdivision as well as a significant interest in development of the subdivision. Priority of rights issues between the municipality and second mortgagee may be unresolved.

[9] Mr. Bassille needs the lenders to indulge default and delay if he has any chance of successfully developing the subdivision to completion. Over the term of the adjournment the respondent did not initiate steps to examine the applicant and has not compiled further materials. Mr. Bassile acknowledges that the project suffers from lack of money. In addition to the debt and interests indicated there is another $300K in outstanding payables and engineering fees need to be paid before he can move forward on the subdivision. He is attempting to refinance all or part of the project.

Positions of the parties

[10] The applicant characterizes the respondent's circumstance as akin to engagement in a poker game with someone else's money. The respondent is asking that the applicant extend trust and indulgence on faith that it will all work out in the end. Meanwhile the loan account with the applicant grows at the rate of $3,000 daily. The second mortgage is in the same situation in that its account has doubled since inception for the same reason. The respondent is unable to pay municipal taxes as they come due, there are no sales pending, no offers and no firm mortgage commitments. The applicant argues that this is a serious default and that given the number of properties, interested parties and conflicts, enforcement in the usual fashion would lead to extended litigation and expense that will make the receiver's fees seem a bargain. The viability of the project is questionable. Every day that passes means less recovery for the second or other creditors. This is a classic case for a receiver. The second secured party endorses the appointment. The receiver is appointed by the court and is responsible to all parties in a fiduciary role. The receiver is expected to work closely and cooperatively with the debtor to achieve the best outcome in a liquidation. The debtor is protected from improvident dispositions as every proposed sale can be subjected to scrutiny of the court. The debtor does not relinquish the right to redeem and displace the receiver at any time. The applicant suggested as a term of the order that the receiver be precluded from entering in to any sales agreement for a period of 30 days to allow the debtor time to implement a refinance plan. In summary the applicant submits that the respondent developer will not be prejudiced by the insertion of a receiver unless the value is not there or there are structural sales and marketing deficits.

[11] The applicant cites the applicant's willingness to facilitate in a commercially responsible fashion vis a vis the payment of $1.1 million and discharge of the home and cottage as evidence of good faith and lack of animus.

[12] Mr. Bassille holds himself out as an accomplished developer who has invested everything he has into development in Almonte. He presented the residential subdivision to the lender in 2006 as the crown jewel of the development that would eventually serve to pay out the loan. He thought the lender was committed until completion. He argues that the shopping plaza alone appraised at $9.5 million as if complete and fully leased with normal vacancy in March 2007. He reports that following receipt of the BIA notice he was reassured by Mr. Roitman. The respondent argues that the applicant has orchestrated default in a fashion comparable to what was ascribed to the Royal Bank in Royal Bank of Canada v. Chongsim Investments Ltd. et. al. (1997), 32 O.R. (3d) 565. He suspects that Blake Cassidy, an 8% shareholder in the applicant has persuaded Mr. Roitman to bring enforcement proceedings for ulterior motives. He cites offers to purchase in October 2009 and concludes that Mr. Roitman wants all of the property to the detriment of the respondent and second mortgagee. The respondent argues that no one can complete this project as efficiently as he can. He suggests that the applicant is in error in its assessment of equity in the subject lands.

Analysis

[13] Successful real estate development requires a vision, a plan, dedication and committed financing. The respondent has three of four. In every such development there is a lag between the significant financial outlay and return on the project. It can and does take years as it has in the instant case. The respondent's mistake, if there is one, was made in 2006 when he accepted the applicant's $10 million promising to repay in two years. The developer respondent asks for more time, thereby converting a short term lender into a long term one.

[14] In terms of effect on the respondent's business, a distinction has to be made between the effects of appointment of a receiver on the day to day operations of, for example, a nursing home as in Fisher v. Nusbaum and a real estate development project. In Fisher/Nusbaum Mr. Nusbaum had been efficiently operating the nursing home for many years. It was not suggested that if he remained in control the business would be in jeopardy. There was no advantage to appointing a receiver pending the wind up hearing and there was serious risk of prejudice to the business operation inherent in appointing a receiver unfamiliar with the effective business operation. The prejudice to the respondent in that case outweighed the nominal advantage to the applicant in appointing a receiver.

[15] The developer is undercapitalized. As in Fisher/Nusbaum the applicant is not advancing an argument suggesting that the respondent is an incapable developer. The respondent does not have the resources to put toward debt. Unsecured payables are in the range of $300K and the respondent is unable to obtain credit from the engineer to complete and release necessary plans. The subdivision is some time and much money away from readying the property for market. The respondent requires more money than he has and can only offer third standing security behind $15 million.

[16] The just and convenient assessment involves consideration of the interests of lender and borrower. The wrap around financing in 2006 was such that the respondent had to know at the time that in the event of default and enforcement a receiver would be advanced. The number and nature of properties, the subdivision agreements, the involvement of the municipality, the second mortgage suggests that enforcement on a piecemeal basis is contraindicated. The fact that the second mortgagee under the direction of a guarantor to the instant indebtedness supports the appointment suggests that they, too, have seen equity evaporate and are concerned that this development is near or past the point of repayment in full. The principals and investors in the second mortgagee are familiar with the Almonte market and their support for the application is a significant factor.

[17] The developer respondents are insolvent. They owe more than $1K and are unable to pay. The first mortgage has been in default since July 2008. The developer respondents are unable to allocate any proceeds of commercial rent to the secured creditors as the rent is consumed by monthly expenses of operation.

[18] I don't discern the animus alleged by the developer. What I do discern is a very concerned group of lenders who has been in collection mode since July 2008 and achieving little. The exchange of money for discharges over the adjournment indicates that the principal of Romspen, Mr. Roitman continues to act in a commercially responsible fashion in interaction with the developer. Mr. Bassille has a personal interest in his holdings. It is only to be expected that Mr. Bassille is not going to part with his hard won assets without a contest. That does not translate into animus of the part of people with the means who offer less than he expects for property in a changed market.

[19] In the instant case as opposed to the circumstances in Fisher/Nusbaum there is advantage to bringing in a receiver to direct the resolution of the outstanding debt. The status quo is untenable even in the short term. There is a daily erosion of equity if there is any. If there is not, it is the second and unsecured lenders who are being compromised. A receiver is a significant intrusion but is clearly the most efficient in a difficult situation. It does not mean the end of the development. It does result in an orderly liquidation of assets bearing in mind the best interest of all parties and when required subject to court approval. The respondent developer is not precluded from obtaining alternate financing. The representation made is that the developer may be able to implement a refinance in 30 days.

Disposition

[20] In the circumstances the just and convenient disposition is to appoint the receiver on terms of the order attached hereto. Paragraph 3(l) will not come into force for a period of thirty days of even date.

Justice Rick Leroy

Date: February 3, 2010