Action No: ~~1501-00955~~

IN THE COURT OF QUEEN'S BENCH ALBERTA

JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 as amended.

LUTHERAN CHURCH CANADA , THE ALBERTA-BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH-CANADA, THE ALBERTA-BRITISH COLUMBIA DISTRICT INVESTMENTS LTD.

APPLICANTS

- and -

MARILYN HUBER AND SHARON SHERMAN

RESPONDENTS

WRITTEN ARGUMENT of the RESPONDENTS Marilyn Huber and Sharon Sherman to be heard March 21, 2016 at 2:00 pm before the Honourable Justice B.E.C. ROMAINE

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I. STATEMENT OF FACTS

1. The Applicant Lutheran Church – Canada, the Alberta – British Columbia District (hereafter "the District") seeks an Order scheduling a meeting of its creditors at which time the District will present its plan of compromise and arrangement (the "District Plan") to the creditors for their approval.

2. In support of the District's Application, the Monitor provided a draft Monitor's Report to the Creditors of the District which was attached to a Confidential Supplement to the Monitor's Seventeenth Report. The draft Monitor's Report has now been issued, with minor amendments, as the March 28, 2016 First Report to Creditors.

3. A company affiliated with the Monitor, Deloitte LLP, provided audit opinions to the District between 1993 and 1999.

4. It is alleged that Deloitte LLP:

    a. Failed to identify and report upon the misappropriation and misuse by the District of CEF trust funds for the purchase and development of the POP Village lands between 1993 and 1999;

    b. Failed to independently verify and report upon the value of the POP Village Lands;

    c. Failed to identify and report upon the misappropriation and misuse by District of CEF trust funds by extinguishing a CEF mortgage loan to EHS in the amount of $5,850,000.00 in exchange for title to the Strathmore lands.

    Affidavit of Courtney Clarke sworn March 4, 2016.

5. The District solicited and accepted deposits into the CEF until January, 2015 without disclosing that the District was insolvent.

    Affidavits of Marilyn Huber and Sharon Sherman sworn February 24, 2016.

6. It is alleged that:

    a. Mr. Taman was a member of the POP Congregation, the Chairman of the POP Congregation's Housing Committee, and counsel for both the District and ECHS.

    b. Taman knew or ought to have known that the use of CEF monies to finance the purchase and development of the POP Village Lands contravened the intent and purpose of the Church Extension Program and the terms of the CEF Trust.

    c. Taman advised the District with respect to, and knowingly facilitated, the following breaches of duty by the District for his own direct and/or indirect

personal financial and other benefit:

a. The District's breaches of the CEF Trust;

b. The District's breaches of fiduciary duty;

d. Taman advised Shepherd's Village Ministries (SVM) with respect to, and knowingly facilitated, SVM's receipt of the Shepherd's Village Lands and the proceeds of the SVM CEF Loans in breach of the CEF Trust.

e. Taman knew or ought to have known that the use of CEF monies to finance the purchase and development of the Shepherd's Village Lands contravened the intent and purpose of the ABC District Church Extension Program and the terms of the CEF Trust.

Paragraphs 148 – 153, Statement of Claim commenced by Sharon Sherman and Marilyn Huber filed February 22, 2016 as Action Number 1603 03142 (Exhibit "A" to the Affidavit of Marilyn Huber filed March 3, 2016).

Affidavit of Donald Fraser filed August 26, 2015.

7. Taman did not disclose his prior involvement in the POP and Shepherd's Village transactions.

Affidavit of Marilyn Huber sworn February 24, 2016.

8. Sharon Sherman and Marilyn Huber oppose the Application for a Hearing Order unless proper disclosure is made to the District's creditors.

Affidavits of Sharon Sherman and Marilyn Huber sworn March 19, 2016.

II. POINTS OF LAW

A. Whether the Supplement is fair, impartial and even-handed, and whether the Monitor has avoided any real or perceived conflicts of interest

9. A trustee in bankruptcy must represent impartially the interests of all creditors, must act even-handedly, and must avoid any real or perceived conflict of interest toward all parties to a bankruptcy.

Re: Confederation Treasury Services Ltd. (1995) Ont. Gen. Div. Bktcy (Doc. 31-205220) at para. 15 (Tab 1).

10. The appointment of a trustee "is not a franchise to make money" nor is it "to favour one party or one side." The trustee must be "an impartial officer of the court."

Re: Confederation Treasury Services Ltd, supra, para. 14 (Tab 1).

11. The Respondents submit that the same principles apply equally to the Monitor in this proceeding.

12. The Respondents submit that the Monitor's First Report to Creditors (hereafter "Report") is not even-handed, and does not impartially reflect the interests of all depositors.

13. The Respondents further submit that the Report is calculated to protect the interests of the Monitor, Deloitte and the District's counsel at the expense of the depositors.

14. The Respondents note that the Monitor did disclose a "potential conflict of interest" in the Monitors' fourth DIL report. However, the Respondents submit that the Monitor is now in a direct conflict of interest by virtue of the demand letter of E. Poyner dated March 4, 2016 (Exhibit "A" of the Affidavit of Courtney Clark sworn March 4, 2016).

15. The Monitor's conflict of interest is apparent throughout the Report and results in a document which is not fair and impartial.

16. At paragraphs 22 and 65, the Monitor reports that Deloitte LLP, a related company, was the auditor of DIL between 1998 and 1999. What the Monitor does **not** say is significant – the fact that the Monitor failed to disclose to anyone that Deloitte was the auditor of DIL until **after** the DIL Plan had been voted on.

17. At paragraph 42 and 43 of the Report, the Monitor points out the value and liquidity risks associated with NewCo:

    a. The value of the NewCo shares could decline and the shareholders could lose some **or all** of their investment (paragraph 42); [emphasis added]

    b. NewCo will be a private Alberta company (para. 34). The NewCo shares will "likely have limited liquidity immediately upon being issued" (para. 41.1). Indeed, NewCo shareholders may not be able to re-sell their shares **at all** due to securities regulations (para. after 43.13). [emphasis added].

18. The Respondents submit that a Plan which contemplates the exchange of their retirement savings for shares having dubious value and restricted or permanent liquidity is not fair and reasonable, especially since most of the depositors are elderly.

19. Notwithstanding the value and liquidity risks associated with the NewCo shares, the Monitor nevertheless supports NewCo. The Monitor states at para. 68:

    "In the event that the District Plan does not proceed and NewCo is not formed, District Depositors would no longer be subject to the general business risks associated with NewCo. District Depositors would, however, be subject to **increased litigation risk** as a result of having **larger claims to pursue** through a class or other litigation." [emphasis added].

20. The Monitor denounces the specter of "larger claims" for good reason. It's sister company, Deloitte & Touche, along with Mr. Taman and Bishop & McKenzie (the architects of the District Plan), will be the targets of these "larger claims." It is clearly in their best interests to minimize the size of the claims they may have to defend. Hence, NewCo.

21. At paragraph 49.2, it is noted that the Representative Action contemplates the ongoing involvement of and fees payable to the Monitor, whose related company is in a direct conflict of interest. Again, this is neither fair nor reasonable.

22. The Monitor claims at para. 2:

> "For clarity, the District includes the Church Extension Fund ("CEF"), which was originally created to allow District members to loan their money and earn interest in **faith-based developments**." [Emphasis added].

This statement is self-serving and misleading. It is calculated to minimize the potential liability of the District, their counsel, and Deloitte. In the letters sent by the District acknowledging receipt of Ruby Sherman's $220,000 and $75,000 deposits, the CEF was described as follows:

> "Thank you for being part of the Church Extension ministry that helps the Church by providing loans **to churches and schools** where people can hear the Gospel."
>
> Exhibits "B" and "C" of the Affidavit of Sharon Sherman filed March 3, 2016.

23. At paragraph 28, the Monitor proposes a number of holdbacks, one of which is to pay the fees and expenses of the Monitor, their legal counsel, and the legal counsel of the Applicant's legal counsel. If the Monitor believes that NewCo is such a good idea for the Depositors, the Respondents suggest that the Monitor, their counsel and the Applicant's counsel accept shares in NewCo as payment for some or all of their fees. The Respondents submit that it is unfair that the Monitor, their counsel and the District's counsel are paid in cash – the Depositors' cash – while the Depositors are forced to take potentially worthless shares of doubtful liquidity in NewCo.

24. At paragraphs 18 and 25, the Monitor describes the proposal that smaller claims ($5,000 or less) be paid out **in full** and **in cash**, whereas larger claims will be paid on a *pro rata* distribution from the proceeds of the shares and the proposed representative action. The "small claims" represent 62% of all District Depositors. By promising a 100% cash payment to the small depositors, the architects and promoters of the Plan are in effect ensuring that the majority of the Depositors will vote in favor of the Plan. This, of course, is to the detriment of larger investors but to the benefit of the Monitor and the Applicant's counsel, who are potential Defendants.

25. At paragraph 67, the Monitor "notes that the suggestion has been made that class action proceedings advanced outside of the Representative Action process will allow District Depositors to seek a full recovery in respect of any shortfall in their proven claims pursuant to the District Plan."

26. The Monitor mischaracterizes the purpose of the class action. It is not being advanced **outside of** the Representative Action. The class action is being advanced as an **alternative to** a self-serving Plan which calls for:

    a. the exchange of debt for potentially worthless and illiquid shares in NewCo, and

    b. a Representative Action which:

        i) will be managed by a "subcommittee" that will instruct counsel (para. 53.3) even though it is not a party to the action, and

        ii) will be the "sole recourse" for District Depositors (para. 58).

27. At paragraph 69, the Monitor, having applied for a stay of the existing class proceedings, now decries the "significant amount of time" required to advance a class proceeding. The Monitor gives no estimate of the amount of time which will be required for a Depositor to cash in their shares, except to point out that they may not be able to sell their shares **"at all."**

28. The egregious deficiencies with the Report are compounded by the fact that the District has already presented to the CEF Depositors a document which creates an impression that the exchange of debt for shares in NewCo is a "done deal." This was done before the Depositors received proper disclosure and before they had an opportunity to vote on the Plan.

    Affidavits of Sharon Sherman and Marilyn Huber sworn March 19, 2016.

III. RELIEF REQUESTED

29. The Respondents submit that the court should not order a meeting until there has been full and plain disclosure of the following:

    a. the extent and nature of the involvement of Deloitte, Taman and Bishop & McKenzie in the events leading up to the CCAA proceedings;
    b. the Monitor did not disclose the involvement of Taman and Bishop & McKenzie in the events leading up to the CCAA proceedings;
    c. Taman and Bishop & McKenzie did not disclose their involvement in the events leading up to the CCAA proceedings;
    d. the District solicited and accepted deposits in CEF knowing that the District was insolvent but did not disclose their insolvency;
    e. the District forgave a $6 million dollar Prince of Peace loan in exchange for the right to receive proceeds from the future sale of property owned by the Prince of Peace congregation, of which Mr. Taman was a member;
    f. the District forgave a $12.5 million dollar loan to Shepherd's Village.

30. The Respondents further submit that their class action should be identified as a clear and straightforward alternative to the District Plan, and that their Statement of Claim should be attached to the disclosure package.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2016

Allan Garber Professional Corporation

Per: Allan A. Garber
Solicitor for the Respondents

Authorities

1. *Re: Confederation Treasury Services Ltd.* (1995) Ont. Gen. Div. Bktcy (Doc. 31-205220)

Ontario Supreme Court
Confederation Treasury Services Ltd., Re
Date: 1995-12-12

Re bankruptcy of Confederation Treasury Services Limited

Ontario Court of Justice (General Division) [In Bankruptcy] Farley J.

Heard - December 8, 1995.

Judgment - December 12, 1995.

Lyndon A.J. Barnes, Gordon Marantz and Tristram Mallett, for UBS Limited and Arm's Length Creditors Committee of Confederation Treasury Services Limited.

Harry Fogul, for Province of Ontario.

Ronald N. Robertson, Q.C., and Edmond Lamek for UBS Limited.

William G. Horton and Daniel V. Macdonald, for U.S. rehabilitator of Confederation Life Insurance Company.

Benjamin Zarnett and Gale Rubenstein, for Peat Marwick Thorne Inc., agent to Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.

Bruce Leonard and John R. Sandrelli for National Organization of Life and Health Insurance Guaranty Associations.

Charles F. Scott and Ulli Streit for Compcorp.

L.A. Wittlin, for Deloitte & Touche Inc., monitor of Confederation Life Ins. Co. pursuant to Companies' Creditors Arrangement Act.

(Doc. 31-205220)

December 12, 1995. FARLEY J.: –

UBS Limited–"UBS"

Arm's Length Creditors Committee–"ALC Committee"

Confederation Treasury Services Limited–"Treasury"

Province of Ontario–"Ontario"

U.S. Rehabilitator of Confederation Life Insurance Company–"Rehabilitator"

[13] Houlden J.A. for the court in *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.) said at p. 86:

> ...Unless this inquiry is carried out, the credit union may be dealt with unfairly. A trustee in bankruptcy should act equitably and so far as possible hold an even hand between the competing interests of various classes of creditors. As James L.J. said in *Re Condon; Ex parte James* (1874), 9 Ch. App. 609 at 614 (L.JJ.):
>
> "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors."

See also my view in *Re Rizzo Shoes (1989) Ltd.* (1995), 29 C.B.R. (3d) 270 (Ont. Gen. Div. [Commercial List]) at pp. 277-8 including my observation:

I think it also fair to observe that in deciding whether or not the trustee has acted properly the court must be careful to judge the trustee's conduct in light of the circumstances as they existed at the time the trustee performed the act or made the decision: see *Cocks v. Chapman,* [1896] 2 Ch. 763 at 777 (C.A.).

[14] A trustee may be removed for cause: see *Houlden and Morawetz, supra,* at p. 1-52 where the authors observe:

> "Cause" means misconduct, fraud, dishonesty, becoming bankrupt or otherwise incapable of acting as a trustee: *Re Herman* (1930), 11 C.B.R. 239 at 246. Cause is not, however, restricted to dishonest conduct; misconduct short of dishonesty is sufficient: *Re Bryant Isard* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (S.C.).
>
> Cause exists: (a) if there is conduct showing that it is no longer fit that a person should continue as trustee; (b) if there is a danger to the estate property; (c) if there is a want of reasonable fidelity; (d) if circumstances prevent the creditors from working in harmony with the trustee; (e) if the trustee cannot act impartially; (f) if there has been an excess of power by the trustee; (g) if there has been a lack of *bona fides* by the trustee; or (h) if there has been unreasonable conduct by the trustee in relation to the bankrupt estate. The main principle upon which the jurisdiction of the court is exercised in ordering the removal of the trustee, is the welfare of the creditors and of the bankrupt estate. The trustee must not undertake a duty and put himself in a position that is in conflict with his duty as trustee, or act in a manner that is inconsistent with that duty. If the trustee has placed himself in a position of conflict, he cannot continue as trustee; he must resign or be removed by the court; *Re Commonwealth Investors Syndicate Ltd.* (1986), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.)', additional reasons at (1986), 62 C.B.R. (N.S.) 308 (B.C.S.C.). In the *Commonwealth* case, the trustee was removed because he had improperly delayed the winding up of the bankrupt estate for several years.
>
> ...
>
> Even if a trustee is not dishonest, the court, if it is of the opinion that he has not acted in the best interests of creditors and that he cannot act in concord with the inspectors, may

remove him and appoint a new trustee: *Re Gauthier Lumber Ltd.; Vanasse Tire Ltd. v. Tardif* (1960), 1 C.B.R. (N.S.) 127 (Que. S.C.).

Where a trustee wishes to be relieved of its duties as trustee in bankruptcy, the court can appoint a substitute under s. 14.04. "Cause", in s. 14.04, embraces a trustee who is incapable of acting for any reason: *Re Philip's Manufacturing Ltd.* (1992), 16 C.B.R. (3d) 127 (B.C.S.C.). Where it would be difficult for a trustee to act impartially and impossible for it to sue itself, a substitute trustee will be appointed: *Re Philip's Manufacturing Ltd.*, supra.

In *Re Bryant, Isard & Co., supra,* Fisher J. was quite caustic with his comments about the actions of the trustee, he said at p. 52 [C.B.R.]:

> I find the trustee guilty of misconduct and abuse of his office in making these payments and retaining the cheques.
>
> ...
>
> The trustee who is an officer of the Court, has no right to make free with creditors' moneys committed to his charge.

However he did not remove the trustee, although he sanctioned the trustee with making the estate good on the inappropriate payment and indicated that his order was without prejudice to the creditors removing the trustee. Fisher J. in doing so observed at p. 53:

> The Court, on an application to remove a trustee for cause, exercises a judicial discretion. The sole question for me to determine in this case is whether there is in the evidence submitted, sufficient cause shewn that the trustee, J.L. Thorne, is unfit to be continued as trustee in the administration of this estate. The estate is a large one, with many important and complicated business problems to solve before the estate can be finally wound up, and while it is the duty of the Court to vindicate the law but in doing so to abstain if possible from injury to those who are vitally, and beneficially interested, to inflict a needless injury on them and vindicate some legal principle should be avoided. Here to transfer the administration of the estate would involve the necessity of a large additional expense, and delay. Therefore, notwithstanding my findings, I will not adopt the extreme course of removing the trustee from office for the following reasons:
>
> (1) It would add to the great expense already incurred in this estate.
>
> (2) The trustee is conversant with the estate, and is in a much better position than a new trustee would be in assisting the Crown authorities in the pending criminal proceedings against N.P. Bryant, and also in the civil actions awaiting trial; and
>
> (3) The creditors at the meeting of December 4, 1922, and the inspectors at the meeting in May, 1923, were not in favour of removing the trustee, and counsel representing Ottawa, Toronto and Montreal creditors urged before me that it the wish of their clients that the trustee should not be removed, but if what has come to light on this application should lead the creditors to change their opinions they have power to do so under the Act. An authorized trustee, as I have pointed out, is an officer of the Court and must administer the estate in his charge in accordance with *The Bankruptcy Act.*

So to in appointing a trustee the Court is exercising a judicial discretion. No one should take too lightly the burdens and responsibility of securing such an appointment. The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate. Miquelon J. in *Re Gauthier*

Lumber Ltd. (1960), 1 C.B.R. (N.S.) 127 (Que. S.C.) said at pp. 135-6:

> On ne peut certes pas affirmer que l'intimé a été malhonnête. Par ailleurs, la Cour ne peut non plus dire qu'il a été un gérant impartial, chargé qu'il était par la loi, de protéger les intérêts de tous les créanciers. Les créanciers garantis sont généralement en état de se protéger et leurs intérêts sont assez souvent contraires à ceux des créanciers ordinaires. Ce sont ceux-ci que le syndic représénte d'abord et ils ont droit à ce que la conduite d'un syndic solt au-dessus de tout soupçon.

[15] McQuaid J. in *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209 (P.E.I. T.D.) reversed on other grounds (1989), 77 C.B.R. (N.S.) 113 (P.E.I. C.A.) had concerns about the propriety of appointing a former privately appointed receiver-manager as trustee. His concerns would appear to be expressed as part of his decision in an obiter fashion when he said at p. 220:

> It is clear that, immediately upon his appointment, the trustee in bankruptcy is in full, complete and exclusive control of the bankrupt business and all of the assets thereof, to the total exclusion of the owner, operator or manager of the business. I think it may be said that those erstwhile functionaries, whatever their capacity might have been, become functus upon that appointment. This would clearly include any receiver-manager who might have been in place at the time of the bankruptcy.
>
> It is the duty of the trustee, who is an officer of the court, to represent impartially the interests of all creditors; he is obligated to hold an even hand as between competing classes of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the *Bankruptcy Act* among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.
>
> *While it may not be incompatible with the scheme of the Bankruptcy Act, or, indeed, with the role of the trustee in bankruptcy, the propriety of appointing the former receiver-manager as trustee is a matter of serious import. The two functions are certainly incompatible, if not in actual conflict.*
>
> As in this instance, the receiver-manager is, in fact, the nominee of the major creditor, put into place as the watchdog on behalf of that creditor, essentially to preserve and hopefully to realize upon the assets of the business for the benefit of that creditor albeit

> as the agent of the company. That is normal, prudent business practice, not to be criticized, and something which happens regularly in the world of commerce.
>
> On the other hand, the trustee, who is in actuality an officer of the court, rather than a single creditor's nominee, must represent all creditors, and ensure that conflicting interests are resolved equitably. He must not only act without interest or bias, but must be clearly perceived to be acting without interest or bias.
>
> That perception may be difficult to maintain when he who yesterday was the man of a single creditor must today act, and be seen to act, as the man of all creditors. (Emphasis added).

As seen by the emphasized words he recognizes that such an appointment may not be incompitable with the BIA or the role of a trustee. It would appear on a reading of the case that McQuaid J. was concerned about there were aspects in which as a receiver-manager representing the interests of a secured creditor the firm in question was not recognizing various aspects which it should have as trustee. For instance he states at pp. 221-2:

> ...It is inconceivable to me that Doane Raymond would not know that Doane Raymond was sitting on a cash deposit representing the assets of the firm whose bankruptcy it was administering.
>
> I find it equally difficult to believe that "the funds realized from the sale by the Receiver [i.e., the corporate entity of Doane Raymond] of the assets of Island Jewellers were paid to the Bank without the participation or consent of the Trustee in Bankruptcy [i.e., the corporate entity of Doane Raymond]". Is the local office that large that the right hand does not know what the left hand is doing?

[16] In *Federal Trust Co. v. Frisina* (1976), 20 O.R. (2d) 32 (S.C.) Galligan J. raised the question of perception or appearances as to a court appointed receiver-manager (i.e. one which was appointed by the court and not privately) when he observed at p. 35:

> Whatever may be required of a person whom a Court will appoint as receiver-manager of a property I think that such a person must be reasonably competent to perform the duties entrusted to him and must be disinterested and impartial so as to be able to deal with the rights of all persons with an interest in the property in a fair and even-handed manner. It ought to be remembered that a receiver-manager appointed by the Court under s. 19 of the *Judicature Act,* becomes an officer of the Court and is therefore very different from a person appointed manager by a mortgagee in possession. That person is simply the agent of the mortgagee.
>
> I think it follows that not only must the receiver-manager appointed by the Court be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, but he ought to appear to have those qualities.
>
> A good part of the argument on the motion was taken up with a discussion of the relative competence of Geisel and Lousbury. If all else were equal, it would seem to me to be sensible to appoint that person whom the Court thought to be the more competent. In this case, it seems that both have sufficient competency to perform the duties of a