

NO. \_\_\_\_\_  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

BANK OF MONTREAL

PETITIONER

AND:

CANSTAR RESTORATIONS LIMITED PARTNERSHIP, by its general partner CANSTAR RESTORATIONS GP INC., CANSTAR RESTORATIONS GP INC., and L.U.N.A RESTORATIONS INC.

RESPONDENTS

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**Book of Authorities of the Petitioner  
(Hearing: September 28, 2026)**

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# Court of King's Bench of Alberta

**Citation: ATB Financial v Mayfield Investments Ltd, 2024 ABKB 635**

**Date:** 20241030  
**Docket:** 2403 12343  
**Registry:** Edmonton

Between:

**ATB Financial**

Plaintiff

- and -

**Mayfield Investments Ltd., Howard Pechet, Chalmers Investment Corp. Ltd., Mayfield Homes Ltd., and Pechet 2018 Family Winery Trust by its trustee and litigation representative Jason Pechet**

Defendants

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## Reasons for Decision of the Honourable Justice M.A. Marion

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### I. Introduction

[1] The applicant, Mayfield Investments Ltd (**Mayfield**), applies (**Application**) to stay the effects of a consent receivership order granted September 6, 2024 (filed September 10, 2024) (**Consent Receivership Order**) and an October 24, 2024 certificate (**Lender's Certificate**) filed by ATB Financial (**ATB**), until November 30, 2024<sup>1</sup> or, alternatively, until after Mayfield's application under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**) (**CCAA Application**) is decided. ATB opposes the Application.

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<sup>1</sup> The Application originally requested a stay until February 1, 2025, but in oral argument counsel amended the request to November 30, 2024.

## II. Background

[2] Mayfield, either in its own capacity or through several subsidiaries or other entities, holds direct or indirect interests in a portfolio of commercial real estate properties and businesses in Alberta, including among others the Camrose Resort and Casino, the Medicine Hat Lodge and the Stage West Dinner Theatre. Some of the assets underlying its interests are regulated by Alberta Gaming, Liquor and Cannabis Commission (**AGLC**). Mayfield indirectly employs in the range of greater than 450 people.

[3] Mayfield has been in financial distress and in default of its financial obligations to ATB since March 2021. It continues to be insolvent, although Mayfield argues it is on the eve of solvency.

[4] Mayfield and its personal guarantor, Howard Pechet (together the **Credit Parties**), entered into credit facilities with ATB; their obligations are secured by various security agreements.

[5] Following initial default in March 2021, the Credit Parties and ATB entered into an Initial Forbearance Agreement dated June 29, 2022. There were further defaults, and, among other things, the parties executed a First Forbearance Amending Agreement dated August 31, 2022, a Second Forbearance Amending Agreement dated December 16, 2022, and a Third Forbearance Amending Agreement dated March 22, 2023.

[6] On August 29, 2023, ATB demanded repayment of the Credit Parties' indebtedness.

[7] On December 12, 2023, ATB delivered a demand letter and corresponding Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). ATB demanded repayment of Mayfield's indebtedness, plus all accrued and accruing interest, standby fees, costs, prepayment fees, and expenses.

[8] The parties negotiated. On February 5, 2024, the parties entered into a further forbearance agreement (**Amended and Restated Forbearance Agreement**).

[9] Following that, the Credit Parties engaged in a sales process that failed to generate any proposal sufficient to repay the indebtedness to ATB.

[10] Mayfield also committed further "Forbearance Defaults" as defined under the Amended and Restated Forbearance Agreement. On April 15, 2024, ATB issued a "Forbearance Notice of Default and Reservation of Rights Letter" to the Credit Parties. Mayfield then committed further Forbearance Defaults.

[11] As of June 14, 2024, the Credit Parties were indebted to ATB for more than \$38 million. Further, the "Forbearance Period", as defined in the Amended and Restated Forbearance Agreement, had expired.

[12] On June 25, 2024, ATB applied to appoint a receiver and manager (**Receivership Application**). The Receivership Application was scheduled to be heard by the Court on July 4, 2024; however, this was adjourned because the parties entered into another agreement dated

effective July 4, 2024 (**First A&R Forbearance Amending Agreement**), which amended the Amended and Restated Forbearance Agreement.

[13] The Credit Parties defaulted under the First A&R Forbearance Amending Agreement. On August 16, 2024, ATB delivered a “Notice of Defaults, Terminating Events, and Reservation of Rights” letter to the Credit Parties.

[14] On August 29, 2024, Mayfield filed the CCAA Application.

[15] On August 30, 2024, the Forbearance Period under the First A&R Forbearance Amending Agreement expired.

[16] On September 4, 2024, at the Credit Parties’ request, the parties entered into further negotiations about a potential further extension of the Forbearance Period.

[17] On September 6, 2024, immediately before the Court was to hear the Receivership Application and the CCAA Application, the parties entered into a Second Forbearance Amending Agreement dated effective August 30, 2024 (**Second A&R Forbearance Amending Agreement**).

[18] The Second A&R Forbearance Amending Agreement contemplated that the parties would consent to the entry of the Consent Receivership Order on September 6, 2024, but that the activation of the receivership under the Consent Receivership Order would be stayed until the earlier of certain conditions (as set out below).

[19] On September 6, 2024, Justice Lema granted the Consent Receivership Order and adjourned the CCAA Application *sine die*. The CCAA Application has never been brought back before the Court.

[20] Paragraph 3 of the Consent Receivership Order provides for the stay (**Stay**) of the Consent Receivership Order, to be effective until the earlier of:

[...] (i) October 31, 2024, or such date as may be amended or extended by the written agreement of the Lender and the Debtor, in their sole discretion; or, (ii) the date on which the Lender files a certificate, substantially in the form attached as Schedule “B” hereto (the “**Lender’s Certificate**”), certifying that a Forbearance Default (excluding and in addition to the Current Forbearance Default Events) has occurred. Upon the filing of the Lender’s Certificate, the Stay shall, without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver pursuant to paragraph 2 hereof. [...]

[21] The Amended and Restated Forbearance Agreement, as amended by the Second A&R Forbearance Amending Agreement, required (among other things) the Credit Parties to deliver an unconditional commitment letter from Canadian Western Bank (**CWB**) in a form acceptable to ATB (**CWB Commitment Letter**), by October 15, 2024. The Credit Parties did not do so. This is not in dispute. These defaults, along with others, constituted “Forbearance Defaults” under the Second A&R Forbearance Amending Agreement which entitled ATB to file a Lender’s Certificate.

ATB did not file a Lender's Certificate initially, to allow the Credit Parties more time to cure the defaults and, in particular, to obtain the CWB Commitment Letter.

[22] By October 19, 2024, Mayfield had not delivered the CWB Commitment Letter and has still not done so. Several Forbearance Defaults continued, and continue now, to be uncured.

[23] On October 23, 2024, Mayfield filed its application seeking to stay "the effects of the Consent Receivership Order", returnable on October 28, 2024. The application is supported by an affidavit of Mayfield's then President, Jason Pechet (**Pechet**).

[24] On October 24, 2024, ATB filed the Lender's Certificate. As of that date, the aggregate indebtedness owed to ATB was more than \$38.8 million.

[25] On October 28, 2024, the Receiver filed its First Report. It summarizes the Receiver's activities since the Lender's Certificate was filed on October 24, 2024, which included, among other things:

- (a) attending at the Medicine Hat Lodge, the Camrose Resort and Casino and Mayfield's head office;
- (b) meeting with Mayfield's Vice President of Operations, general managers and employees;
- (c) inspecting some of the properties and identifying operational and maintenance requirements and capital deficiencies;
- (d) meeting with representatives of AGLC;
- (e) obtaining and reviewing Mayfield financial information;
- (f) working on operational procedures;
- (g) reviewing insurance;
- (h) communicating with employees about the receivership and the Receiver's intentions. On October 25, 2024, the Receiver provided a letter to all Mayfield employees outlining the details of the receivership and the Receiver's intention to, among other things, continue operating Mayfield's business without interpretation, to maintain the employment of all current Mayfield employees and to determine the most appropriate sales strategy for Mayfield's assets (which could include selling Mayfield as a going concern);
- (i) putting restrictions on fund outflow and reviewing cash flow forecasts;
- (j) maintaining an onsite presence at the Medicine Hat Lodge and Camrose Resort and Casino since October 24, 2024; and

- (k) terminating the employment of Mayfield's President, Pechet, effective on October 24, 2024.

[26] On October 25, 2024, ATB provided the Court its response materials to the Mayfield application, including an October 24, 2024 affidavit of ATB's Director, Risk Advisory & Management.

[27] On October 25, 2024, legal counsel amended Mayfield's application and brief of argument and provided a supplemental Pechet affidavit.

[28] On October 28, 2024, the Receiver filed its First Report and ATB filed additional materials. I heard the Application and briefly reserved my decision.

### **III. Issues**

[29] Mayfield argues that it is not just and convenient to decide on or continue Mayfield's receivership (including where debtor refinancing is imminent), that the Court has the power to stay the effects of the Consent Receivership Order and the Lender's Certificate (including staying the actions of the Receiver even after the granting of the Consent Receivership Order and the filing of the Lender's Certificate), and that Mayfield meets the tripartite test for a stay (either until November 30, 2024 or until its CCAA Application is heard).

[30] ATB argues that the question of whether it is just and convenient to appoint the Receiver has already been decided by Justice Lema when he granted the Consent Receivership Order, and that the Credit Parties are estopped from arguing that the Consent Receivership Order should be stayed. ATB notes that no appeal or application to set aside or vary the Consent Receivership Order has been filed, and in any event any application to set aside or vary the order would be unsuccessful. ATB argues that the test to stay the Consent Receivership Order is not met in any event.

[31] In argument, I posed the question to Mayfield's counsel whether anyone other than the Receiver had standing to continue Mayfield's initial application or to file the amended Application, given the terms of the Consent Receivership Order and following the delivery of the Lender's Certificate. Paragraphs 2, 4 (and, in particular, 4(j)), 8, 9 and 10 of the Consent Receivership Order were discussed or considered. Ultimately, since no party (including the Receiver) objected to Mayfield's standing to continue the amended Application, but rather argued it on the merits, I have proceeded on the basis Mayfield has standing to continue the Application.

[32] Accordingly, based on the materials provided and the parties' submissions, the issues on this Application are:

- (a) What is the effect of the Consent Receivership Order and the Lender's Certificate?
- (b) Is Mayfield estopped from arguing that the Consent Receivership Order should be stayed?
- (c) Should the Consent Receivership Order be stayed?

#### IV. Analysis

##### A. The Effect of the Consent Receivership Order and the Lender's Certificate

[33] As noted above, paragraph 3 of the Consent Receivership Order provides that, upon the filing of the Lender's Certificate, the Stay shall "without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver".

[34] Mayfield does not dispute that ATB was entitled to file the Lender's Certificate or that the Lender's Certificate was validly filed based on Mayfield's Forbearance Defaults. Accordingly, since October 24, 2024, the Consent Receivership Order's terms have been activated. Since that date, the Receiver has been and is the receiver over Mayfield's property and the stay of proceedings against Mayfield has been and is in place.

[35] Therefore, I agree with ATB that the question of whether it is "just and convenient" to appoint a receiver under section 243 of the *BIA* or section 13(2) of the *Judicature Act*, RSA 2000 c J-2 has been overtaken. The Consent Receivership Order provided a clear and simple mechanism to terminate the Stay under paragraph 3 of the Consent Receivership Order, and those provisions have been engaged and implemented. Put another way, whether it is just and convenient to appoint a receiver was decided by this Court on September 6, 2024 based on the agreement and consent of ATB and Mayfield.

[36] The issue, then, is not whether the Stay under paragraph 3 of the Consent Receivership Order should be *extended*, as it was originally articulated by Mayfield. That Stay has ended on its own terms and cannot be extended. The issue is whether the Consent Receivership Order, looking at the situation now, should be stayed after its terms have been active for only a few days.

##### B. Mayfield is Not Estopped from Arguing that the Consent Receivership Order Should be Stayed

[37] ATB argues that Mayfield's Application is subject to issue estoppel, relying on *Toronto (City) v CUPE*, Local 79, 2003 SCC 63 at para 23:

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.).

[38] In my view, the argument that issue estoppel applies fails on the first ground. The issue is not precisely the same on this Application as it was on the day the Consent Receivership Order was presented to the Court and granted. On September 6, 2024, the issue was whether it was just and convenient to appoint a receiver over Mayfield's property at that time, coupled with the Stay on certain conditions. There is new evidence before the Court that was not before the Court on

September 6, 2024. The issue now, as I alluded to above, is whether the Consent Receivership Order, now activated through an agreed and court-ordered process, should be stayed.

[39] Accordingly, I find that Mayfield was not legally barred by issue estoppel from bringing the Application. This finding is consistent with the Court’s jurisdiction to consider an application for stay of receivership proceedings “at any stage of the proceeding” pursuant to section 17(1) of the *Judicature Act*. That determination is made at the time of the application based on the then prevailing circumstances.

[40] However, to be clear, the finding that issue estoppel does not apply does not mean Mayfield can ignore its previous consent to the Consent Receivership Order and its effects. Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order (including, for example, and without limitation, for matters such as fraud or misrepresentation): ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 42-50, 60; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff’d 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC). There is no application to set aside or vary the Consent Receivership Order based on fraud or misrepresentation, or on any other basis. The relief sought is a stay.

[41] Mayfield’s consent to the Consent Receivership Order will be considered within the applicable legal framework as to whether the Consent Receivership Order should be stayed.

### C. The Consent Receivership Order is Not Stayed

[42] Mayfield argues that the Court’s authority to order a stay extends to the ability to order a stay of the actions of a receiver/manager well into an extant receivership, relying on ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 3659 at paras 44-54 and 77. I agree with ATB that ***BCIMC*** is wholly distinguishable and does not assist Mayfield’s position. ***BCIMC*** did not involve a stay of a receivership, but rather the Court’s refusal to approve a receiver-proposed Sale and Investor Solicitation Process for a condominium project where the debtor was in the position to immediately, and without conditions, pay out the indebtedness of the secured creditor. The Court gave the debtor an opportunity to pay out the secured debt, the receivership debt and interest within 72 hours instead of approving the sale. In this case, as noted further below, Mayfield has not established that it is in a position to imminently and unconditionally pay or redeem its indebtedness to ATB.

[43] However, a proceeding or judgment can be stayed under rule 1.4(2)(h) and sections 17(1) and (4) of the *Judicature Act* pending trial, pending other processes in the action, or in favour of different proceedings which may overlap with the existing proceedings: see, for example, ***1499925 Alberta Ltd v NB Developments Ltd***, 2023 ABKB 114 at paras 96-100 and 108-109 (and cases cited therein).

[44] The parties agree that the applicable test for a stay in this proceeding is the tripartite test. It has been described in ***Stephenson v Romspen Investment Corporation***, 2020 ABCA 316 at para 13:

[13] The well-known tripartite test for a stay pending appeal is set out in **RJR-MacDonald Inc v Canada (Attorney General)**, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 334, 111 DLR (4th) 385, following **Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd**, 1987 CanLII 79 (SCC), [1987] 1 SCR 110, 38 DLR (4th) 321. The applicant has the burden of showing that: (i) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

[45] See also **HML Contracting Ltd v Pinder**, 2022 ABCA 185 at paras 18-19.

[46] Even where the tripartite test is not met, the Court may have a residual discretion to grant a stay “where the interests of justice so require”: **HML Contracting** at para 19; **Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited**, 2015 ABCA 406 at para 33; **Stephenson** at paras 14, 17 and 37.

### 1. Serious Question or Arguable Issue

[47] I agree with ATB that Mayfield has not raised a serious question or arguable issue with respect to a stay in this action, as it pertains to the Consent Receivership Order, *per se*. The Consent Receivership Order was a final receivership order (subject to the usual comeback provision) granted with Mayfield’s consent and agreement, including the conditions upon which the receivership would be activated. By consenting to its terms, Mayfield is in much the same position as the debtors in **Servus**, as described by Justice Lema at paras 50-56:

[50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus’s enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus’s debt.

[51] The debtors effectively surrendered, on a contingent basis: “If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order.”

[52] I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.

[53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not “just or convenient” in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus’s debt in full.

[54] Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.

[55] Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.

[56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

[48] In fact, Mayfield is in an even more difficult position than the debtor in **Servus**, as the Consent Receivership Order has already been granted. In **Servus**, the Court still had to consider whether granting the receivership order on consent was just and convenient. Here, the Consent Receivership Order is already activated, the Receiver has been appointed and has already commenced its work.

[49] The Consent Receivership Order has not been appealed. There is no application to vary it pursuant to the comeback provision in paragraph 34 of the order. As noted above, there is no suggestion it was procured by fraud or misrepresentation or is otherwise tainted.

[50] However, Mayfield also relies on the existence of its CCAA Application. It argues that the receivership should be stayed to allow Mayfield to pursue protection under the CCAA which it argues is preferable to a receivership. Mayfield relies on several cases by which it argues courts consider several criteria when faced with competing applications for the implementation of a receivership and proceedings under the CCAA: **Pacific Shores Resort & Spa Ltd (Re)**, 2011 BCSC 1775; **Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd**, 2013 BCSC 2358; **Century Services Inc v Canada (Attorney General)**, 2010 SCC 60. Mayfield argues this establishes a serious question or arguable issue.

[51] ATB argues that Mayfield should have raised its argument about the CCAA Application at the time the Consent Receivership Order was granted. The transcript of the attendance before Justice Lema is not before me. What is before me is that both matters were before Justice Lema, the Consent Receivership Order was granted, and the CCAA Application (which is not addressed in any material way in the Consent Receivership Order) was adjourned *sine die*. The fact the CCAA Application was adjourned *sine die*, rather than dismissed, suggests that it was contemplated as a possibility that it could be brought back on.

[52] I have considered Mayfield's arguments and am satisfied that the pre-existing CCAA Application sufficiently meets the low threshold of a serious question or arguable issue in the context of an application to stay the Consent Receivership Order. Whether Mayfield is barred from raising the CCAA Application for failing to raise this issue before Justice Lema also raises a serious question or arguable issue that would have to be addressed, if necessary, on a more complete record of what happened on September 6, 2024. I make no findings in that regard.

[53] I raised with Mayfield’s counsel the practical question of exactly how the stay would implement what Mayfield appears to seek, namely maintaining control of the management of Mayfield’s assets pending the CCAA Application (and pending a hoped-for CWB refinancing) given that the Receiver has already been appointed. Stays in this context typically pause proceedings and operate prospectively, not retroactively. Arguably, a prospective stay of the Consent Receivership Order would simply postpone further activity by the Receiver but would not necessarily reverse the effect of the Consent Receivership Order and give possession and control of Mayfield’s property back to Mayfield’s directors. What Mayfield really seeks is a stay of the Consent Receivership Order that is retroactive back to before October 24, 2024 when the Receiver’s appointment was activated by the filing of the Lender’s Certificate. Effectively, it seeks an unwinding of events since October 24, 2024.

[54] Counsel provided me no authority that would support a retroactive stay of proceedings. However, the Court of Appeal has noted that the jurisdiction to grant retroactive stays (at least in CCAA proceedings) is a novel issue. For example, in *Wiebe v Weinrich Contracting Ltd*, 2021 ABCA 242, the Court of Appeal, at para 20, a single Justice of the Court stated:

[20] As previously recognized by this Court, stays in insolvency proceedings are very common, and “the ability of a case management judge to grant retroactive stays is of significance to the practice”: 2019 ABCA 323 at para 17. This question was not answered in the first appeal, which was determined on the basis of procedural fairness. Therein, however, the Court noted: “Whether a supervising judge in CCAA proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court: 2020 ABCA 396 at para 42.

[55] In the circumstances, I proceed on the basis that Mayfield has raised a serious question or arguable issue about whether the Consent Receivership Order should be stayed until November 30, 2024 to allow it to pursue the CCAA Application (and associated refinancing), and also about whether the Court could potentially implement a stay on such conditions to allow Mayfield’s directors to pursue that application during the stay period.

## 2. Irreparable Harm

[56] Mayfield argues that it will suffer irreparable harm if a stay is not granted because its assets will “likely be irreversibly disposed of, with little recourse”. It also argues that receivership will decrease the value of Mayfield’s business and assets, and that the opportunity cost of seizing and likely dissolving Mayfield’s assets “when it is so close to a possible Court-sanctioned CCAA proceeding is impossible to calculate”.

[57] I agree with ATB that Mayfield has failed to establish irreparable harm, for several reasons, including but not limited to:

- (a) the alleged immediate irreversible loss or devaluation of Mayfield assets is not established. The Receiver has taken steps to work with AGLC to ensure a smooth transition and has been granted a temporary casino facility licence for the Camrose Casino and Resort until January 22, 2025. Further, the Receiver’s First Report has

indicated the Receiver's intentions to continue operating Mayfield's business without interruption and to determine the most appropriate sales strategy which could include selling Mayfield as a going concern;

- (b) the ability of Mayfield to continue operations for the benefit of its employees and charities with which it works, and to maintain Mayfield's present asset values, pending refinancing or a CCAA Application, has not been established. The Receiver's opinion is that cash levels, of at least some of the businesses, are insufficient to maintain business operations and meet critical expenditures, and has been advised by Mayfield's Vice President of Operations that Mayfield was forecast to have insufficient funds, without a cash injection, to operate beyond November 1, 2024. Mayfield has not established on a balance of probabilities that Mayfield's past or potential future sales of assets, or possible further infusions of capital from the Pechet family or others, are sufficient for ongoing operations or to address capital deficiencies or repairs already identified by the Receiver;
- (c) Mayfield does not have a concrete refinancing plan in place. Mayfield has been advising ATB (since June 2024) and the Court (since at least August 2024), that a CWB refinancing is forthcoming or imminent. The evidence now before the Court illustrates that CWB has not yet provided credit approval (let alone executed a CWB Commitment Letter), and Mayfield's 2023 financial statements are still being prepared or, at best, have only very recently been provided to CWB;
- (d) it is not clear that an unconditional repayment of the indebtedness to ATB would be possible upon a CWB refinancing, even if it occurs. The CWB refinancing appears now to contemplate funding of \$30 million instead of \$35 million<sup>2</sup>, and it is not clear that a \$4.125 million deposit relating to the transfer of the Camrose Casino Corporation casino facility licence is imminently releasable. Further, Mayfield argued that getting the CWB Commitment Letter during the proposed stay would help Mayfield to "better negotiate with ATB"; it did not argue that the CWB Commitment Letter *would* allow Mayfield to expeditiously and unconditionally pay out the ATB indebtedness; and
- (e) Mayfield is not "so close to a possible Court-sanctioned CCAA proceeding" as it asserts. It has not taken any steps to bring the CCAA Application back before the Court.

[58] Mayfield's stay application fails on the irreparable harm element of the tripartite test.

### **3. Balance of Convenience**

[59] Mayfield's application also fails on the balance of convenience element of the test.

[60] ATB has agreed to forbear on enforcement of its security for many months. Based on the understanding, among other things, that a CWB Commitment Letter was imminent, ATB agreed

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<sup>2</sup> Pechtel advised the Court during argument that a \$35 million CWB refinancing was still available but may be necessary. This was not in his affidavit. It would not have changed my decision even if were accepted as evidence.

to further forbear for a short time, by agreeing to the terms of the Consent Receivership Order. It was entitled to file the Lender's Certificate and crystallize the benefits of its bargain with Mayfield. The CWB Commitment Letter has still not arrived almost two months later, Mayfield remains in default, and there are further Forbearance Defaults. ATB has lost confidence that the CWB Commitment Letter is forthcoming. The indebtedness to ATB is significant and ATB is the primary secured creditor with assets at risk. A subordinate secured creditor supports ATB's position on the Application. No stakeholder other than Mayfield, through its directors/shareholders, voiced opposition the continuation of the receivership.

[61] Again, critically, Mayfield agreed to the terms of the Consent Receivership Order and the clear terms that the receivership would be activated upon the filing of a Lender's Certificate. Mayfield took the benefit of the bargain and, in its Application, seeks to resile from it. While I have held that Mayfield is not legally barred by issue estoppel to make the Application, Mayfield attempts to effectively unwind its consent and agreement, which was relied on by Mayfield and the Court, and it seeks to do so mere days after the consequences of its consent and agreement are brought to bear. While not technically attempting to relitigate precisely the same issue, as a practical matter it is doing just that because it has not (in my view) established a favourable material change in its circumstances since the Consent Receivership Order was granted. These are significant factors against Mayfield's position when considering the balance of convenience. As noted above, parties must expect courts to enforce their bargains, and I am satisfied it is appropriate to do so in this case.

[62] Finally, the Stay has been terminated, the Receiver has already been appointed and activated, and the Receiver has been diligently pursuing its mandate since October 24, 2024. It has already communicated with employees about the receivership, terminated Mayfield's President, taken possession and control of Mayfield's assets, and started working on financial and interim borrowing plans. ATB argues that the egg cannot be unscrambled now. I find that, while the egg may not be fully scrambled at this point, it has been cracked and is already bubbling on the griddle. It would be inconvenient, and may cause confusion and unintended consequences, to try to put the egg back together by granting the relief Mayfield seeks.

[63] In all the circumstances, the balance of convenience does not support a stay of the Consent Receivership Order.

#### 4. Conclusion re Tripartite Test

[64] Mayfield has failed to establish the elements of the tripartite test.

[65] I note that both parties also referred to *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27, which outlines factors a court may consider in determining whether it is appropriate to appoint a receiver. Although not technically applicable in this case because the Receiver has already been appointed, I found many of the *Paragon* factors relevant to the application of the tripartite test for a stay in this receivership context. I considered the *Paragon* factors and find that, to the extent they could be applicable in this situation, they support my conclusion not to grant the requested stay.

## 5. No Exercise of Any Residual Discretion

[66] In the event I have residual discretion to grant a stay notwithstanding that Mayfield has failed to establish the elements of the tripartite test, on the basis that “the interests of justice so require”, I find that the interests of justice do not support granting a stay and I would decline to do so in this case, including for the reasons noted above.

## V. Conclusion

[67] Mayfield’s Application is dismissed.

Heard on the 28<sup>th</sup> day of October, 2024.

**Dated** at the City of Calgary, Alberta, this 30<sup>th</sup> day of October 2024.

---

**M.A. Marion**  
**J.C.K.B.A.**

## Appearances:

Chuck Russell, K.C., and Jared Lane, McLennan Ross LLP  
for Mayfield Investments Ltd.

Pantelis Kyriakakis and Nathan Stewart, McCarthy Tétrault LLP  
for ATB Financial

Darren Bieganeck, K.C., Duncan Craig LLP  
for Howard Pechet

Kelly Bourassa, Blake, Cassels & Graydon LLP  
for Ernst & Young Inc. in its capacity as court-appointed receiver of Mayfield  
Investments Ltd.

Susy Trace, Miller Thomson LLP  
for Agriculture Financial Services Corporation

David Archibold, Sharek Logan & Van Leenen LLP  
for Camrose Regional Exhibition & Agricultural Society

Terry Czechowskyj, K.C., Miles Davison LLP  
for Albert Stark

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Gian's Business  
Centre Inc.*,  
2016 BCSC 2348

Date: 20161117  
Docket: H160631  
Registry: Vancouver

Between:

**Bank of Montreal**

Petitioner

And

**Gian's Business Centre Inc.  
0822965 B.C. Ltd.  
Jagroan Enterprises Ltd.  
Sudhir Kumar Mankatala  
Satwant Kaur Mankatala  
Ramesh Kumar Mankatala  
Sawrana Rani Mankatala  
Sonam Mankatala  
Sarah Mankatala**

Respondents

Before: The Honourable Madam Justice Fitzpatrick

## **Oral Reasons for Judgment**

In Chambers

Counsel for the Petitioner:

H. Ferris

Counsel for the Respondent Gian's Business  
Centre Inc.:

B. Markus

Place and Date of Hearing:

Vancouver, B.C.  
November 17, 2016

Place and Date of Judgment:

Vancouver, B.C.  
November 17, 2016

[1] **THE COURT:** This foreclosure proceeding was commenced November 4, 2016. The present application was filed November 7, 2016 by the petitioner, Bank of Montreal (the "Bank"), for the appointment of The Bowra Group Inc. ("Bowra") as receiver of the respondent Gian's Business Centre Inc. ("Gian's").

[2] Mr. Markus appears as counsel for Gian's in respect of this application only. Gian's opposes the granting of the relief sought. Gian's takes the position that this application is premature and that the matter should be adjourned for at least one month. Gian's contends that such an adjournment will allow time for the delivery of pleadings and also service of this application on the other respondents.

### **Background**

[3] Gian's owns certain development property in Abbotsford. Gian's intention was to develop six different buildings on the property, with each to be stratified in due course after their completion.

[4] The respondent, 0822965 B.C. Ltd., is a guarantor of the debt owing by Gian's to the Bank and it has provided collateral security to the Bank. The remainder of the respondents, including Jagroan Enterprises Ltd. and various individuals having the last name of Mankatala, are also guarantors of the Bank debt. I am told that the principal player within the guarantor group is Sudhir Kumar Mankatala, also known as Sam Mankatala, who is the president and sole director of Gian's. The remaining respondents appear to be Mr. Mankatala's wife, parents and daughters.

[5] The facts are somewhat straightforward. The bank has two lending facilities with Gian's, a term facility and an operating facility. Two mortgages are held by the Bank as security. In addition, the Bank holds a general security agreement against Gian's personal property. There does not seem to be any dispute that the Bank's security is validly held against all of Gian's real and personal assets.

[6] The lending relationship between Gian's and the Bank seems to have come to a head in the summer of 2016. At that time, Gian's defaulted under the terms of

the various credit agreements. As a result, the parties entered into negotiations concerning a forbearance agreement. I am told that by about this time, of the six buildings, building No. 2 had been completed and sold and the net sale proceeds had been paid to the Bank.

[7] On September 6, 2016, all of the parties to this proceeding, being the Bank, Gian's and the guarantors, entered into a forbearance agreement (the "Agreement"). The Agreement is lengthy and I will not quote extensively from it since the parties are well aware of its terms.

[8] At the time of the execution of the Agreement, the Bank's debt was approximately \$8.6 million. The Agreement included: an acknowledgement by all parties as to the validity of the Bank's security; that the debt was payable on demand; and importantly, that there had been default by Gian's in respect of the various credit agreements.

[9] In accordance with the Agreement, the Bank agreed to forbear on terms that I will discuss in a moment. The Bank also agreed to advance the further amount of \$1.5 million to Gian's for operating funds, which amount was intended to allow continued construction of the other buildings that were underway at the time. The further buildings underway at that time included buildings Nos. 1 and 6.

[10] As Ms. Ferris indicated in her submissions, throughout the course of the Bank's history with Gian's and Mr. Mankatala, there have been various offers presented from time to time in respect of the buildings or the strata units within what I presume are buildings Nos. 1 and 6. Various iterations of purchase agreements are before me today. I take Ms. Ferris's submission to be that these documents had been forwarded to the Bank from time to time indicating sales to be completed and also referencing deposits that had been received by Gian's. However, none of these sales appear to have been completed. In many cases, later iterations of the same sale agreements were provided to the Bank, leading to the Bank's suspicion at this time that many of these agreements were not truly valid agreements. The suspicion

is that these documents were meant to show progress in the development and sales of individual properties so as to keep the Bank at bay.

[11] In any event, paragraph 23 of the Agreement provided that Gian's was to meet various "benchmarks" or deadlines relating to the development of the property:

- a) certain things to be done by September 6 and it appears that those benchmarks were met;
- b) certain things to be done by September 9 concerning the sale of building No. 1. As required, Gian's provided a sale agreement to the Bank and a deposit was paid to the Bank's solicitors. Other requirements under the Agreement in relation to building No. 1 were not done by Gian's;
- c) there was a deadline of September 29 relating to the sale of building No. 1. In addition, appraisals of other properties held as collateral security were to be provided by that date;
- d) by October 10, documents were to be provided concerning construction of building No. 6; and
- e) by November 15, the Bank was to be provided with pre-sale documents in respect of units in building No. 6.

[12] None of the benchmarks that were to be met by September 29 and the later dates were, in fact, completed or satisfied in accordance with the Agreement. Not unexpectedly, the Bank was concerned about that matter and further discussions ensued between the parties. Gian's solicitors, Rosborough & Company, was also involved, particularly concerning the closing of building No. 1 and also the other matters that were to have been completed under the terms of the Agreement. For example, at some point, the Bank was provided with an addendum relating to the sale of building No. 1 which indicated a closing of October 14, 2016, but that closing did not happen, just as no sale completed by the earlier required date of September 29, 2016.

[13] The Bank attempted to obtain the information and documentation that it thought it had already earlier secured in accordance with the Agreement. Further discussions ensued between the Bank and Gian's towards negotiating an amended forbearance agreement, although the Bank's proposed terms were rejected by Gian's. On October 18, 2016, Rosborough advised the Bank's counsel that Gian's was not agreeable to the terms of the proposed amended forbearance agreement. It appears that one of the sticking points at that time was that Gian's did not agree to the appointment of a financial monitor. On that same date, Rosborough also referred to Gian's making efforts to obtain new financing and there was a request that the Bank be patient in order to allow those efforts to continue.

[14] The Bank was not agreeable to waiting any further. The next day, October 19, the Bank issued letters to all of the respondents demanding payment of the then balance owing of approximately \$9.1 million. Included with the demands for payment were the usual notices of intention to enforce security.

[15] The Bank did not receive any response to these demands. On October 31, 2016, the Bank instrument appointed Bowra as the receiver under the Bank's security. Bowra's representative, Mario Mainella, then made unsuccessful efforts to access the property over which the Bank held security. Mr. Mainella stated in an email that he had been refused access in accordance with advice from Mr. Markus. Mr. Mainella stated:

[Mr. Markus] says his clients have sales, refinancing coming ... so he is told and will not allow us to take possession without a court appointment.

[16] That same day, namely October 31, was the last verbal contact between Mr. Markus and Mr. Mankatala. Around that time, Mr. Mankatala, and perhaps some or all of the other Mankatala respondents, left Canada for India on an extended trip. Mr. Markus now advises that, as far as he is aware, it is anticipated that they will be returning to Canada on or about December 20, 2016.

[17] The refusal to allow Bowra to take possession of Gian's property in accordance with the instrument appointment led to the filing of this petition

proceeding on November 4 and the filing of this application to appoint a receiver on November 7, 2016.

### **Discussion**

[18] As previously stated, Gian's takes the position that the matter should be adjourned.

[19] The initiating documentation, being the petition and supporting affidavits were properly filed on the corporate respondents on or about November 4, 2016 by delivery to Rosborough's offices. Accordingly, the corporate respondents have been properly served. However, there are issues relating to service on the personal respondents. The Bank has provided various affidavits relating to attempts to serve the Mankatalas, although it is difficult what to make of them. The Bank suggests that the Mankatalas are evading service, although if they are in India then that suggestion may not be justified.

[20] In my view, it is not necessary to address the service issues for the purpose of this application. The Bank takes the position that I can proceed *ex parte*, if necessary, with respect to the individual respondents who have not been served. Mr. Markus, as I said earlier, appears only on behalf of Gian's with respect to this application.

[21] I will now turn to the law. The application is brought pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The *Law and Equity Act* states that I may appoint a receiver where it is just or convenient to do so.

[22] I am aware that there is some divergence in our Court concerning the test to be applied in respect of appointing a receiver in these circumstances. On one hand, there are two decisions of Justice Burnyeat in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 and *CIBC v. Can-Pacific Farms Inc.*, 2012 BCSC 437. In both decisions, Burnyeat J. took the view that where a receivership order is sought by a secured creditor and default under the security is proven, a receiver

should be granted as a right unless there is some other compelling reason why the order should not be made.

[23] On the other hand, there is Justice Masuhara's decision in *Maple Trade Financing Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527. At para. 25 of *Maple Trade*, the Court refers to various factors from *Bennett on Receivership* which may be considered in determining whether it is appropriate to appoint a receiver. *Maple Trade* was subsequently followed and applied in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 by Justice Willcock, as he then was. Both of these decisions are to the effect that while it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, no such presumption of appointment should be made; rather, the court should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver. The Court in *Textron* also considered and applied *Korion Investments Corporation v. Vancouver Trade Mart Inc.* [1993] B.C.J. No. 2352 (S.C.), a decision which was referred to me by Gian's counsel.

[24] I followed *Maple Trade* and *Textron* in my later decision on the issue: *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 77. I propose to follow the same approach here. Accordingly, relying on the second line of authorities outlined above, the analysis calls for a robust review of all the circumstances.

[25] There is no dispute concerning the validity of the Bank's security. It is also not in dispute that Gian's is in default of that security. Importantly, similar to the point made in *Maple Trade*, Gian's was in default at the time the Agreement was entered into.

[26] What are also significant are the various defaults under the Agreement and the position of Gian's and Mr. Mankatala in response to those defaults. Again, there is little, if any, controversy that numerous benchmarks in the Agreement, signed as recently as the beginning of September 2016, were not met by Gian's. The benchmarks in the Agreement were intended not only to get the Bank paid from the

sale proceeds of building No. 1 by September 29 (which did not happen), but also to provide significant information flow to the Bank with respect to building No. 6.

[27] In the face of that clear intention and agreement, there have been absolutely no communications from Mr. Mankatala to the Bank to this point in time concerning what is happening with building No. 6.

[28] Mr. Markus advises that building No. 6 is completed and that various strata lots in that building have been sold, however, no documentation has been provided to support that statement. As such, it remains a complete mystery, at least from the Bank's point of view, as to what is being done with building No. 6 and how that may affect the Bank's security.

[29] I should also add at this point that Mr. Markus has filed two affidavits by Amarit Dass, being affidavit #1 sworn November 10 and affidavit #2 sworn November 16, 2016. The Bank raised certain concerns regarding these affidavits and I share those concerns. Mr. Dass has no official capacity with respect to Gian's or any of the guarantors; rather, he simply states that he is "assisting the respondents". He does not state that he has been authorized by any of the respondents to swear these affidavits on their behalf. Further, Mr. Dass refers to various things that he is doing or that the respondents are doing in respect of dealing with the matter. He does not state the source of his information and belief as to what is being done. I appreciate that Mr. Dass is a realtor and, based on the documentation before me, it appears that he has been involved to some extent, perhaps to a great extent, in the sales that have either occurred or are intended to occur on the properties. Even so, I have concerns about the source of his knowledge since it is not explicitly stated in his affidavits.

[30] What is also troubling to me is that, in the face of the clear defaults under the Agreement and the Bank's intention to act on those defaults through the later demands and the appointment of Bowra, Mr. Mankatala did not see the clear need for him to address the situation. Instead, he saw fit to leave the country for an extended period of time. It is not clear why he went to India - whether it is a family

holiday or some other business trip or some combination, although at bottom, it likely does not really matter. The point is that he has absented himself from the country and has acted in such a fashion so as to put up a wall to the Bank in terms of dealing with this matter until he chooses to come back to the Lower Mainland and he chooses to abide by the Agreement, which was in place months ago.

[31] What is also somewhat mystifying is why Mr. Mankatala is not able to properly instruct Gian's counsel and provide evidence to this court as to what is happening with the property despite the fact that he is in India. As far as I'm aware, India is a very technologically advanced country with phones, fax machines and the internet with email capability. In that event, it is not clear to me why Mr. Mankatala has chosen to put up this wall of silence in terms of responding to this application.

[32] A similar issue was addressed by Willcock J. in *Textron* where there had been less than full disclosure of refinancing plans. The Court considered that there was real risk to the plaintiff's equity and real doubt about the prospect of recovery of the debt. It seems to be common ground that the Bank is not fully secured against Gian's property, however, there is collateral property also secured in favour of the Bank. No appraisal evidence has been put before me. Further, even if there is further value in the collateral property, the fact remains that there is insufficient value in Gian's property over which the principal security is registered.

[33] The other matter is the Agreement itself, upon which I place considerable reliance. There are key provisions of the Agreement which address the consequences of first entering into the Agreement and, secondly, not abiding by it. Those provisions are:

- a) paragraph 8: the respondents waive various defences against the Bank;
- b) paragraph 11: the respondents acknowledge that the Forbearance Period (to December 15, 2016) is reasonable in the circumstances;
- c) paragraph 27: in the events of a default under the Agreement, the respondents acknowledge and agree that the Bank has the immediate

right to terminate the remainder of the Forbearance Period, without further demand or notice and proceed to enforce the security and recover the debt; and

- d) paragraph 28: this provision more directly addresses the right of the Bank to appoint a receiver in the event of default under the Agreement:

In the event that the Bank commences proceedings to enforce some or all of the Security, either at the expiry of the Forbearance Period or after the Forbearance Period has been terminated at the Bank's election, each of the [respondents] shall consent to the appointment of a Receiver or Receiver/Manager over any or all of the [respondent's] assets and undertakings charged by the Security or New Security, and that any such Receiver or Receiver/Manager shall have conduct of sale of the personal property and lands charged by the Security and the New Security.

[Emphasis added].

[34] It is clear that the Forbearance Period has been terminated at the Bank's election, again by reason of the defaults under the Agreement that I have already discussed.

[35] The Bank's counsel has referred me to *Alexander v. 2025610 Ontario Limited*, 2012 ONSC 3486. Justice Brown, as he then was, was similarly considering a forbearance agreement and circumstances. Also, similar to what was before the Court in *Textron*, *Alexander* concerned a scenario where the bank had obtained agreement, through a forbearance agreement, for access to books and records and financial information that was intended to allow the Bank to review the situation and its security position. That access was not provided. Brown J. stated that:

[42] ... The respondents were granted forbearance on very strict terms, understandably strict in light of the respondents' failure to account for the significant sums loaned by the applicants. As I have found, after the execution of the Forbearance Agreement the respondents failed to provide timely and meaningful access to information about the accounts ...

...

[46] ... The April Forbearance Agreement signified that the respondents realized that if they were to secure the forbearance of significant creditors, they would have to provide transparency to the creditor/applicants about the affairs of the remaining operating company ... I reiterate: those were heavy

terms, but reasonable in the circumstances and ones freely entered into by the respondents with the benefit of independent legal advice.

...

[49] Moreover, I regard that conduct, against the backdrop of all three respondents agreeing to the obligations contained in the Forbearance Agreement, as making it just and convenient to appoint a receiver over the three respondents ...

[36] Here, Gian's and Mr. Mankatala and the other guarantors secured the Bank's forbearance, which avoided the Bank acting under its security over two months ago. The respondents agreed to do certain things, which included more particularly, providing the Bank with disclosure of information which would provide the Bank with information about the state of its security and about Gian's intentions and perhaps ability towards paying out the Bank. The respondents did not live up to their obligations under the Agreement and despite defaults and the Bank's attempt to secure compliance without acting on its security, they have seen fit to not respond at all to the Bank concerning the situation. It is difficult to see what they could have said in light of their clear consent to the Bank's appointment of a receiver in that event.

[37] It strikes me that Mr. Dass' evidence that building No. 1 is about to complete and that building No. 6's units are under contract (all statements without disclosing the source of his knowledge and providing supporting documentation) rings hollow in light of the abject failure of Gian's or Mr. Mankatala to provide proper documentation in accordance with what was agreed to over two months ago.

[38] The Bank's application was ultimately argued in the face of Gian's adjournment application, with Mr. Markus taking the position that the corporate respondents should be given time to file their pleadings in the usual course and that the individual respondents should be properly served after which they could file whatever materials they might wish.

[39] In that situation, the court would usually, as I intend to do on this application, address the matter on the basis of urgency. Both counsel have made submissions on that point.

[40] I agree with Mr. Markus that there is no urgency in the usual sense. There are no buildings that are unattended, as far as anyone knows. There are no financial matters that are urgent in the sense that the Bank's security might be jeopardized. However, I do consider that, in a more general sense, there is urgency when one looks at the circumstances relating to the Agreement and the lack of information and documentation from the respondents. I conclude that there is some element of urgency which justifies the Bank taking action on this matter, particularly in light of the factors that I have already discussed, including the consents, and Mr. Mankatala's clear disinclination to properly address the Bank's concerns.

[41] Accordingly, having reviewed all of the circumstances and after considering the relevant factors as discussed in *Maple Trade* and *Textron*, I am satisfied that it is just and convenient to appoint the receiver in this case and I would exercise my discretion to do so.

[42] Having said that, I am mindful of the sniff of evidence that suggests that some sales are underway. In addition, there is some suggestion -- and I stress the word "suggestion" and not evidence -- that Gian's may be refinancing the Bank's debt once the building No. 1 sale proceeds are received if, in fact, they are received on the anticipated closing date is now said to be November 15, 2016.

[43] Accordingly, what I propose to do is restrict the receiver's powers to less than what had been sought by the Bank. The application to grant the powers sought in paragraphs 3(k), (l) and (m), relating to marketing and sale of the secured properties, is adjourned generally. In addition, the borrowing powers of the receiver will be \$100,000, not \$500,000. My intention is to give Bowra sufficient leeway to allow the receiver to find out what is going on so that it has a better sense of the state of affairs, such as of whether there are sales underway. If the Bank agrees with any sales to be completed, as it would in the normal course, then those can take place. Further, this will give Gian's and Mr. Mankatala the opportunity to communicate with Bowra, either directly or through Mr. Markus concerning the state of affairs. Those discussions may be such that the Bank is convinced that there is

some reason to hold the receivership in abeyance pending the later hearing to be scheduled.

[44] MS. FERRIS: My Lady, the only suggestion or request, maybe, as opposed to adjourning generally, I'm wondering if we could adjourn it to a fixed date, and then if we have to adjourn that, so be it. The reason I ask for that is I am getting concerned that Mr. Markus is not going to be counsel anymore. And I have Rosborough who, you know, kind of slip in and out. And so I thought if we actually had a date and if it turns out we don't need it, well, we can always adjourn it, but at least we know we're working towards a date.

[45] THE COURT: What date would you suggest?

[46] MS. FERRIS: Mr. Markus is telling us this sale which was supposed to close two days ago, it hasn't closed. He was talking about the sales on building No. 6 closing by the end of November. So I'm thinking the first week of December.

[47] MR. MARKUS: Could Your Honour make that December 15, My Lady?

[48] THE COURT: And the rationale for that, Mr. Markus?

[49] MR. MARKUS: The rationale again is with all the delays that have been evident in this so far, by saying the end of November, giving the extra two weeks is not going to make any difference to the receivership at all.

[50] THE COURT: I will give you to December 9. I am sitting that time and I am prepared to hear it. I am reluctant to seize myself of the matter because if I am not available, you may find it hard to find time in my rota. I will seize myself of the matter, but that will be on the understanding that if I am not available, you can appear before someone else.

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Haro-Thurlow Street  
Project Limited Partnership*,  
2024 BCSC 47

Date: 20240111  
Docket: H230802  
Registry: Vancouver

Between:

**Bank of Montreal**

Petitioner

And

**Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd.,  
Harlow Holdings Ltd., 1104227 B.C. Ltd., Cloudbreak Holdings Ltd., CM  
(Canada) Asset Management Co. Ltd., Forseed Haro Holdings Ltd., 1115830  
B.C. Ltd., Terrapoint Developments Ltd., Kang Yu Zou, Wei Dong, Wei Zou, Xia  
Yu and Treasure Bay HK Limited**

Respondents

Before: The Honourable Justice Fitzpatrick

## Reasons for Judgment

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M. Gill

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Limited Partnership, Harlow Holdings Ltd.,  
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Ltd., Cloudbreak Holdings Ltd., CM  
(Canada) Asset Management Co. Ltd.  
,1115830 B.C. Ltd. and Kang Yu Zou:

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R. Clark, K.C.

Counsel for Terrapoint Developments Ltd.:

C. Brousson

Counsel for Wei Dong, Wei Zou and Xia Yu: D. Fitzpatrick

Counsel for Treasure Bay HK Limited: D. Shouldice

Counsel for Deloitte Restructuring Inc, the  
Proposed Receiver: C. Hildebrand

Place and Date of Hearing: Vancouver, B.C.  
December 22 and 28, 2023

Place and Date of Judgment: Vancouver, B.C.  
January 11, 2024

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## **INTRODUCTION**

[1] The petitioner, Bank of Montreal (“BMO”), is a secured creditor of the respondent limited partnership who owns a development property in downtown Vancouver, BC. BMO is owed over \$82.2 million in principal and interest (the “Debt”). BMO’s Debt has been in default since July 2023.

[2] In October 2023, BMO commenced this proceeding, seeking to enforce its mortgage and personal security against the property, the debtors and the guarantors of the Debt. On this application, BMO seeks the appointment of a receiver of the real and personal property secured in its favour, effective in early 2024, with the principal purpose of arranging a sale of the property by spring 2024 to repay the Debt.

[3] All of the respondent debtors/guarantors, with one exception, oppose the appointment of a receiver, particularly one having the power of sale. The opposing respondents seek further time – to June 2024 - to arrange a refinancing of the lands, asserting that they are entitled to and need this further time to allow them an opportunity to redeem their equity of redemption.

## **BACKGROUND FACTS**

[4] There is little controversy about the facts as relevant to the issues.

### **The Parties**

[5] The respondent, Haro-Thurlow Street Project Limited Partnership (“HTLP”), is the beneficial owner of the development property in Vancouver (the “Property”). The respondent, Harlow Holdings Ltd. (“Harlow Holdings”), is the legal owner of the Property. The respondent, Haro and Thurlow GP Ltd. (“HTGP”), is the general partner of HTLP. I will refer to all of these respondents collectively as the “Borrowers”.

[6] HTLP is beneficially owned by its limited partners, the respondents, 11044227 B.C. Ltd. (“110”), as to 45%; Forseed Haro Holdings Ltd. (“Forseed”), as to 45%; and Terrapoint Developments Ltd. (“Terrapoint”), as to 10%. 110, Forseed and Terrapoint are collectively called the “Partners”.

[7] 110 is beneficially owned by the respondent, 1115830 B.C. Ltd. (“111”), which is, in turn, beneficially owned by the respondent Kang Yu Canning Zou (“Mr. Zou”). Mr. Zou is a director of HTGP, Harlow Holdings, 110 and 111. He is also a director of the respondents, Cloudbreak Holdings Ltd. (“Cloudbreak”) and CM (Canada) Asset Management Co. Ltd. (“CM”). I will refer to all of these respondents collectively as the “CM Group”.

[8] Forseed, the members of CM Group and Terrapoint are guarantors of the Debt.

[9] The respondent Wei Dong is Mr. Zou’s wife. The respondents, Wei Zou and Xia Yu, are Mr. Zou’s parents (the “Parents”).

[10] The shareholders of HTGP (111 and Forseed being majority), and Intracorp Projects Ltd. (“Intracorp”), an entity related to Terrapoint, a minority shareholder, are parties to a shareholders’ agreement dated September 26, 2018 (the “SH Agreement”). The SH Agreement provides, in essence, that 111 and Forseed shall at all times have a majority of four out of five directors on the board of directors. In addition, the SH Agreement provides that “Major Decisions” by HTLP can be made by majority rule, with any dissenting shareholders having the right to seek arbitration.

[11] In Section 1.1(s) of the SH Agreement, “Major Decisions” include (vi) Incurring any indebtedness in connection with the Lands or Project other than indebtedness under the land and pre-development loan ...”. I assume this means any indebtedness other than the Debt and would include any refinancing of the Debt.

### **The Property**

[12] In August 2018, HTLP was formed for the purpose of purchasing the Property, which is currently a mixed commercial and residential rental building located at the south-east corner of the intersection of Haro and Thurlow Streets in Vancouver.

[13] The Property comprises a rectangular-shaped parcel of land with a total gross surface area of about 43,250 square feet. The Property includes a seven-story

residential strata building and a low-rise commercial building over a common underground parking structure.

[14] The overall plan was to redevelop the existing buildings and construct a 55-story residential condominium tower on the site.

[15] The rental of the buildings on the Property is managed by FirstService Residential BC Ltd. ("First Service"). FirstService manages the buildings, collects the residential and commercial rents and remits the net monthly rental revenue to HTLP's account at BMO. The Borrowers have undertaken to continue this practice through any redemption period.

[16] Net monthly revenue from the Property is about \$175,000 per month. Although these funds are paid to BMO, the amount is insufficient to service the monthly interest expense of the Debt. Historically, this shortfall was paid by some or all of the Partners to BMO.

[17] The Borrowers have carried out extensive pre-application work for the proposed high-rise building or buildings on the Property. Apparently, they have paid more than \$4 million for this work to Intracorp, the development manager of the Property.

### **Financing of the Property**

[18] In August 2018, the Property was purchased for a total cost of \$172,750,000, which includes the purchase price of \$164,750,000, property transfer taxes, commissions and other expenses.

[19] The acquisition costs on closing were financed by the Debt from BMO of approximately \$94 million. In addition, the Partners provided the remainder of the necessary funds by advancing loans totalling approximately \$84.5 million to HTLP.

[20] By January 1, 2023, the Partners had advanced over \$18 million to fund ongoing costs of HTLP. Further contributions by the Partners, or some of them, to

HTLP continued into 2023. As of December 2023, the Partners' total contributions to HTLP exceed \$106 million.

**BMO Debt / Security**

[21] BMO's security against the Borrowers is set out in a credit agreement dated August 21, 2018 (the "Credit Agreement"). The security includes both a first ranking mortgage against the Property and a general security agreement against the Borrowers' personal property.

[22] The Credit Agreement required \$50 million guarantees from Cloudbreak and CM and a \$10 million guarantee from Terrapoint. In addition, the Credit Agreement required the deposit of cash collateral and CM Group and Forseed provided some of this collateral to BMO to secure the Debt, as I will discuss below.

[23] The original term of BMO's loan was to have been for two years, from August 2018 to August 2020.

[24] 110, Forseed and another company have a second mortgage against the Property that was registered in October 2018 (the "Forseed Mortgage"). There is no evidence as to the amount owed, if any, under the Forseed Mortgage.

[25] The Borrowers say that, for many reasons, they have not met the requirements of the City of Vancouver (the "COV") to proceed with the development of the Property, despite substantial efforts to do so over the last five years. The Borrowers have not yet formally applied for a development permit for the Property.

[26] As a result of these delays, the Borrowers and BMO negotiated several amendments to the Credit Agreement. In September 2022, the last amendment to the Credit Agreement provided for an extension of the "Outside Date" to August 31, 2023, which is when the term of the Debt ended.

[27] Various iterations of the Credit Agreement also provided for guarantees to a maximum of \$50 million from 110, 111, CM, Cloudbreak and Mr. and Ms. Zou and guarantees to a maximum of \$7 million from the Parents. The guarantees from the

individuals are secured against various lands held by them, by way of a first mortgage or undertakings not to encumber those lands. The value of the lands held by the individual guarantors, Mr. and Ms. Zou and the Parents, is said to be approximately \$16.9 million.

[28] In early 2023, BMO advised the Borrowers that it would not grant any further extensions of the Debt beyond August 31, 2023. The Debt has now matured and is fully owing.

### **The Borrowers' Sale / Refinance Efforts**

[29] In the face of BMO's refusal to further extend the Loan, in early spring 2023, the Borrowers retained CBRE Limited to solicit offers to purchase the Property.

[30] In May 2023, the Borrowers received six different offers, ranging in value from \$81.5-100 million. Incentives were built into some of the offers which might have resulted in higher purchase prices if certain conditions subsequent had been met. 110 signed a letter of intent ("LOI") in respect of one offer for almost \$93 million (the "Chard Offer"), which was supported by Terrapoint. Forseed refused to approve the Chard Offer and 110 also backed away from its support of it.

[31] Ultimately, none of these offers was accepted by the Borrowers. Mr. Zou states that, while these offers would have generated sufficient proceeds to pay the Debt in full, even with incentives for potential price increases based on favourable development approvals by the COV, all of the offers would have resulted in the Partners, collectively, suffering tens of millions of dollars of losses on their investments.

[32] Terrapoint asserts that the majority partners of HTLP (111 and Forseed) did not provide any "good faith" reason for refusing to proceed with the Chard Offer.

[33] The CM Group and Forseed deny that their rejection of the Chard Offer was done in bad faith. They say that, rather than accepting the loss that would have

occurred, they decided to attempt a refinance of the Debt. They acknowledge that, in the long run, this may prove to be a “bad decision” or “bad business decision”.

[34] In late August 2023, the Borrowers’ provided the only firm evidence of their efforts to refinance the Debt to BMO. This amounted to a very “high level” brief one-page document delivered on August 29, 2023 that provided for a \$80 million first mortgage, which is, of course, not even sufficient to repay the Debt.

[35] Even Terrapoint, a minority stakeholder in HTLP, has little information regarding this proposed refinancing and no information as to any other refinancing options. Terrapoint is not prepared to be a part of any refinancing of the Property. This may or may not prove to be a sticking point, since Terrapoint, through Intracorp, has been involved in the management of the development and construction of the Property to the present time.

#### **BMO Default / Forbearance**

[36] In July 2023, the Borrowers defaulted in payment of the interest amount, when BMO received the rent amounts from First Service, but the shortfall was not remitted by the Partners. There is no evidence from Forseed or Mr. Zou as to what caused the default. Terrapoint offers an explanation, as I will discuss below.

[37] On August 29, 2023, BMO made demand for payment. At that time, the Debt was outstanding at \$95,520,027.39. BMO also made demand on the guarantors. BMO gave notice of its intention to enforce its security against the Borrowers’ property, including the Property, and the collateral security provided by the guarantors.

[38] In August/September 2023, the Borrowers engaged in discussions with BMO with a view to entering into a forbearance agreement. BMO negotiated a forbearance agreement that it understood was acceptable to the Borrowers. Ultimately, in early October 2023, the Borrowers refused to sign the agreement.

[39] On October 23, 2023, BMO filed this proceeding.

### **Treasure Bay**

[40] One significant circumstance relating to the Property and any potential refinancing of the Debt is Mr. Zou's dispute with Treasure Bay HK Limited ("Treasure Bay").

[41] On November 12, 2021, Treasure Bay filed an action in this Court against 111, 110, Mr. Zou, Harlow Holdings and GM International Holding Limited ("GMIH"). Treasure Bay is a minority shareholder of GMIH. Treasure Bay alleges that Mr. Zou breached his fiduciary obligations to GMIH by causing GMIH to advance \$30 million to himself, 111 and 110 without adequate security (the "TB Action"). Treasure Bay alleges that the monies were intended to assist Mr. Zou in purchasing the Property.

[42] On November 12, 2021, Treasure Bay also filed a certificate of pending litigation ("CPL") against the Property, asserting that GMIH is entitled to an equitable mortgage or alternatively, is entitled to trace its loan into the Property pursuant to a remedial constructive trust.

[43] Since March 2022, Treasure Bay and the defendants in the TB Action have been engaged in resolving what the parties call the "pleadings dispute", namely whether Treasure Bay is entitled to proceed with its derivative action without leave of the Court. After this Court's finding that no leave was required (2022 BCSC 761), that decision was upheld in *1115830 B.C. Ltd. v. Treasure Bay HK Limited*, 2022 BCCA 380. On July 20, 2023, leave to the SCC was dismissed: 2023 CanLII 64850 (SCC).

[44] The defendants have now filed an application to remove Treasure Bay's CPL against the Property, arguing that Treasure Bay is not asserting any interest in the Property to support the filing of the CPL as against an interest in land. That application is scheduled for late January 2024.

### **Further Refinancing Efforts**

[45] In Mr. Zou's affidavit sworn December 12, 2023, he provides the only update on the Borrowers' refinancing efforts in the face of BMO's foreclosure.

[46] Mr. Zou states:

In late September 2023, at or about the time forbearance negotiations with the petitioner came to an end, the Borrowers retained consultants to assist them in securing take-out financing.

These consultants have identified a syndicate of three lenders who have indicated a strong willingness to provide the Borrowers with a loan or loans in amounts sufficient to fully repay the Petitioner's loan.

However, the Borrowers' consultants have identified the CPL registered against title to the property in favour of the Respondent Treasure Bay HK Ltd. ("Treasure Bay") as an impediment to the new lenders proceeding to finalize their commitments and provide funding. Accordingly, Borrowers are proceeding with an application to have the Treasure Bay CPL discharged from title. That application is set for January 22, 2024.

The Borrowers are confident that they will be able to secure take-out financing by no later than June 30, 2024.

[47] BMO emphasizes that absolutely no documents have been provided by the Borrowers to support any of Mr. Zou's statements, including the identity or involvement of the "three lenders" or their "strong willingness" to provide financing sufficient to repay the Debt.

[48] As can be seen from Mr. Zou's evidence, the Borrowers are still facing significant headwinds in achieving any refinancing. They could only do so by removing Treasure Bay's CPL or obtaining Treasure Bay's consent. In addition, even assuming that occurs, they have not secured any concrete offers to refinance the Debt.

[49] They are, at best, "hoping" that they will be able to refinance by June 2024.

**BMO Present Position / Concerns**

[50] In July 2023, BMO held \$23.6 million of cash collateral as follows:

- a) \$13,625,000 pledged by Forseed;
- b) \$1,375,000 pledged by 110; and
- c) \$8.6 million pledged by CM Grouse Mountain (LP) Ltd. ("CM Grouse"), which is a company related to the CM Group. Although it is somewhat

unclear, the \$8.6 million seems to be comprised of \$5.6 million in CM Grouse's account and \$3 million in 110's account.

[51] Subsequent to the interest default and the maturity of the Debt, BMO applied the amounts pledged by Forseed and 110 to the principal owing under the Debt.

[52] BMO continues to hold the deposit made by CM Grouse. BMO has not applied that amount to the Debt as BMO has identified some issues that may impede its ability to do so. One of those issues is that Treasure Bay is a minority shareholder of CM Grouse and holds a position on the board of directors. Treasure Bay refuses to consent to BMO applying the cash pledged by CM Grouse against the Debt.

[53] In addition, BMO continues to hold the balance in 110's account of approximately \$3 million. 110 placed those funds in the account pursuant to the Credit Agreement, which required that 110 maintain a cash balance of not less than \$3 million as cash collateral security for repayment of the Debt. However, BMO's counsel states that Treasure Bay has indicated that it may potentially have claims against the \$3 million on deposit for 110. In light of that potential difficulty, BMO has declined to apply those funds to the Debt.

[54] Accordingly, despite the CM Group's attempts to free up further cash in the various accounts at BMO to service the Debt going forward, or pay down outstanding interest, so as to attenuate the risk to BMO going forward, the offered amounts are not issue free and readily available to be used for that purpose.

[55] Currently, the gross monthly interest cost under the Debt is approximately \$620,000 per month. Net monthly revenue from the Property is about \$175,000 per month, resulting in a monthly shortfall of about \$445,000.

[56] As of December 19, 2023, the principal amount owing under the Debt was \$78,256,373.16. Accrued interest amounted to just under \$4 million, resulting in a total amount owing in excess of \$82.2 million.

[57] Peter Mullin, BMO's director of the Special Accounts Management Unit, states that the Borrowers' failure to list or market the Property or pay the monthly interest shortfall has caused BMO to lose confidence that they are working to repay the Debt. In addition, Mr. Mullin is concerned about BMO's position eroding given the accruing interest amounts and the risk of deterioration in the market.

[58] By June 2024, the Debt will be at approximately \$85 million.

### **POSITIONS OF THE PARTIES**

[59] BMO seeks declarations of its mortgage and personal property security and declarations as to their priority. BMO also seeks judgment against the Borrowers. BMO has agreed not to seek any judgments or declaration of security at this time in respect of any of the guarantors.

[60] In addition, BMO seeks the appointment of a receiver of the Borrowers' property that is secured in its favour, including the Property. BMO points to the fact that the Borrowers have now been in default for five months. BMO says that the Borrowers are simply seeking more time for a market reversal or "miracle", all the while disregarding the delay and prejudice that is being visited upon BMO in the face of their unsupported hope that the Property may be worth more than what is owed on the Debt. BMO has lost confidence in the Borrowers' ability to repay the Debt.

[61] BMO wants a timely sale of the Property to be arranged by the receiver. BMO says that it is unreasonable to allow the Borrowers another six months (to June 2024) within which to possibly find the solution to their financing woes, beyond the five months already provided to them, over which time no sale or refinancing has occurred.

[62] After some negotiations with Terrapoint, BMO's proposed order would appoint the receiver effective January 10, 2024. This date would notionally result in the Borrowers having had six months from default to refinance or sell. The proposed order would include the power to manage, although BMO has indicated that it does

not wish the receiver to address the collection of monthly rents, which is currently being done by First Service.

[63] In addition, BMO has agreed that, save with the consent of Terrapoint, the receiver would not set down any application for sale approval until after March 16, 2024, which would allow the Borrowers a total time to redeem of eight months.

[64] Terrapoint supports the relief sought by BMO, stating that it is concerned that BMO is not well secured and may be facing a shortfall, such that it will be called upon its guarantee. Terrapoint wishes to restrict any receiver's ability to manage the Property, given the current arrangements, presumably to reduce costs.

[65] Treasure Bay would like to see a sale of the Property, but it takes no position on the appointment of a receiver.

[66] The Borrowers, the Partners and guarantors (with the exception of Terrapoint) want more time to refinance the Debt – i.e., another six months to June 2024. They dispute that the appointment of a receiver is appropriate, particularly one having a power to sell the Property. They rely on their continued cooperation in remitting the monthly rents to partially pay the interest and in responding to any other request for documentation or information by BMO.

[67] In addition, the Borrowers assert that they are entitled to a six-month redemption period following this hearing prior to any order being granted to authorize a sale of the Property.

## **DISCUSSION**

[68] BMO seeks the appointment of a receiver pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which allows a court to do so if it is “just or convenient” in the circumstances.

[69] BMO does not seek an appointment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as it initially did, so as to avoid any finding that the Borrowers are insolvent.

### **Receiverships Generally**

[70] As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 81, the granting of a receivership order is “extraordinary relief which should be granted cautiously and sparingly”.

[71] I have been referred to what seems to be most of the BC jurisprudence addressing receiverships.

[72] As is well-known, for at least over a decade now, those authorities have invariably endorsed the Court’s consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 [*Maple Trade*] at para. 25; *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 [*Textron Financial*] at para. 50 and many other cases.

[73] The *Maple Trade* factors include:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

[74] In *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348 [*Gian's*] at para. 23, I stated that all relevant factors should be viewed holistically. Recently, Justice Gomery commented to the same effect: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc.*, 2023 BCSC 514 at para. 9.

[75] In *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32 [*Ward Western BCCA*] at para. 49, the court upheld this Court's reasons indexed at *Ward Western Holdings Corp. v. Brosseuk*, 2021 BCSC 919, and confirmed that the above approach remained valid in relation to whether a receiver should be appointed.

[76] Below, I discuss the various circumstances relevant here. While I have not done so for each of the specific *Maple Trade* factors listed above, I have considered them all. Those factors can be considered conveniently within the following headings.

### **Borrowers' / Forseed's Equity of Redemption**

[77] The main plank of the Borrowers' and Forseed's argument is that BMO is attempting to do an "end run" around the usual foreclosure practice so as to defeat their equity of redemption. They stridently object to the appointment of a receiver. In addition, they object to any receiver having a power of sale until after the expiry of a six-month redemption period.

[78] They contend that they are entitled to a six-month redemption period because BMO has failed to establish any "special circumstances" to shorten the "usual"

period. Finally, they say that BMO should be denied any relief at this time and be required to return to the Court for any appropriate relief only after that six-month redemption period which should begin to run from the time of this hearing (i.e. to June 2024).

[79] Both the Borrowers and Forseed have referred to many of the well-known foreclosure authorities that have been applied in BC for decades. In addition to numerous case authorities, this includes Chief Justice McEachern's "On Foreclosure Practice", (1983) 41:6 The Advocate (Vancouver Bar Association) 583. As the Chief Justice states, the "usual" case is that, in the absence of special circumstances, a six-month redemption period will be set, which recognizes the right of the mortgagor to seek either a sale or refinance of the debt in a foreclosure. The onus of proving any special circumstances rests on the mortgagee, usually said to arise from a lack of equity or wasting of the property.

[80] McEachern C.J. was intending by his remarks to bring about consistency in foreclosure proceedings in what were then difficult financial circumstances, a result that was undeniably achieved. However, it is worth noting that he emphasized that his remarks were not "authoritative" and that judges were required to exercise their discretion based on the facts of each case and with regard to the law.

[81] In support of their position, the Borrowers and Forseed refer to *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (C.A.) [Mrazek], where the court upheld an immediate order for sale in foreclosure in light of what this Court found were special circumstances. In *F.B.D.B. v. F.J.H. Constructions Ltd.* (1988), 24 B.C.L.R. (2d) 100 (C.A.), the court discussed the usual procedures in foreclosures.

[82] They also refer to *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252 (C.A.) [Astor Hotel] where the court stated:

[34] In a case like the present, where the fixed charge forms a significant part of the debenture security, I see no reason why the usual rules commonly followed in the foreclosure of real property should not apply. These rules require that except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale in a mortgage until the expiry of the normal redemption period (six months):

see *South West Marine Estates Ltd. v. Bank of B.C.* (1985), 65 B.C.L.R. 328 at 332, 37 R.P.R. 137 (C.A.), where my judgment reads as follows:

If I am wrong in concluding that the courts of equity would intervene to prevent the exercise of a contractual power of sale during the redemption period, it appears to me that this is a proper case for bringing the rules of equity into accordance with modern practice. Firstly, in order that there be certainty in commercial matters it is, in my opinion, necessary that the same principles apply to all proceedings whether by way of foreclosure or by way of exercise of a contractual power of sale. This rule is as follows:

“Except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale until the expiry of the normal redemption period (6 months).”

Secondly, the courts should intervene to protect the equity of redemption. To distinguish between a sale in foreclosure proceedings and a sale made pursuant to a contractual power of sale as a means of permitting the mortgagee to effectively eradicate the equity of redemption is not in accordance with the basic tenets of equity.

[Emphasis added.]

[83] Another authority referred to is *Sun Life Assurance Co. of Canada v. 535401 B.C. Ltd.*, 2001 BCSC 605, where the Court set a six-month redemption period and denied the first mortgagee conduct of sale. Conduct of sale was granted in favour of the second mortgage effective five months into the redemption period.

[84] In *Textron Financial*, Justice Willcock, as he then was, was addressing relief sought by a secured lender, similar to what BMO seeks in this action. That secured creditor sought the appointment of a receiver over a hotel property. It was not a foreclosure. In reviewing the *Maple Trade* factors, at paras. 57–74, Willcock J. considered whether there should be an order for sale before judgment. He referred to the well-settled case law in relation to foreclosures, the power of sale and the right to redeem, including *Mrazek* and *Astor Hotel*. In particular, at para. 57, he referred to the law being clear that an immediate order for sale can only be made in “exceptional circumstances”. I need not repeat his extensive discussion of those case authorities, other than to note that many of them have also been referred to me on this application.

[85] In *Textron Financial*, Willcock J. then framed the issue as being whether a receiver of a business should be appointed with power to sell, given the “general rule” in foreclosures:

[63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

[86] The Borrowers and Forseed also rely on *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899 [*IMOR Capital*]. In that case, the secured creditor sought to enforce its debenture security and appoint a receiver with power of sale. The debtor did not oppose the appointment, but disagreed that the receiver should have the power to sell.

[87] In *IMOR Capital*, Justice Burnyeat reviewed many of the foreclosure authorities. At para. 24, he stated that he was satisfied that a redemption period should be set. He found that the secured creditor was “amply” secured. He then set a six-month redemption period and adjourned the application to empower the receiver to sell.

[88] Arguments similar to those advanced by the Borrowers - concerns about truncating a redemption period - were considered by Justice Horsman, as she then was, in *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Inc.*, 2021 BCSC 2449 [*Prospera*] at para. 27. In that foreclosure, Order *Nisi* had been granted and a redemption period set. Prior to the expiry of the redemption period, the petitioner applied to appoint a receiver with power of sale. At paras. 34 and 40, Horsman J. addressed these concerns by granting the receivership order but adjourning the application with respect to the power of sale, with liberty to apply after the expiry of the redemption period.

[89] The Borrowers and Forseed refer to the granting of a sale power to a receiver as negatively affecting their ability to redeem. They point to the comment in *Textron Financial* at para. 86 that:

As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

[90] In making the above comment, Willcock J. appears to have been referring to *Mrazek*, where the court stated:

[13] The law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances. See *Devany v. Brackpool* (1981), 31 B.C.L.R. 256, 21 R.P.R. 100, 127 D.L.R. (3d) 498 (S.C.) where a number of authorities are reviewed by Taylor J. See also *Canlan Invt. Corp. v. Gibbons*, 42 B.C.L.R. 199, [1983] 3 W.W.R. 226 (S.C.) and, in particular at p. 228, where the judgment of van der Hoop L.J.S.C. reads in part as follows:

The petitioner may be granted an order for sale in lieu of an immediate order absolute at the hearing of the petition where the facts set out in the material justifies such an order. If a sale is approved, the mortgagor then loses the right to redeem, except in very unusual circumstances, but is still liable for any deficiency outstanding on the judgment on the personal covenant to pay. *It is therefore only under very clear circumstances that an immediate order for sale should be granted.* [The italics are mine.]

[91] However, a reading of the cases referred to in *Mrazek* confirms that the order that results in an extinguishment of the equity of redemption – or “precludes” it - is not one for “conduct of sale”, but an order *approving* a sale, which has the same effect as the one arising from the granting of an order absolute of foreclosure.

[92] This result is in accordance with well-established BC law which follows *Pew v. Zinck*, [1953] 1 S.C.R. 285, as was recently described in *Accepted Financial Corporation v. 1225614 B.C. Ltd.*, 2022 BCSC 942 by Justice Weatherill:

[34] Accepted Financial points to the general rule that an owner cannot redeem, and the court has no jurisdiction to order the redemption of, a mortgage after an order approving sale has been made: *Montreal Trust Company v. Brown et al.*, 1974 CanLII 1108 (B.C.C.A.) [*Montreal Trust*]; *Farmers & Merchants Trust Company v. Church*, 1977 CanLII 312 (B.C.S.C.).

See also *Galway Capital Corp. v. Nikolov*, 2005 BCCA 375 at para. 6; *Pollard v. Regional District of Central Okanagan*, 2005 BCCA 159 at para. 30.

[93] Accordingly, a redemption can take place at any time prior to a sale being approved by the Court on application by any receiver.

[94] Here, even if the receiver was granted the power to sell, and with BMO having undertaken not to apply for any sale approval until after March 15, 2024, there could not be any extinguishment of the equity of redemption until court approval of a sale. Having said that, I accept that any power to sell does affect the Borrowers' equity of redemption in terms of shortening the time allowed to the debtor to refinance or sell.

[95] The issue could be considered through the lens of either foreclosure or receivership, as both are paths that a secured creditor, such as BMO may follow. As many cases illustrate, even within a foreclosure, receivership appointments may be sought. A secured creditor is entitled to elect the means by which the security will be enforced, as provided in the Credit Agreement, subject of course to the Court granting any relief sought from it.

[96] In foreclosure law, the Court is able to exercise its equitable jurisdiction to fashion a redemption period. The practice in most cases is to set a six-month redemption period, save in special or extraordinary circumstances. The onus in establishing that a shortened redemption period should be set rests on the mortgagee to prove such "extraordinary" or "special" circumstances. In most cases, those circumstances will be a proven risk by a lack of equity (either presently or over the redemption period) or some jeopardy to the property that requires immediate attention.

[97] In this case, BMO has chosen to pursue a receivership, not a foreclosure.

[98] In receivership, as I stated above, a secured creditor also bears the onus of establishing the appropriateness of the appointment, again recognizing that it is "extraordinary relief which should be granted cautiously and sparingly". If the

appointment is appropriate, the Court will then proceed to consider what powers should be granted to the receiver, including whether there should be a power of sale and, if so, when any sale powers should be effective.

[99] To that extent, there is great similarity in the test to be applied in both paths – whether foreclosure and/or receivership - in that the onus rests of the secured creditor/mortgagee to show special circumstances or justify the extraordinary relief sought.

[100] BMO does not dispute that there is an equity of redemption, although at this point, it is technically held by Forseed given that the Borrowers transferred their equity of redemption to Forseed under the Forseed Mortgage which is registered after BMO's mortgage. BMO also does not dispute the equity of redemption is a relevant consideration here.

[101] In my view, the above case authorities support the proposition that the Court should consider the debtor's equity of redemption in terms of whether a receiver will be appointed and, if so, whether that receiver will be granted the power of sale and when. Such a consideration is clearly relevant to the question as to whether any such appointment and power is "just or convenient", again having regard to the nature of the relief sought. In addition, a consideration of any equity of redemption also comes within the *Maple Trade* factors – factor (k) – in relation to the "effect of the order upon the parties".

[102] I respectfully agree with the comments of Justice Gomery in *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406 emphasizing that procedures in receivership, perhaps more so than in foreclosures, are flexible. This is consistent with the needs and often complexity of insolvency scenarios which require consideration of many factors. He stated:

[73] The procedure in receivership proceedings is flexible. There is no requirement that a creditor obtain an order nisi before applying for an order for sale, for example. However, deference is still afforded to a debtor who wishes to redeem. *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, involved a sale by a court-appointed receiver/manager in which the debtor sought to tender the amount owing and redeem at the

hearing of an application to approve a sale of the debtor's assets. At paragraph 27, Justice Tysoe, as he then was, observed that:

Whenever there is a court-ordered-sale process, it is always implicit that the conduct of sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court. I am aware of no authority to the effect that the granting of conduct of sale precludes the debtor from redeeming the property. Allowing a redemption of the mortgaged property in these circumstances does not blemish the integrity of the court process but, rather, it represents the court process at work.

[103] Seen in that light, and recognizing that an equity of redemption exists, even in a receivership, the true issue in that event is what amount of time should be afforded to the Borrowers and/or Forseed to redeem BMO's mortgage, in the context of whether BMO has established sufficient factors to justify whatever period of time is sought. Again, that will be a decision of the Court taking all of the circumstances into account.

[104] The Borrowers also assert that, since a redemption period should be set, it should be six months from the date of order, citing *Dass v. Rumball*, 2015 BCSC 343 at para. 70 and *Century Services Corp. v. LeRoy*, 2021 BCSC 1285 at para. 192. Both cases allowed a six-month redemption period in foreclosure proceedings, as there was no basis to shorten the period. These cases illustrate the usual procedure, but do not stand for the proposition put forward by the Borrowers in the sense of *requiring* that a redemption period run from the date of the hearing.

[105] In any event, what BMO proposes is the receiver having the power of sale in the near future, which effectively amounts to recognizing a six-month redemption period from the date of default (July 2023) or a shortening of the time for redemption, which is open to the Court to consider.

### **Nature of the Property**

[106] Attempts by the Borrowers and Forseed to minimize the complexity of the property secured in favour of BMO, including the Property, are without merit.

[107] The Property is not a residential home that can be easily listed on the MLS.

[108] The Property is a tenanted commercial and residential complex, i.e. an operating business. It is also a unique development property, which will attract only a certain cohort of potential purchasers. It is well taken on this application that the Borrowers' own lack of success in advancing the development over the last five years may be relevant to any purchaser who would similarly seek to develop the Property.

[109] I agree with BMO that selling the Property will require the specialized expertise of a receiver to competently list and market the property. This may include the receiver retaining a commercial real estate brokerage, just as the Borrowers did in spring 2023.

[110] Any receiver will have to undertake certain investigations and complete due diligence to prepare an appropriate sales process. I would expect that financial information would be reviewed as part of that process. I expect that there will be the need to prepare complex sale documentation, such as teasers, non-disclosure agreements and the like. I expect a data room will be set up and populated to assist prospective buyers with the necessary due diligence to make an informed offer.

[111] It is uncertain whether the Borrowers will be cooperative in the context of a sales process, although I acknowledge their counsel's submission that they have not refused to satisfy any request to date.

[112] All of this is to say that a sales process for the Property can be expected to take some time, perhaps months. Toward that end, it will be necessary to grant an order appointing a receiver with appropriate powers relating to access to the Property.

### **BMO's Security**

[113] Under the *Maple Trade* factor (g), BMO has the right to appoint a receiver under the documentation provided for the loan. BMO has not appointed a receiver; rather, BMO seeks a court appointment, as it is entitled to do in the Credit

Agreement, particularly since any sale would require court approval and a vesting order.

[114] As was stated in *Prospera* at para. 24, where a secured party is entitled to appoint a receiver, the “extraordinary nature of the remedy is less central to the inquiry”.

[115] The undisputed fact is that BMOs’ Debt and security have been in default since July 2023 and demand for payment in full was made in August 2023.

[116] Nevertheless, I accept that this factor is but one factor to be considered and no presumption of entitlement to a court appointment arises from the fact that the Credit Agreement allows for such an appointment: *Textron Financial* at para. 55; *Prospera* at para. 24; *Ward Western BCCA* at paras. 62–66; *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, 2023 BCSC 1158 at paras. 76–80.

#### **Risk to BMO / Terrapoint**

[117] The parties very much disagree as to whether or not BMO is at risk in terms of recovering the Debt.

[118] The amount of the Debt is significant. Further, the ongoing increase in the debt is also significant, with over \$4 million of accrued interest already owed.

[119] The Borrowers refer to an appraisal dated July 31, 2023 prepared by L.W. Property Advisors. This document indicates an appraised value of \$192 million as at July 31, 2023. However, this valuation is based on the Property’s development potential, not its current value as is. In my view, this appraisal is more aspirational, than real, particularly since the Borrowers have been singularly unsuccessful in advancing their development efforts over the last five years and no doubt significant funds must be spent in the future toward creating the development that is being “appraised”.

[120] Further, there is no evidence that any lender would consider this appraisal as supporting lending value in respect of any refinancing.

[121] The 2023 BC Assessment indicates that, as of July 2021, the Property had a value of \$107,980,400; as of July 2022, the Property had a value of \$98,042,000. BMO emphasizes that this represents a 9% decline from 2021-2022.

[122] The sales process conducted in spring 2023 is undeniably the most reliable indication of value, assuming no change in the market has taken place since then.

[123] In addition to the BMO default, HTLP is also in default of paying its 2023 property taxes. As of December 2023, the amount owed is \$355,850.09.

[124] The only evidence, such as it is, concerning refinancing, indicates a lending value of \$80 million, suggestive of the fact that the value of the Property is not as high as the Borrowers would suggest.

[125] Evan Allegretto, Terrapoint's representative, states in his affidavit sworn in December 2023 that the real estate market has changed considerably since August 2023, likely resulting in a lower value for the Property than even the Chard Offer. He points to: higher interest rates; weaker sales data; increased tightening of credit; increased rates of foreclosures reducing overall valuations; limited number of potential purchasers who are able to purchase the Property due to its size, price and development requirements; and, increased construction costs.

[126] Forseed objects to Mr. Allegretto's evidence as being impermissible expert evidence and not properly before the Court as such. I agree that no expert evidence is before me, however, Mr. Allegretto's evidence is not put forward as expert evidence of value; rather, it represents his actual observations of factors which are well taken as being relevant to the real estate market, particularly in relation to development lands, such as the Property.

[127] Terrapoint supports the appointment of a receiver to sell the Property. It does not believe that BMO is well secured and it is concerned that any delay of repayment will be result in BMO suffering a shortfall, which could result in Terrapoint being called upon under its guarantee.

[128] The Borrowers' position, that BMO should be delayed in being granted any right of sale until after June 2024, would significantly expose BMO to more risk. When one considers that any sales approved after that time would further delay repayment, any sale would have to achieve *in excess of* \$85 million (to account for a further six-months interest (\$2.7 million)) and pay outstanding and accruing property taxes, commissions on a sale and receiver expenses.

[129] Even if one accepts that the real estate market is not declining, but remaining stable, this scenario puts BMO into a far riskier recovery situation than what presently exists.

[130] I reject the Borrowers' submission that there is "sufficient equity" in the Property to justify further delay to June 2024.

[131] I conclude that BMO is at some risk now and faces increasing risk of being under-secured in respect of the Property if there is any further delay. It is no answer that the guarantors point to their own risk under the guarantees and the collateral security that some of them have given. At this stage, BMO is entitled to relief in respect of the assets of the Borrowers that secure the Debt. This risk is not mitigated by the exposure of the guarantors who have their own real assets and properties at risk, particularly given Mr. Zou's own refusal to fund 110's capital contributions to HTLP since 2022.

### **Dysfunction of HTLP?**

[132] Terrapoint asserts that the management of HTLP is dysfunctional.

[133] Terrapoint states that Forseed has, since August 2022, failed to make required capital contributions to HTLP. Currently, Forseed owes approximately \$3.4 million. 110 has also failed to make required capital contributions to HTLP and currently owes approximately \$360,000.

[134] To avoid default in the Debt, Terrapoint made capital shortfall loans of approximately \$1.4 million to May 2023. When that funding stopped, the default in the Debt occurred.

[135] The CM Group and Forseed acknowledge that they have not made certain contributions to HTLP when required. They defend that position by pointing to the \$15 million cash collateral that they provided to BMO, which has now been applied to the Debt.

[136] Terrapoint remains frustrated by the fact that all of the Partners agreed on the sales process in spring 2023 and 110, at least initially, signed the LOI for the Chard Offer. Only later did 110 and Forseed vote against proceeding with any sale.

[137] I agree that the see-sawing of actions on the part of 110 is puzzling. Mr. Zou's stated reason to reject the offers given that substantial losses would occur is understandable, but only to a point. It is difficult to see that the Borrowers could have deluded themselves into thinking that the Property was worth the same or more than they had invested in it some years ago.

[138] The Property is worth what third parties will pay for it. The Property is not worth what an owner may have initially paid for it. Further, any refinancing of the Property by a lender will inevitably be tied to what the Property is worth now, not what it might be worth in the future.

[139] The only way to avoid the potential difficulty of a delta arising between what the property is worth and what amount can be secured by way of refinance is to offer financial resources from other persons – such as the guarantors – to backstop the loan. There is also the difficulty of servicing the debt, and the fact that the current rents from the Property do not service the Debt. No lender would advance funds without this shortfall being addressed.

[140] Here, all of this difficulty would have been avoided if 110 and Forseed had continued to make their capital contributions so as to allow ongoing interest payments to BMO to August 2023, during which time they should have arranged for

refinancing to repay BMO in August 2023. Presumably, such contributions would also have allowed HTLP to make property tax payments.

[141] It is telling that the CM Group and Forseed are unwilling to make any further payments to BMO to cure the interest defaults, which may have alleviated risk to BMO and may have allowed them more time to address the CPL issue and refinance the Debt. This is contrast to the debtor's proposal to make significant payments to delay the receivership in *Maple Trade* (paras. 3 and 27) and *Textron Financial* (para. 17), which were both factors considered by the Court in delaying either the receivership or granting the receiver the power of sale.

[142] What is also concerning is the apparent sequential approach of the Borrowers to resolving what was a well-known financial deadline in August 2023 when the Debt matured. In April 2023, the decision was to only pursue a sale, not a sale or refinance in tandem. Only after the sale efforts were abandoned, were some efforts made in August 2023 to refinance. By any measure, those were completely inadequate to even pay out BMO.

[143] Now, four months later, the Borrowers are still only suggesting some refinancing efforts, without providing anything concrete to support their bald statements. Those supposed refinancing efforts are, to use BMO's counsel's word, "opaque" and not illuminating at all in terms of what has been tentatively done and what results, if any, achieved: *Textron Financial* at para. 78; *Gian's* at paras. 30–32.

[144] I agree that BMO and Terrapoint's concerns about the ability of the Borrowers to refinance are valid. No credible term sheet has been provided to date, even one that assumes the removal of Treasure Bay's CPL. There is nothing to indicate what financing might be available to the Borrowers, including whether other financial supports are required and, if so, whether those are available. There is some uncertainty as to whether the Borrowers can even refinance without the involvement of Terrapoint, who point blank now refuses to be a part of any such effort.

[145] Further, there is a complete lack of evidence as to how the Borrowers and Forseed intend to address the Forseed Mortgage in terms of any refinancing. As the saying goes, you foreclose down, redeem up. There is no information even as to what is owed under the Forseed Mortgage, let alone any comment by Forseed as to it having any intention to redeem the Property in respect of the Debt, which it is entitled to do.

[146] The Borrowers and Forseed have known since September 2022 that the Debt was going to mature in August 2023. Since at least that time, they have had the ability to redeem the Property, but they had failed to do so. It can hardly be suggested that they have acted with any sense or urgency, or even timeliness, toward resolving the issue with BMO.

[147] While I would not necessarily agree with Terrapoint that the management of HTLP by the Partners is “dysfunctional”, it is certainly challenged and somewhat in disarray in terms of direction and results.

#### **Balance of Convenience to the Parties**

[148] The CM Group and Forseed’s response to Terrapoint’s concerns regarding the lack of any sale or lack of support that a refinance is even possible is that, if it turns out that their decisions were “bad business decisions”, they will suffer greater losses than Terrapoint.

[149] At bottom, the CM Group and Forseed now seem keenly focussed on seeking to minimize their own downside, and hope for an upside, while remaining unconcerned about the risks faced by BMO and Terrapoint as the matter is delayed.

[150] The Borrowers also allege that a receivership will result in prejudice to them arising from the stigma associated with the appointment of a receiver such they will be unable to secure new financing. They cite *Korion Investments Corporation v. Vancouver Trade Mart Inc.*, [1993] B.C.W.L.D. 2928 (S.C.) at para. 12, which was referenced in *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 at para. 44.

[151] BMO disagrees, referring to *Prospera* at para. 32, where Horsman J. found that the reputational impacts of the appointment of a receiver would not significantly impair a debtor's ability to refinance, beyond the impairment that had already accrued at the outset from the foreclosure proceedings themselves.

[152] BMO's legal proceedings have already begun and the result has been that the Borrowers' financial difficulties have now been fully disclosed to the public. In light of this, I agree with BMO that any receiver appointment is unlikely to give rise to any further "stigma" or difficulties. In some quarters, the appointment may be seen as beneficial toward maximizing value for the Property in the sense of telling the market that professionals who have expertise in the real estate market will be addressing the matter.

[153] BMO says that the Borrowers and Forseed have been given substantial time already to remedy their default. After the July 2023 interest was not paid, BMO engaged in good faith discussions with them upon which BMO would forbear from any enforcement action.

[154] That forbearance agreement was not signed. This resulted in further delay in filing the action and now a five months delay after the first default. BMO says that the Borrowers have had time to address the Debt, by either paying the interest, securing a financing commitment, even a conditional one, or list the Property for sale.

[155] The Borrowers object to any suggestion that they have deliberately delayed BMO in taking steps under its security. Somewhat surprising, they say that there was nothing to prevent BMO from commencing proceedings sooner than it did and that BMO could have commenced proceedings in July 2023.

[156] I agree with the Borrowers that they have not deliberately delayed BMO in proceeding under its security. However, on the other hand, BMO has acted in commercially reasonable manner in entering into further negotiations with the Borrowers by agreeing to terms upon which the Borrowers would be given more time

to solve their financial difficulties. It cannot be doubted that this negotiation process was for the benefit of the Borrowers, particularly given their current allegations that the proceedings are publicizing their financial difficulties to the world, including prospective lenders.

[157] At bottom, the Borrowers cannot have it both ways. Having effectively asked BMO to delay matters while a potential forbearance agreement was pursued, they cannot now suggest that the ensuing delay is irrelevant to a consideration of the issues relating to the receivership. I agree with BMO that it would be a perverse situation to do so, and would encourage lenders to immediately commence proceedings and disregard any potential negotiated interim solutions. Generally speaking, in insolvency proceedings, a solution without litigation is one that benefits all stakeholders.

[158] I acknowledge that a receivership, including one that entails sale powers, will have an effect on the Borrowers. However, that must be balanced against the interests of BMO that is entitled to appoint a receiver and is entitled to realize on its security, failing repayment, within a reasonable period of time, after default (here, July 2023) and where risk of repayment exists.

### **CONCLUSION**

[159] I conclude from all the circumstances that BMO has met its burden to establish that it is just and convenient to appoint the receiver. I agree with BMO that it is necessary to have the receiver appointment effective as of January 12, 2024 so as to allow the receiver to investigate the circumstances of the Property and the rental business with a view to considering how a sales process might be implemented.

[160] I am also satisfied that the receiver should be granted the ability to access the Property and the books and records of the Borrowers. The receiver will also have the ability to manage and operate the business (para. 2(c) of the initial draft order), although it is my intention that the receiver will seek to maintain the current operations as much as possible, so as to minimize receivership costs. This would

include continuing to allow for the collection of rents by First Service, as before. I do so on the basis that some oversight by the receiver is appropriate given the ongoing leaseholds, particularly as to how those might affect any sale or refinance in the future.

[161] I would also expect that, if the receiver considers that changes to the current management of the Property are required to be made, advance notice will be given to the Borrowers and the Partners so that they may provide input or, if necessary, apply to the Court.

[162] In light of the somewhat minimal, and what are described as “hopeful” efforts on the part of the Borrowers to refinance, I intend to allow them more time to do that, before the receiver embarks on a sales process.

[163] I have concluded that the further time to be allowed to the Borrowers will be more than what was sought by BMO, but less than what was sought by them. I cannot conclude that it is appropriate to allow the Borrowers and Forseed to delay matters until after June 2024, which would effectively allow them a total period of 12 months to redeem. During that time, there would be increasing risk to BMO, particularly given the additional \$2.7 million in interest that would accrue.

[164] The receiver is appointed as of January 12, 2024, but will not be empowered to undertake any sales efforts until after February 23, 2024. In addition, the receiver will be unable to file any application for approval of any sale until after April 26, 2024.

[165] Forseed made certain submissions in relation to the provisions in the draft order regarding the execution of documents by the receiver. As that provision is in relation to the Property only, and not relating to the Borrowers generally, that is appropriate. I agree that amendments are necessary to the order with respect to the initiation or management of legal proceedings in relation to the Borrowers, which would include their ability to defend this proceeding and also the TB Action. That provision regarding the powers of the receiver should be amended to exclude those legal proceedings.

[166] Finally, I decline to authorize the receiver to exercise shareholder, partnership, joint venture or other rights that may be held by the Borrowers. Such a provision may restrict their ability to refinance. Generally speaking, nothing in the receivership order should be taken as restricting the ability of the Borrowers to pursue refinancing of the Debt. The receiver has liberty to apply to exercise any such rights as may be appropriate beyond what is already granted.

“Fitzpatrick J.”

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Peakhill Capital Inc.*,  
2024 BCCA 246

Date: 20240702  
Docket: CA49320

Between:

**His Majesty the King in Right of the Province of British Columbia**

Appellant  
(Respondent)

And

**Peakhill Capital Inc.**

Respondent  
(Petitioner)

And

**KSV Restructuring Inc., Cenyard Pacific Developments Inc.,  
and Cenyard Southview Gardens Ltd.**

Respondents  
(Respondents)

Before: The Honourable Mr. Justice Harris  
The Honourable Mr. Justice Voith  
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated  
August 25, 2023 (*Peakhill Capital Inc. v. Southview Gardens Limited Partnership*,  
2023 BCSC 1476, Vancouver Docket S231065).

Counsel for the Appellant:

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W.L. Roberts  
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B. Hunt

Place and Date of Hearing:

Vancouver, British Columbia  
June 3, 2024

Place and Date of Judgment:

Vancouver, British Columbia  
July 2, 2024

**Written Reasons by:**

The Honourable Mr. Justice Harris

**Concurred in by:**

The Honourable Mr. Justice Voith

The Honourable Justice Winteringham

**Summary:**

*This case concerns an order under the Bankruptcy and Insolvency Act [BIA] approving a transaction, known as a reverse vesting order (“RVO”), designed to avoid provincial property transfer tax for the benefit of creditors. The appellant Province submits that the judge erred: by grounding jurisdiction for the RVO in the BIA; by contravening s. 72(1) of the BIA in granting an order that abrogates the Property Transfer Tax Act [PTTA]; and in exercising his discretion to grant the RVO.*

*Held: Appeal dismissed. Section 243 of the BIA confers jurisdiction to grant an RVO in a receivership; the appellants did not satisfy the Court that the transaction at issue undermines the PTTA; and finally, the judge reasoned that the RVO furthered the purpose and object of the BIA, namely by maximizing return for creditors while balancing other risks. He did not err in exercising his discretion.*

**Reasons for Judgment of the Honourable Mr. Justice Harris:****Introduction**

[1] The appellant, the Province, appeals from an order pronounced in a receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA], approving what is referred to as a reverse vesting order (“RVO”).

[2] Reduced to its essentials, this RVO approved a transaction whereby the shares of the insolvent debtor were sold to a purchaser. As part of the transaction, the unwanted assets and liabilities of the debtor were stripped out of the company and transferred to another corporate entity (the residual company), leaving only the valuable real property as an asset of the company. The sale of the shares therefore transferred the beneficial interest in the property to the purchaser of the company without transferring title to the underlying real estate asset. By avoiding the transfer of title, the transaction did not attract property transfer tax (“PTT”) under the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [PTTA], thereby enhancing, for the benefit of creditors, the value of the estate for distribution to them. If tax were payable, the amount available for distribution to the creditors would have been reduced by the tax owing.

[3] The use of RVOs appears to be a relatively recent innovation in insolvency proceedings. They have been used principally, it seems, in restructuring the affairs

of insolvent companies under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA], (see, e.g., *Harte Gold Corp. (Re)*, 2022 ONSC 653) or the proposal provisions of the *BIA* (see, e.g., *PaySlate Inc. (Re)*, 2023 BCSC 608 [*PaySlate #1*]). We are told that this case is the first opportunity for an appellate court to consider whether a court in a receivership proceeding has the jurisdiction to authorize an RVO rather than an approval and vesting order ("AVO") involving the transfer of title from the insolvent debtor to a purchaser. It seems that, if such a jurisdiction exists, the parties invite the Court to identify the criteria governing the exercise of discretion to make such an order.

[4] For completeness, the order under appeal also approved an AVO, as an alternative transaction in the event the RVO was improperly approved, for the sale and transfer of the underlying asset, at a reduced price to account for PTT that would then be owing.

### **Reasons for Judgment**

[5] The judge began by outlining the transaction and the rationale for it. He noted, at para. 14, that "(i)t is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately \$3.5 million."

[6] The judge first considered whether he had jurisdiction to make the order sought. The application grounded jurisdiction in s. 243 of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The judge followed a decision of Justice Walker in *PaySlate #1* that had found jurisdiction to grant an RVO in the courts' general jurisdiction under s. 183(1)(c) of the *BIA*. That section grants the Supreme Court of British Columbia "such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act ...".

[7] The judge considered that Justice Walker's decision was a complete answer to the challenge to jurisdiction mounted by the Province. In passing, I comment that I am not persuaded that that was necessarily so, if only because Justice Walker's

decision did not deal with an RVO in the context of a receivership, but dealt rather with a proposal under the *BIA*. The judge in the present case did not go on to decide whether s. 243 also provided the necessary jurisdiction.

[8] The judge then turned to a second argument, rooted in the implications of s. 72(1) of the *BIA*, which limits the jurisdiction of the court such that the *BIA* cannot “be deemed to abrogate or supersede” provincial laws of general application that relate to property and civil rights.

[9] The judge concluded that this argument did not properly relate to jurisdiction, but went to whether an RVO was appropriate on the particular facts of the case. On that question, the judge identified the issue as being whether an RVO may be granted solely for the purpose of achieving a tax benefit.

[10] The judge turned to examine cases in which RVOs had been authorized for the tax benefits they provide. I do not think it necessary to summarize the judge’s analysis of those cases. It is sufficient to observe that the judge recognized that typically RVOs had been used to preserve going concerns or to deal with situations where, for example, licences were not readily transferrable. Moreover, these cases typically involved restructuring, not liquidation. Furthermore, he identified a common theme in the cases: that RVOs should be sanctioned only where they furthered the remedial objects of the legislation under which authorization was sought, and that they were not regarded as routine, the norm, but rather were “exceptional” or “extraordinary”. The judge commented:

[45] There is no doubt that careful consideration is required when an RVO is sought. It is important to observe, however, that much of the reluctance expressed by courts about granting RVOs has arisen because RVOs may be used to circumvent processes in insolvency proceedings which entitle creditors to vote on plans, or may otherwise prejudice creditors.

[11] The judge then turned his mind to the details of the proposed transaction. He considered that the proposed RVO provided approximately \$3.5 million more to the secured creditors than an AVO; that the three secured creditors were owed more

than the recovery available under either an RVO or an AVO; and, that the unsecured creditors or residual claimants were “out of the money”. He reasoned:

[51] There is no suggestion in this case that the rights of creditors are being compromised or that their interests would be prejudiced by the granting of an RVO. There is no suggestion that any significant liabilities or obligations other than the PTT will be avoided. It appears that the only party by whom any prejudice will be allegedly suffered is the taxing authority. In the particular circumstances of this case, the reasons for caution typically considered when an RVO is contemplated do not weigh heavily.

In his view, the analysis needed to be viewed in the context of the purpose and objectives of insolvency law, including maximizing recovery for creditors.

[12] The judge then considered the interplay between the granting of an RVO and the application of the *PTTA*. First, he reiterated that courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding, blessing the objective of avoiding a tax liability, albeit in circumstances where that was not the only objective. Second, the judge said that “the Province’s arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner’s shares constitutes unlawful tax avoidance”: at para. 62. The judge rejected that proposition, noting that outside of the insolvency context, share transactions premised on PTT avoidance are not captured by the *PTTA*. On this point, the judge concluded:

[66] ... This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

[13] The judge did not accept the Province’s argument that statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Administrator can assess PTT and penalties when a transaction is designed to avoid the tax. He accepted that the Province already has, by means of regulation (albeit not exercised), the authority to impose PTT on the transfer of property through the purchase of the shares of a nominee company.

[14] Finally, the judge summarized his conclusion:

[77] In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:

- a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve \$3.5 million in value for the creditors and to maximize the return for creditors.
- b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province “loses” exactly the amount that the creditors gain.
- c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province’s argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.
- d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

[15] In authorizing the RVO, the judge decided that the order should include releases of third-party claims, even though the releases would potentially prevent the Province from collecting PTT. In his view: “As the purpose of the RVO is to maximize the creditors’ recovery by avoiding [PTT], it would be inconsistent with that purpose to permit the Province to collect the tax from the proposed releasees”: at para. 81.

### **The Province’s Position on Appeal**

[16] The Province contends that a court supervising a receivership intended to liquidate an insolvent debtor’s assets for the benefit of its creditors lacks the jurisdiction to approve an RVO. It says that neither s. 183 nor s. 243 of the *BIA* confer that authority on the court. The Province says that s. 183 provides a more limited jurisdiction to approve a transaction such as an RVO than is found in, for

example, s. 11 of the CCAA. Had Parliament intended to confer on a court such a broad authority to approve such a transaction, it would have amended s. 183 of the *BIA* at the same time as the broad scope of a court's authority was clarified by the amendments to s. 11 of the CCAA.

[17] According to the Province, the broad scope of authority conferred by s. 11 of the CCAA is consistent with the purposes and objects of restructuring and plans of arrangement under that Act, which focus on attempting to continue insolvent companies as going concerns. By contrast, the receivership provisions in the *BIA* are concerned with the liquidation of assets in accordance with the priorities of creditors and interested third parties. The court's authority in receiverships under the *BIA*, it argues, is rule bound and does not engage a broad discretionary grant of authority outside what is necessary to sell assets as part of an orderly liquidation of them.

[18] In the Province's submission, if the jurisdiction to authorize an RVO in a receivership exists at all, it must be found in the part of the *BIA* that concerns receiverships. More specifically, it says the jurisdiction must be found in s. 243 which gives a court power to appoint a receiver to take possession and control of the insolvent company's assets. Section 243 further allows the court to "take any other action that the court considers advisable" — language that has been held to authorize the court to direct a sale of the assets, and to take actions incidental or ancillary to that sale. The Province, however, says that s. 243 should not be read broadly to confer the jurisdiction required to authorize an RVO. It says that an RVO goes beyond anything that can properly be seen as incidental or ancillary to a sale.

[19] If this Court is inclined to find the jurisdiction for an RVO in the *BIA*, the Province offers an alternative argument against transactions designed specifically to limit tax exposure. It says that an order authorizing such an RVO, if accompanied by releases of any third-party claims arising from the transaction, immunizes the transaction from a possible review or reassessment by the Administrator designated by the *PTTA*. In short, it usurps the authority of the Administrator to potentially

inquire into and determine whether the transaction is a tax avoidance transaction for the purposes of the *PTTA*. By so doing, it violates the limitation on jurisdiction found in s. 72(1) of the *BIA*, which prevents a court abrogating any other law or statute governing property and civil rights.

### **Analysis**

[20] It is convenient to set out the relevant statutory provisions that provide the framework in which the RVO was granted. Section 183(1)(c) of the *BIA* provides:

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

...

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court; ...

Section 243 of the *BIA* provides:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable. [Emphasis added.]

And finally, s. 72(1) of the *BIA* states:

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

***Did the court err in finding jurisdiction to grant the RVO?***

[21] It is important to begin by recognizing that the purpose and object of a receivership authorized by the *BIA* is to facilitate and enhance the preservation and realization of the assets of an insolvent debtor for the benefit of the creditors in accordance with their priority rankings: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 73 [*Third Eye*], quoting *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (S.C.), 1995 CanLII 7059. This necessarily involves the receiver being endowed with the power to liquidate assets, and being charged with a principal responsibility to ensure the liquidation of the assets results in a maximum return to the creditors: *Third Eye* at para. 73, quoting *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340 at para. 77. It is, perhaps, surprising that there is no *express* power in the *BIA* authorizing a receiver to liquidate and sell assets. Although, those powers are incontrovertibly conferred on a court-appointed receiver, inherent in their role and standardly contained in the order appointing them, in order to give effect to the purpose and object of the insolvency regime contained in the *BIA*: *Third Eye* at para. 74.

[22] There is, it appears to me, no question that the general jurisdiction found in s. 243(1)(c) to “take any other action that the court considers advisable” encompasses the jurisdiction to authorize the sale of a debtor’s assets confirmed by the mechanism of a vesting order. If authority is needed to confirm that proposition, it can be found in cases such as *Third Eye* (at para. 87) and *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2. In that case, the Yukon Court of Appeal, *per* Justice Tysoe, observed:

[132] ... The Ontario Court of Appeal held that s. 243(1) does give jurisdiction to grant such orders on the bases that vesting orders are incidental and ancillary to a receiver's power to sell and that the interests of efficiency dictate the ability for vesting orders to be granted in national receiverships rather than requiring them in each province in which assets are being sold. The Court did, however, note that the exercise of the jurisdiction is not unbounded: *Third Eye* at para. 82. [Emphasis added.]

[23] The Province relies heavily on the observation that the jurisdiction to grant vesting orders is not unbounded. That is hardly a surprising proposition. Orders granted pursuant to a statutory regime will only be legitimate to the extent that they are consistent with, and further the purposes and objects of, the statute. The question here is simply whether an RVO furthers the purpose and objects of the insolvency regime insofar as a receiver is liquidating assets to maximize the recovery of the creditors, subject to the priorities among them and the rights of third parties.

[24] It follows, in my view, that there is a clear jurisdiction to authorize an RVO found in s. 243, provided that the vesting order in question is incidental and ancillary to the receiver's power to liquidate the assets by sale. The shares of the insolvent company are assets within the receivership. The receiver has taken possession and control of them. They are capable of being sold or liquidated just as underlying assets held by the company can be sold or liquidated. Just as the company's underlying assets can be prepared for the sale in a manner intended to maximize their fair market value (as in an AVO), so too can arrangements be made to enhance the value of the shares by transferring the liabilities that serve to depress the value of those shares to another entity. I can see no reason to conclude that an RVO is not incidental or ancillary to a receiver's power to sell. An RVO advances the same goals as an AVO — albeit by employing a different transaction structure. The Province was not able to explain why the RVO at issue here was not incidental or ancillary to powers of the court and receiver under s. 243. This Court was provided only with a bald assertion, without any underlying rationale, as to why the RVO was not an exercise of incidental or ancillary powers.

[25] Accordingly, given that the jurisdiction to authorize an RVO is found in s. 243, it is not necessary to opine on whether that jurisdiction is also found in s. 183 (which appears in the part of the *BIA* concerned with the general jurisdiction of courts pursuant to the statute). As noted above, s. 243 deals with the powers of a receiver, and in that sense is a more specific source of the jurisdiction. I appreciate that the judge concluded the jurisdiction was found in s. 183. That may very well be correct.

But, as I understand it, the application was brought pursuant to s. 243 of the *BIA* and s. 39 of the *LEA*. It suffices to say that s. 243 of the *BIA* provides a jurisdictional foundation for the order. It is also unnecessary to decide whether the jurisdiction to authorize an RVO is also found in the *LEA*, although I am aware of cases which have found jurisdiction under the equivalent of the *LEA*.

***Did the court err in granting an order inconsistent with s. 72(1) of the BIA?***

[26] I turn now to the question whether the judge erred in granting an RVO for what is said to be the sole purpose of avoiding the payment of PTT that would be incurred under the *PTTA* if title to the real estate asset were transferred. Here, the Province does not suggest that the transaction as structured attracts PTT. It also accepts that the form of the transaction approved by the RVO is one commonly used outside the insolvency context to ensure that PTT is not payable. The Province does not explicitly contend that structuring a transaction in this way is illegitimate, abusive, or in any other way an improper means of avoiding the payment of taxes otherwise owing. These circumstances figured prominently in the judge's consideration of how to exercise his discretion. It is convenient to reproduce what the judge had to say:

[62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.

[63] ... [I]t is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.

[64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.

[65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.

[66] In the Province's submission quoted above, it refers to "specific provisions of the *PTTA*...which provide for...the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless

to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company. [*Italics emphasis in original; underline emphasis added.*]

[27] As noted, the Province does not challenge these conclusions. Indeed, in resisting an application to introduce new evidence, the Province explicitly accepts the fact that transactions of this kind are routine outside the insolvency context, and went so far as to submit that the factual findings in paras. 63–65 were not contested. The Province has not provided any evidentiary basis that would permit the Court to conclude that the Province regards such transactions as improper tax avoidance, or a form of tax evasion, or that the powers of the Administrator have been used to invoke the *PTTA*'s general anti-avoidance tax rules.

[28] Before us, the Province's argument devolved to an academic and theoretical argument about a potential conflict between the authority of the Administrator to review transactions in order to decide whether they should be assessed under the so-called Recapture Provisions of the *PTTA*. Section 2.001(3) of the *PTTA* enables the Administrator to deny any resultant tax benefit where the transaction is not undertaken for a *bona fide* purpose other than obtaining tax avoidance. For the purposes of s. 2.001, an "avoidance transaction" is comprised of:

- a transaction (which notably is defined so as to include an arrangement);
- resulting directly or indirectly in a tax benefit (which is defined broadly as a reduction, avoidance or deferral of tax payable under the *PTTA*); and,
- where that transaction is not one that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit.

[29] The Province contends that the Recapture Provisions demonstrate a statutory intention that the *PTTA*'s Administrator has the exclusive jurisdiction to review the RVO at first instance and decide whether to assess under the Recapture Provisions. It says the effect of the RVO was to insulate the parties from the potential application

of the Recapture Provisions and usurp the role of the Administrator. Any jurisdiction afforded by the *BIA* was necessarily circumscribed in this case by the Recapture Provisions by operation of s. 72(1) of the *BIA*. The Province maintains that by granting the RVO in the face of the Recapture Provisions, the chambers judge exceeded his jurisdiction by trenching provincial jurisdiction.

[30] Respectfully, I think there is no force in these submissions. I can see no error in the judge's conclusion that structuring a transaction to avoid the transfer of title and thereby PTT is a legitimate commercial practice outside the insolvency context. It is a perfectly proper form of transaction structured so as to avoid attracting PTT. In other words, there is no basis for the suggestion that the Recapture Provisions might apply to them. I can see no reason why that which is legitimate and proper outside the insolvency context should be viewed differently within it.

[31] In any event, I can find no air of reality to the suggestion that the Recapture Provisions could apply to this transaction. The Province fastens on to the suggestion that the sole purpose of the transaction is to avoid PTT, but that is not entirely accurate. As the judge found, the purpose of the transaction was to maximize recovery for the creditors and it did so by avoiding PTT. The goal of maximizing recovery for creditors is a *bona fide* purpose intended to further the objectives of the *BIA*. Avoiding PTT was simply the means by which that benefit was conferred. To use the language of the provisions, the RVO is a transaction that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit. Accordingly, I see no conflict, on these facts, between the RVO and the jurisdiction of the Administrator.

***Did the judge err in exercising his discretion?***

[32] Finally, I can discern no other errors in the way the judge exercised his discretion. The judge noted the various reasons why it is important to give very careful consideration to whether to pronounce an RVO. He identified the importance of respecting third-party rights, concerns about avoiding creditors' rights to vote on plans, and other factors. In my view, the comment that RVOs are exceptional or

extraordinary orders simply reflects the fact that, in any given situation, the rights of all persons engaged in an insolvency must be carefully weighed to decide whether an RVO best fulfills the purposes and objects of the statutory scheme. The judge turned his mind to those considerations and determined that, in all of the circumstances of this case, an RVO should be pronounced. There is no basis to interfere with his decision.

**Disposition**

[33] I would dismiss the appeal.

“The Honourable Mr. Justice Harris”

I agree:

“The Honourable Mr. Justice Voith”

I agree:

“The Honourable Justice Winteringham”

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Institutional Mortgage Capital Canada Inc.*  
*v. Mortise (Scott Road Residential)*  
*Holdings Ltd.*,  
2025 BCSC 1500

Date: 20250723  
Docket: S253697  
Registry: Vancouver

Between:

**Institutional Mortgage Capital Canada Inc., in  
its capacity as general partner of IMC Limited Partnership**

Petitioner

And

**Mortise (Scott Road Residential) Holdings Ltd., Mortise (Scott Road Office)  
Holdings Ltd., Mortise (Scott Road Commercial) Holdings Ltd., 1048799 B.C.  
Ltd., Baljit Singh Johal, Bancorp Balanced Mortgage Fund II Ltd., Bancorp  
Growth Mortgage Fund II Ltd., Bancorp Financial Services Inc., Mandate  
Management Corporation, G4 Construction Ltd., Buland Construction Ltd.,  
Lifetime Construction Ltd., Best Canadian Homes Ltd., Gill 22 Construction  
Ltd., 1370395 B.C. Ltd., Harjus Construction Ltd., and 1507718 B.C. Ltd.**

Respondents

Before: The Honourable Madam Justice Wilkinson

## **Oral Reasons for Judgment**

In Chambers

Counsel for the Petitioner:

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B. Gibbons

Counsel for the Respondents, Mortise  
(Scott Road Residential) Holdings Ltd.,  
Mortise (Scott Road Office) Holdings Ltd.,  
Mortise (Scott Road Commercial) Holdings  
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Johal:

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Mortgage Fund II Ltd., and Mandate  
Management Corporation:

S. Poisson

Counsel for the Attendee Receiver, Alvarez  
& Marsal Canada:

K. Mak

Place and Date of Hearing:

Vancouver, B.C.  
July 11 and 14, 2025

Place and Date of Judgment:

Vancouver, B.C.  
July 23, 2025

[1] **THE COURT:** These are my reasons for judgment in the petitioner's application for an order appointing Alvarez & Marsal Canada Inc. (the "Proposed Receiver") as receiver and manager over all the property, assets, and undertakings of Mortise (Scott Road Residential) Holdings Ltd., Mortise (Scott Road Office) Holdings Ltd., Mortise (Scott Road Commercial) Holdings Ltd., (collectively, the "Borrowers"), and 1048799 B.C. Ltd. ("104 Ltd.").

**Background**

[2] Pursuant to a commitment letter dated October 31<sup>st</sup>, 2022 between the petitioner Institutional Mortgage Capital Canada Inc., in its capacity as general partner of IMC Limited Partnership ("IMC"), and Mortise (Scott Road Residential) Holdings Ltd., Mortise (Scott Road Office) Holdings Ltd., Mortise (Scott Road Commercial) Holdings Ltd. (collectively, the "Borrowers"), IMC loaned the Borrowers \$19,500,000 (the "Loan").

[3] As security for the loan, the Borrowers granted to IMC, among other things:

- a) the mortgage and assignment of rents over the lands with a civic address of 8140 120<sup>th</sup> Street in Surrey, British Columbia (the "Lands"); and
- b) a general security agreement dated October 21, 2022 ("GSA").

[4] As further security for the loan, 104 Ltd. and Baljit Singh Johal (collectively, the "Guarantors"), granted to IMC a full recourse guarantee.

[5] The petitioner, ("IMC"), fully advanced the Loan to the Borrowers by November 1<sup>st</sup>, 2022, pursuant to the Commitment Letter on the following terms and conditions, among others:

- a) the Loan would be repaid in full by February 1<sup>st</sup>, 2025;
- b) no subordinate mortgages, liens, charges, or other financial encumbrances or security interests are permitted in respect of the Lands and other personal

property at anytime without the prior written consent of IMC in its sole discretion; and

- c) any failure of the Borrowers to perform any obligation or condition under any loan documents or to make a payment when due to IMC of any indebtedness is considered an Event of Default (as defined in the Commitment Letter).

[6] On November 1, 2022, the lands were transferred to the Borrowers for a purchase price of \$22,200,000.

[7] To perfect its security, IMC:

- a) registered a mortgage on title to the Lands on November 1, 2022;
- b) obtained an equitable mortgage dated October 21, 2022, in and to the Lands executed by the Borrowers and 104 Ltd. (as beneficial owner of the Lands) in favour of IMC; and
- c) registered the GSA in the British Columbia Personal Property Registry on October 14, 2022.

[8] As of May 1<sup>st</sup>, 2025, the Debtors were indebted to IMC in the amount of \$19,555,812.02 with interest at approximately \$180,000 per month and fees continuing to accrue.

[9] Back on February 9, 2024, Mortise (Scott Road Residential) Holdings Ltd. entered into a contract of purchase and sale to sell the lands with a completion date of November 30<sup>th</sup>, 2024 (the "First Contract"). A deposit in the amount of \$3,400,000 (the "Deposit") was paid to Mortise (Scott Road Residential) Holdings Ltd in respect of those contracts.

[10] On July 10, 2024, IMC received an email from Bancorp Financial Services Inc. advising that they may place a second mortgage behind IMC on the Lands and asked if such a mortgage would be allowed. IMC responded and advised that the

Loan maturity date was February 1<sup>st</sup>, 2025, and so it was unlikely that IMC would discuss a new subordinate debt without a repayment plan for the Loan.

[11] Following this correspondence, IMC advised Bancorp Financial Services Inc. that any subordinate debt to the loan would have to be formally approved by IMC's loan servicer and that the Borrowers would have to deal directly with this provider. To date, the approval process was not undertaken.

[12] On or around October 29, 2024, the Borrowers provided IMC with a signed copy of a commitment letter dated September 12, 2024 (the "Bancorp Commitment Letter"), between the Borrowers and Bancorp Balanced Mortgage Fund II Ltd., Bancorp Growth Mortgage Fund II Ltd., Bancorp Financial Services Inc., and Mandate Management Corporation (collectively, the "Bancorp Parties") for a loan in the principal amount of \$9,250,000 secured by, among other things, a second mortgage registered on title to the lands (the "Bancorp Mortgage").

[13] IMC did not approve the Bancorp Loan or the Bancorp Mortgage and did not take steps to obtain interim approval upon being notified in October. At this time, as noted above, IMC expected the First Contract to complete at the end of November 2024 and be repaid its loan.

[14] On December 2, 2024, the Borrowers advised IMC that the First Contract did not complete and requested a one-year renewal and extension of the Loan. IMC did not agree to the requested extension. The Borrowers acknowledged IMC's position on December 16, 2024.

[15] On January 14, 2025, IMC obtained a title search of the Lands which revealed that the Bancorp Mortgage was registered on title to the Lands without the consent of IMC. The registration of the Bancorp Mortgage is a default under the Commitment Letter and applicable security.

[16] The loan matured on February 1, 2025 and the Borrowers failed to repay the Loan.

[17] On February 5, 2025, through its solicitors, IMC made a formal demand on the Borrowers and the Guarantors (together, the “Debtors”) for repayment of the Loan in full, plus interest, and enclosed Notices of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“BIA”).

[18] Subsequent to the demand, IMC and the Debtors entered into a Forbearance Agreement which provided the Debtors until May 30<sup>th</sup>, 2025 to repay the outstanding balance of the Loan in the amount of \$19,706,302.47 as at February 1, 2025, plus interest thereafter (the “Indebtedness”) on certain terms and conditions, including that:

- a) the Debtors acknowledge and agree that the indebtedness secured by the security is due and owing to IMC;
- b) if IMC commences proceedings to enforce some or all of its security in respect of the Loan, the Debtors, among other things, irrevocably consent to the appointment of a receiver or receiver/manager over any or all of the Debtors’ assets and undertakings charged by IMC’s security; and
- c) monetary payments must be made by the Debtors to IMC to reduce the indebtedness as follows:
  - i. on or before March 31, 2025, accrued and unpaid interest for the months of January through March 2025 in the total amount of \$653,743.15;
  - ii. on or before April 15, 2025, a payment of 500,000;
  - iii. on or before April 30, 2025, a payment of 500,000; and
  - iv. on or before May 1, 2025 accrued and unpaid interest for the month of April 2025.

[19] The debtors failed to make the March 31, 2025 payment on time and have not made any further payments towards the Loan.

**Receivership application**

[20] The petition for appointment of a receiver manager was filed May 15, 2025.

[21] The Debtors, while acknowledging the debt, oppose the appointment of a receiver in the circumstances of this matter. They submit that the petitioner should enforce its claim in foreclosure accompanied by the usual six-month redemption period.

[22] Bancorp opposes the appointment of a receiver arguing that it is not necessary and the associated costs will inevitably impact its interests as the second mortgagee. It does not oppose a swift foreclosure process and in submissions suggested it could have conduct of sale, if necessary.

[23] IMC initially sought to appoint the proposed receiver pursuant to s.2.3 of the *BIA*, s.39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, s.66 of the *Personal Property Security Act*, R.S.B.C., c. 359 and Rule 10-2 of the *Supreme Court Civil Rules*, BC Reg 168/2009. However, at the hearing before me they are no longer relying on the *BIA* and the Debtors acknowledge that the *Law and Equity Act* provisions do apply.

[24] Section 39 of the *Law and Equity Act* provides:

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

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

[...]

[25] There are a number of factors the court may consider in exercising its discretion to appoint a receiver as set out in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, at para. 25; *Bank of Montreal v. Gian's Business*

*Centre Inc.*, 2016 BCSC 2348 at paras. 23-24 [*Gian's*]; and *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47, at para. 73 [*Haro-Thurlow*]:

- a) whether irreparable harm might be caused if no order were made, although, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the nature of the property;
- c) the preservation and protection of the property;
- d) the balance of convenience to the parties;
- e) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
- f) the effect of the order upon the parties;
- g) the conduct of the parties;
- h) the costs to the parties;
- i) the likelihood of maximizing the term to the parties; and
- j) the goal of facilitating the duties of the receiver.

[26] It must be noted that these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether in all of the circumstances the appointment of a receiver is just or convenient. *Royal Bank of Canada v Canwest Aerospace Inc.*, 2023 BCSC 514, at para. 9.

[27] A secured creditor is entitled to elect the means in which to enforce its security as provided for under the applicable agreement, subject to court granting the relief sought. See *Haro-Thurlow*, *supra* at para. 95.

**Is the appointment of a receiver just or convenient?**

[28] The granting of a receivership order is “extraordinary relief which should be granted cautiously and sparingly”, and if there is a remedy other than receivership, it should be considered because receiverships are intrusive interferences with the affairs of the company. They can be harmful to the reputation of the company and the cost of a receivership can be considerable. See *Mirage Trading Corporation v. Ghahroud*, 2025 BCSC 588, at para. 95.

[29] The acknowledgement of the right of a creditor to make an application for a receiver is a strong factor in support of the imposition of a receiver. Therefore, the “extraordinary nature” of the remedy sought is less essential to the inquiry and irreparable harm need not be demonstrated. See *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32, at para. 65, and *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007 [*Carnival*], at paras. 27 to 29.

[30] The consideration of a creditor’s right to appoint a receiver is even more significant when it is contained within a forbearance agreement since that agreement is entered into at the time the debtor was in default: *Gian’s* at para. 25.

[31] Before me, the Mortgage, GSA, and Forbearance Agreement expressly provide for the appointment of a receiver. In addition, the terms include a provision whereby the Debtors irrevocably consent to the appointment of a receiver or receiver/manager over any of the Debtors’ assets, properties, and undertakings charged by IMC’s security.

[32] In *Haro-Thurlow*, the court dealt with a similar situation in which the secured creditor, the Bank of Montreal (“BMO”), sought to appoint a receiver over the objections of the debtors and guarantors. The position of the debtors and guarantors in *Haro-Thurlow*, was the same as in this case, being that they are entitled to an opportunity to redeem their equity of redemption in the mortgaged lands: *Haro-Thurlow* at paras. 1-3.

[33] In considering whether to appoint a receiver, Madam Justice Fitzpatrick noted that:

- a) BMO held a first-ranking mortgage over the mortgaged lands, a general security agreement, and guarantees (at para. 21);
- b) that the debt owed to BMO had matured and was fully due and owing (at para. 28);
- c) BMO had made a demand for repayment of the debt and issued notices to enforce the security (at para. 37);
- d) the debtors had requested to negotiate a forbearance agreement but ultimately refused to execute it (at para. 38);
- e) the gross monthly interest for the debt exceeded the net monthly revenue from the property at issue (at para. 55); and
- f) the property at issue was a tenanted commercial and residential complex with a unique development opportunity that would only attract a certain cohort of potential purchasers (at para. 108).

[34] Madam Justice Fitzpatrick then proceeded to consider the principles and entitlement of a secured creditor to seek an appointment of a receiver over mortgaged lands, stating the following:

[95] The issue could be considered through the lens of either foreclosure or receivership, as both are paths that a secured creditor, such as BMO may follow. As many cases illustrate, even within a foreclosure, receivership appointments may be sought. A secured creditor is entitled to elect the means by which the security will be enforced, as provided in the Credit Agreement, subject of course to the Court granting any relief sought from it.

[35] The court found that it was just and convenient to appoint a receiver in the circumstances noting, among other things, that the debtors were unwilling to make further payments to BMO to cure interest defaults and did not made adequate

attempts to refinance the Loan before and after the debt matured: *Haro-Thurlow* at paras. 141-147 and 159.

[36] The differences here are that the Debtors went further and executed a forbearance agreement which includes an irrevocable consent to the right to appoint a receiver. Another is the fact that the debtors here took out another loan secured on the Lands and use the proceeds for another project. However, the operations on the Lands before me involve fewer tenants and the loan, while significant, is approximately one-quarter of the amount owing in *Haro-Thurlow*.

[37] Before me, the loan matured and the Debtors have not taken any concrete steps to refinance the loan or otherwise to pay IMC.

[38] Despite offering through counsel at the hearing before me that they are able and willing to direct all payment of rents to IMC if a receiver is not appointed, they have been unwilling and/or unable to make any payments to IMC to cure interest defaults.

[39] Interest accrues at approximately \$190,000 per month where the rent receipts are approximately \$88,000 a month, according to the debtors. The debtors take the position that should a six-month redemption period be granted, IMC “will receive the benefit of the accruing interest under the mortgage”. IMC has demanded repayment of its Loan. Given the shortfall in rent receipts and range of opinions of the value of the secured lands in the range of \$19 million to \$34 million, the risk is evident. Accruing more interest is not a benefit.

[40] Bancorp opposes the appointment of a receiver arguing the expense of that process is prejudicial to its subordinate secured interest. However, Bancorp has taken other security in support of its loan to the Borrowers. Bancorp advanced its funds knowing it would trigger a default to the IMC loan. As well, there is no evidence before me that the Bancorp loan is in default.

[41] I have similar concerns as Justice Osborne in *RBC v. Maxx Properties (No. 323) Ltd.*, 2024 ONSC 1660, who stated the following regarding a debtor failing to make payments toward their debt while continuing to operate the business:

[38] The defaults are not merely technical. In addition to the fundamental fact that there has been no monetary repayment whatsoever since December, the Debtor continues to operate the gas station business at the Property and receive revenues. Yet, no repayment is being made to the bank, nor have the funds been transferred to an RBC account as was specifically agreed to. The inescapable inference is that the funds are being diverted on a continuing basis.

[42] In this case, IMC has not been receiving rents from the Borrowers and has no visibility into the leases or the rents payable pursuant thereto so as to ensure the reliability and accuracy of the rent roll provided; nor does IMC have any visibility to the collection and disposition of the rents. The Borrowers have removed equity from the Lands by, among other things, using the proceeds from the Deposit and the Bancorp Mortgage for an unrelated development project and/or its own use. In respect of the Deposit, it does form part of IMC's security, including the GSA.

[43] There is a question as to whether there is sufficient equity in the Lands based on conflicting evidence regarding the value of the Lands which raises a question as to whether the loan is in jeopardy of being fully repaid. The Debtors point to the high sales prices received over the last year, as high as \$34,000,000, however, these sales did not complete. IMC has provided evidence that the value properly appraised for sale is between \$19,000,000 and \$25,000,000.

[44] Both parties agree that a proper marketing and sales process in relation to the Lands will ultimately determine its value. The Debtors' appraisal notes such a process is estimated to take 6 to 12 months.

[45] Within the last month, the Debtors have allowed the insurance for the Lands to be terminated (although they recently obtained a new insurance policy although its terms are not disclosed) and have failed to pay the property taxes for the Lands when due.

[46] It is evident that the Debtors are facing financial constraints that have impacted the management and protection of the Lands. I agree that as in *Haro-Thurlow*, and despite there being fewer tenanted spaces to manage, review and oversight of the leases is required, potentially as to how they might affect any sale or refinance.

[47] There is no requirement that the redemption period runs from the date of the hearing of the petition: *Haro-Thurlow* at para.s. 14 and 157. The court should consider the debtors' equity of redemption in terms of whether a receiver will be appointed and, if so, whether that receiver will be granted the power of sale and when: *Haro-Thurlow* at paras. 101 and 102.

[48] Knowing they were in financial difficulty and failing to obtain a renewal from IMC, the Borrowers engaged in a sales process. They also sought out and obtained additional financing when the loan matured February 1, 2025. Six months from this date is August 1, 2025. During the past five-and-a-half months the Borrowers have failed to take concrete steps to refinance the Loan or otherwise develop a plan for its repayment. The Borrowers have still not presented a plan to IMC to repay the loan.

[49] Granting additional time to redeem the Lands will not provide a benefit to either party. The interest burn on the loan for six months is approximately \$1.14 million. Appointing a receiver, who is an experienced court officer that has a duty to discharge its powers honestly and *bona fides* will ensure an efficient and reasonable process to repay the Loan is achieved.

[50] IMC has understandably lost confidence in the debtors' ability to cure the defaults.

[51] There is no dispute amongst the parties regarding the amount owed, that default occurred, and that IMC's security is valid. IMC has a right to enforce its security and rely on the debtors' defaults to do so. This includes its right to appoint a receiver, especially in circumstances in which the Debtors consented to the appointment of a receiver: *Haro-Thurlow* at para. 95. As such, the appointment of a

receiver over the mortgaged lands is not an “extraordinary remedy”: *Haro-Thurlow* at para. 114; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, at paras.43-44; *Carnival* at paras. 27-29.

[52] The burden on the applicants for obtaining the court appointment is, at the very least, relaxed where the parties have expressly contemplated the appointment of a receiver in the agreement: *Ward* at para. 56.

[53] The Lands appear to be a unique development property that will take a certain purchaser that is willing to proceed with the development challenges. Notably, the Borrowers have failed to advance the development of the Lands past the initial review stage since purchasing them in 2022.

[54] The costs of the receiver do not outweigh the interest that continues to accrue on the Loan on a monthly basis. The proposed receiver has agreed to a borrowing facility capped at \$150,000. This is less than one month’s interest. Given the problems and the limited marketing and sales efforts taken to date, the lands will likely require a commercial broker selection process and marketing and sales effort. IMC is not in the business of managing such professionals nor in managing the operation in the meantime. They would likely have to engage other professionals in any event.

[55] The Debtors have not presented any plan to this court or IMC on how it intends to repay the Loan or sell the Lands. A receiver is required to create a plan in a timely and cost effective manner. There is no evidence before this court that suggests the cost of the receiver will greatly exceed the costs incurred by all the parties should the Debtors be granted additional time to redeem the Lands.

[56] The receiver will be required to undertake certain investigations and complete due diligence to prepare an appropriate sales process. This will likely include some complex sales documentation such as non-disclosure agreements. Given the nature of the Lands a data link may be necessary to assist prospective buyers with the due diligence necessary to make an informed offer.

[57] In sum, this process will likely take some time and it is necessary to grant an order appointing a receiver immediately with the appropriate powers to allow the receiver access to the Lands to start the process of gathering information. Even with the immediate appointment, given the time it will take to engage in the sales process and effect a sale the Debtors will continue to have some months to redeem.

[58] The circumstances are such, and more so than in *Haro-Thurlow*, that the Debtors have already been extended at this point in time their full six-month redemption period given the original due date of February 5, 2025, the timelines under the forbearance agreement, and the timing of a receivership order. The following comments of Madam Justice Fitzpatrick are apt at para. 157:

[157] At bottom, the Borrowers cannot have it both ways. Having effectively asked BMO to delay matters while a potential forbearance agreement was pursued, they cannot now suggest that the ensuing delay is irrelevant to a consideration of the issues relating to the receivership. I agree with BMO that it would be a perverse situation to do so, and would encourage lenders to immediately commence proceedings and disregard any potential negotiated interim solutions. Generally speaking, in insolvency proceedings, a solution without litigation is one that benefits all stakeholders.

### **Conclusion**

[59] In the circumstances, the extent of the defaults, the amount of the Loan, the interest that continues to accrue, the length of time already provided to the Debtors to redeem the Loan with no hopeful prospects in view, and the poor management of the lands, it is not just or convenient to require the petitioner to enforce its rights by way of a simple foreclosure, or delay the appointment of a receiver or any of the powers sought in order to achieve the greatest recovery for all. It is the opposite.

[60] The proposed receiver is appointed under s.39 of the *Land and Equity Act* on the model order terms as varied and set out in the petitioner's draft order presented at the hearing. As well, I granted a sealing order with respect to some affidavit evidence on July 11. That order is extended until such time as an order approving sale is granted or as otherwise ordered by the court.

[61] Counsel, anything arising from my reasons or any clarification required?

[62] CNSL C. FORMOSA: No, Justice. Nothing from me.

[63] CNSL E. HATCH: Nothing from me, Justice.

[64] CNSL K. MAK: I have one clarification. This is counsel for the receiver. I don't know which blackline you were looking at, but on Schedule C, which was the demand for notice, the original order that was submitted had the wrong address for Alvarez & Marsal. I already corrected one, but I just don't know which version you had, so I wanted to point that out to make sure that would be okay.

[65] THE COURT: We should confirm on the record the correct address.

[66] CNSL K. MAK: The proper address on the record would be Cathedral Place Building, 925 West Georgia Street, Suite 902, Vancouver, BC, V6C 3L2.

[67] THE COURT: Subject to that change, if needed to be made to the order presented, the orders will go as sought.

"Wilkinson, J"

**CITATION:** JBT Transport Inc.(Re), 2025 ONSC 1436  
**COURT FILE NO.:** CV-25-00736572-00CL and CV-25-00737791-00CL  
**DATE:** 20250304

**SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
JBT TRANSPORT INC., WAYDOM MANAGEMENT INC., MELAIR  
MANAGEMENT INC., HERITAGE TRUCK LINES INC., DRUMBO  
TRANSPORT LIMITED, HERITAGE NORTHERN LOGISTICS INC., AND  
HERITAGE WAREHOUSING & DISTRIBUTION INC.

**AND RE:**

THE TORONTO-DOMINION BANK

Applicant

**AND:**

JBT TRANSPORT INC., WAYDOM MANAGEMENT INC., MELAIR  
MANAGEMENT INC., HERITAGE TRUCK LINES INC., DRUMBO  
TRANSPORT LIMITED, HERITAGE NORTHERN LOGISTICS INC., and  
HERITAGE WAREHOUSING & DISTRIBUTION INC.

Respondents

**BEFORE:** KIMMEL J.

**COUNSEL:** *Brendan Bissell/Caitlin Fell/Jessica Wuthmann*, for the JBT Group of Debtors

*Craig A. Mills /Matthew Cressatti*, for the Creditor Toronto-Dominion Bank

*Graham Phoenix/Shahrzad Hamraz*, for the Proposed Monitor, Dodick Landau Inc.

*Nabiel Dawood*, for lien creditors with a separate ongoing action, Trade-Mark  
Industrial Inc., Trade-Crete Ltd., and Comtrade Ltd.

*Phil Turner*, for R& S Trailer Leasing Limited

**HEARD:** February 27, 2025

**ENDORSEMENT**  
**(COMPETING CCAA AND RECEIVERSHIP APPLICATIONS)**

[1] The court has been asked to decide between the debtors' CCAA Application and the Receivership Application by the Toronto-Dominion Bank. For the reasons that follow, I have concluded that it is most just and convenient to appoint a receiver. This decision is context and fact specific.

[2] Accordingly, the Receivership Application is granted and the CCAA Application is dismissed.

### **The Competing Proceedings**

#### *The Debtors' NOI Proceedings and CCAA Application*

[3] JBT Transport Inc., Waydom Management Inc., Melair Management Inc., Heritage Truck Lines Inc. ("HTL"), Drumbo Transport Limited ("Drumbo"), Heritage Northern Logistics Inc. ("HNL"), and Heritage Warehousing & Distribution Inc. ("HWD") (each individually, a "Debtor" and collectively, the "JBT Group" or "Debtors") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") on February 6, 2025 (the "CCAA Application"). The first hearing before this court with respect to that application was on February 10, 2025.

[4] Prior to the CCAA Application, the Debtors had each filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "BIA"). Dodick Landau Inc. ("DLI") was appointed as proposal trustee under each NOI proceeding (collectively, the "NOI Proceedings"). The NOI's were filed after the JBT Group's senior secured lender, Toronto-Dominion Bank ("TD Bank"), served demands for the approximately \$16.2 million debt owed by the JBT Group to TD Bank (the "Demands"). The automatic stay in the NOI Proceedings would have expired on February 24, 2025.

[5] The Debtors pivoted to a CCAA Application after commencing the NOI Proceedings because they claimed to be facing an urgent liquidity and operational crisis that had been exacerbated by prejudicial self-help remedies that were being taken by transport carriers who they relied upon to continue to carry on their business (the "Critical Suppliers").

[6] As part of the CCAA Application, the Debtors sought an order staying such carriers from contacting customers of the JBT Group directly, and from otherwise interfering with the JBT Group's arrangements with their customers. They sought a Critical Suppliers Charge attached to the receivables associated with the shipments that they were each, respectively, the carriers of subsequent to the CCAA filing date and a corresponding direction under s. 11.4 of the CCAA for the continued supply of goods and services by the Critical Suppliers, with discretion to pay pre-filing obligations to these creditors to ensure their continued supply during the stay period. The ability of transport carriers to enforce their right to payment of the Carrier Trust Funds directly from the customer who receives and pays for the goods, instead of that payment going to the broker, was also preserved under the Initial Order.

[7] Beyond the need for stability and for the continuing supply of services by the transport carriers (Critical Suppliers) to keep a going concern restructuring option open for the Debtors, the

court's decision to grant the Interim Order also took into account the fact that during the initial Stay Period (defined below), there would be far less of a learning curve for the proposed Monitor and counsel for the Debtors and the Monitor than for TD Bank and its proposed Receiver who did not have the same background regarding the business and operations of the JBT Group. This would also serve to minimize costs during that initial Stay Period.

[8] An Initial Order dated February 10, 2025 was granted under the CCAA (the "Initial Order") without prejudice to all issues raised or to be raised at this *de novo* comeback hearing. The Initial Order included a stay of proceedings (the "Stay") until February 28, 2025 (the initial "Stay Period"). The CCAA Initial Order that was granted only contained the essential terms for the continued operation of the Debtors' business to maintain the *status quo* pending the outcome of the come-back hearing.

[9] Since the initial Stay Period was expiring the day after the comeback hearing, by a preliminary endorsement dated February 28, 2025 the Stay Period was extended until March 6, 2025 pending the release of this endorsement.

*The Debtors' Arguments in Favour of Continuing the CCAA Proceeding*

[10] The JBT Group has over 58 trucks, 162 dry vans and refrigerated units, and over 100,000 square feet of state-of-the-art, GDP Gold-certified food storage and warehouse spaces. They employ more than 80 full-time employees and have contracts with more than 20 independent owner-operators. They regularly service 187 customers, and deal with 125 carriers and suppliers.

[11] Through the CCAA Proceeding, the JBT Group seeks to continue their end-to-end supply chain services, transportation logistics and warehousing services (the "Business") as a going concern for the benefit of all stakeholders. They seek to do so through an amended and restated initial order ("ARIO") that includes debtor in possession ("DIP") financing, and customary DIP and Administration Charges as well as preserving the Carrier Trust Fund and Critical Suppliers' Charge. The DIP Lender will rank behind the Critical Suppliers Charge and the Administration Charge. It would also be subordinate to TD Bank's first ranking security on the one remaining property owned by the Debtors, municipally known as 425 Melair Drive, Ayr, Ontario (the "Melair Property").

[12] The Debtors maintain that a debtor-in-possession restructuring that permits the JBT Group to continue their operations in the normal course will better preserve value for stakeholders. By contrast, the Debtors believe a receivership will put their Business at risk, as they have the familiarity with their own operations, suppliers, customers, employees and other stakeholders that are needed to maintain the business.

[13] At the core of the Debtors' position is their desire to preserve a going concern option while they run a sale and investment solicitation process ("SISP"). Through that process, they propose to try to sell their Business as a going concern, but also propose to solicit a wide range of possible transactions including refinancing, sale transactions, or liquidations, with the backstop of a management backed stalking horse agreement (the "Stalking Horse Agreement"). They say they

are looking for a means to avoid what they believe will be devastating social and economic effects of bankruptcy or creditor initiated termination of their ongoing business operations.

[14] The shared conclusion of the JBT Group, their financial advisor Grant Thornton (“GT”) and the Monitor, is that a liquidation will produce a worse result (based on either a forced liquidation value or an orderly liquidation value) than a going concern sale. The financial analysis of the JBT Group and the Monitor is that the Stalking Horse Agreement represents a superior financial result for creditors, including TD Bank, relative to a liquidation because they predict that a liquidation will result in both a lower anticipated sale price as well as higher costs to the estate including as a result of occupation rent, employee WEPPA claims, and liquidator sales commissions.

[15] The Monitor assisted the JBT Group in developing the SISP and was involved in vetting and improving the terms of the stalking horse bid that is reflected in the Stalking Horse Agreement. The Monitor will lead and oversee the SISP process because of management’s involvement in the Stalking Horse Agreement. The JBT Group seeks approval to commence the SISP and to accept a stalking horse bid from management as part of the SISP if no superior bid is received (the “SISP Approval Order”).

[16] The Monitor provided an update at the hearing about some of the terms of the SISP. The stalking horse bidder will now be required to provide proof of binding commitments from lenders and evidence of available cash to make up the balance of the purchase price under the stalking horse bid by March 31, 2025 to maintain its status as a binding bid. The stalking horse bidder was also asked, and agreed, to provide an increased cash deposit (beyond the \$250,000 already provided for) by March 15, 2025 (the start of the SISP process). The stalking horse bidder’s entire deposit will be forfeited and there will be no repayment of the DIP loan (being advanced by a party related to the stalking horse bidder) if the March 31, 2025 conditions are not satisfied. Conversely, if the conditions are met and a superior bid comes in and is accepted, the stalking horse bidder will be paid a \$65,000 break fee in addition to being repaid the deposit amounts and the DIP loan will have to be repaid.

[17] The stalking horse bid involves a transaction that is predicated upon a reverse vesting order that will still require future court approval (although the reverse vesting order structure is not mandated under the SISP for other bidders). At the February 27, 2025 come-back hearing, the court confirmed that if the stalking horse bid (and SISP) are approved now, the court is not being asked, and will not be taken, to approve an RVO structure for any transaction that emerges from the SISP, including the Stalking Horse Agreement. The requesting parties would still have to satisfy the court that an RVO is appropriate if and when approval is sought for any RVO based transaction.

[18] The stalking horse bid does not include the Melair Property, but interested parties will have the option to make an offer to purchase that property as part of a purchase of the Business (including other assets) or on its own. The Melair Property is estimated to be worth approximately 50% of the JBT Group’s Indebtedness to the TD Bank, although efforts to date to sell that property have not been successful.

[19] The Monitor supports the request by the JBT Group for both the ARIO and the SISP Approval Order, for reasons detailed in the Monitor's First Report dated February 26, 2025. The Monitor has reviewed the cash flows prepared by JBT Group management and is satisfied that with the proposed DIP financing of \$250,000, the JBT Group will have sufficient liquidity to continue its business operations until May 31, 2025, which would be after the expiry of the extended Stay Period under the ARIO (proposed to expire on May 16, 2025). Under the SISP, binding bids are to be submitted by April 18, 2025 and the successful bidder is to be selected on April 25, 2025.

*The Arguments in Favour of TD Bank's Receivership Application*

[20] TD Bank is the Debtors' senior secured and largest creditor.

[21] The Debtors have been in default of their various loan agreements and credit facilities with TD Bank (the "Credit Facilities") since in or about June of 2023. The Bank informally agreed to forbear from enforcing on its security for almost a year. This agreement to forbear was formalized in a forbearance agreement dated April 13, 2024, and renewed on June 26, 2024 and December 13, 2024 (collectively, the "Forbearance Agreement"). During this period the Debtors continued to be in default of the Credit Facilities and were often in default of their obligations under the Forbearance Agreement.

[22] During the forbearance period, and in consultation with TD Bank, the JBT Group engaged a financial advisor, effected the sale of a real property and other assets, and implemented an operational restructuring to decrease operating costs and enhance the JBT Group's market position. The JBT Group's efforts resulted in a reduction of the indebtedness owed to TD Bank from approximately \$25 million in January of 2024 to \$16.2 million in December of 2024.

[23] Despite a lengthy period of forbearance by TD Bank, and the reduction of the indebtedness owed to TD Bank to \$16.2 million by December of 2024, the JBT Group were unable to come up with a refinancing proposal or restructuring plan that was acceptable to TD Bank, and they missed critical milestones in January of 2025 that resulted in TD Bank's Demands.

[24] The February 6, 2025 CCAA Application was met with a draft Notice of Application for the appointment of a receiver by TD Bank dated February 7, 2025 (the "Receivership Application"). The receivership application seeks to lift the NOI stay of proceedings and the appointment of BDO Canada Limited ("BDO") as receiver (the "Receiver"), without security, of all of the current and future assets, undertakings, and properties (the "Property") pursuant to s. 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "CJA").

[25] When the two applications came before the court on February 10, 2025, the court was concerned with preserving a *status quo* pending a proper hearing of both the CCAA Application and the Receivership Application. This was achieved through the granting of the limited CCAA Initial Order. The Receivership Application was adjourned to February 27, 2025 at the return of the comeback hearing in the CCAA Application to keep the options for both manner of proceedings open and available for the court's consideration.

[26] TD Bank has the right under its security documents to appoint a receiver. The JBT Group also consented to the appointment of a receiver under the terms of the Forbearance Agreement.

[27] The Debtors continue to access their line of credit with TD Bank, forcing TD to effectively assume the role of a *de facto* interim lender and bear the burden of CCAA-related costs. At the heart of TD Bank's position are its concerns about the erosion of its security and its increasing debt. TD Bank is not prepared to continue financing, through its outstanding Loan Facilities, the going concern business of the JBT Group while its indebtedness increases and its security is primed by the proposed charges under the ARIO and continues to be eroded. The Debtors' cash flow projections do not forecast any payments under TD Bank's Credit Facilities during the extended Stay Period under the CCAA scenario.

[28] The CCAA Application proposes DIP Charges, Administration Charges for the professional fees of the Debtors and DLI (the Proposal Trustee and proposed Monitor) and possibly certain thus far unspecified non-trust priority payments for pre-filing debt to Critical Suppliers in excess of \$500,000. It does not propose to pay anything to TD Bank until there are distributions to creditors or there is a refinancing, in circumstances where TD Bank already anticipates that it will suffer a shortfall on its outstanding indebtedness.

[29] TD Bank's position is that the Debtors have already spent more than a year trying to refinance or sell their Business, with limited success (the sale of one property). The proposed SISP does not introduce anything new to entice third party interest; all it does is provide management with the ability to buy the Business and rid themselves of the burden of the TD Bank indebtedness through a stalking horse agreement that introduces uncertainty into the sale process and may, if anything, serve as a disincentive to potentially interested third parties.

[30] Given the history of this matter, TD Bank no longer has confidence in management's ability to successfully achieve a sale or refinancing of the Business to a third party and it wants to take control of the sale process now, particularly since its security has eroded to the point that there is likely to be a deficiency in TD Bank's recoveries.

## **Analysis**

### *The Threshold Requirements Are Not in Dispute*

[31] Neither the JBT Group nor TD Bank contest the ability of the other to satisfy the basic threshold requirements for the orders they seek: for the appointment of the proposed Monitor under the CCAA or Receiver under the BIA, respectively. They both agree that it is appropriate for one of the orders to be made (perhaps with some tweaking of the specific terms). However, they disagree about which of the orders is the more appropriate order to be made at this time and in the specific circumstances of the JBT Group.

[32] In deciding whether the appointment of a receiver is just or convenient, the court "must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto," which includes the rights of the secured creditor under its security: see *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d)

274 (Ont. Gen. Div.), at para. 10. Various factors may be considered by the court in making this determination: see *Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al.*, 2024 ONSC 1983, at paras. 24-25. The applicable factors, many of which are also relevant to the court's consideration of whether to grant an order under the CCAA, are present in this case..

[33] Conversely, to grant an initial order under the CCAA, there are basic statutory requirements that are satisfied in this case (and were found to have been at the time the Initial Order was made). To extend the CCAA Stay Period, the JBT Group must demonstrate under s. 11.02 (2) and (3) of the CCAA that, (1) circumstances exist to make the order appropriate, and (2) they have acted and are acting in good faith and with due diligence. The good faith and due diligence of the JBT Group are not being challenged at this time.

[34] Either one of the requested orders could be justified. The question to be decided is which one is more appropriate, just and convenient in the circumstances of this case.

#### *CCAA vs. Receivership*

[35] Where there are competing applications for a continued insolvency proceeding under the CCAA, or the appointment of a receiver under the BIA, "the court must consider all of the relevant factors in the exercise of its discretion to determine the most appropriate path forward": see *Antibe Therapeutics Inc. (Re)*, CV-24-00717410-00CL, Unreported Endorsement of Osborne J., 22 April 2024, at para. 59.

[36] The JBT Group focuses on the importance of the remedial purposes of the CCAA, as set out by the Supreme Court of Canada in *Century Services Inc v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379, emphasizing the importance of encouraging rehabilitation and allowing the debtor companies to carry on business to avoid the devastating effects of a bankruptcy or liquidation where possible, see *Century Services*, at paras. 15, 17-18, 59, and 70.

[37] However, courts have also held that it is just and convenient to appoint a receiver where:

- (i) The lender's security is at risk of deteriorating;
- (ii) There is a loss of confidence in the debtors' management;
- (iii) There is a need to stabilize and preserve the debtors' business; and
- (iv) The positions and interests of other creditors militate in favour of appointing a receiver.

See *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, 78 CBR (6th) 299, at para. 45.

[38] In this case, all of the above four factors are engaged, although the third and fourth could support both the Receivership and the CCAA Application.

[39] The jurisprudence suggests that a receivership is generally more appropriate where:

- (i) The debtor is not operating an active business: see *AFC Mortgage Administrative Inc v. Sunrise Acquisitions (Stayner) Inc et al*, CV-23-00710361-00CL, Unreported decision of Black J. dated February 29, 2024, at paras. 63-66; *Ashcroft Urban Developments Inc. (Re)*, 2024 ONSC 7192, at para. 70; *Antibe*, at paras. 70-71; and *Callidus v. Callcap*, 2012 ONSC 163, at para. 52;
- (ii) The debtor has acted in a manner to ground an objective basis for a loss of confidence in management: see *Antibe*, at para. 85; *Ashcroft* at paras. 104-106; and *Callidus*, at para. 51;
- (iii) There is no germ of a plan such that a stay is merely an attempt to postpone an inevitable liquidation: see *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36, at paras. 20-21; *Ashcroft*, at paras. 99-100; *Antibe* at para. 70; *AFC Mortgage*, at paras. 55-57; and
- (iv) The secured creditors will face prejudice as a result of a significant erosion of their security/collateral from the debtor's ongoing operations: see *Callidus*, at para. 53.

See also, *BCIMC*, at para 45.

[40] In *Ashcroft*, this court had to choose between competing CCAA and Receivership Applications involving businesses with over 200 employees that owned and operated various residential properties, and chose to appoint a receiver and terminate the CCAA proceedings, noting (at para. 113) that:

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

[41] The JBT Group seeks to distinguish *Ashcroft* on three primary grounds.

[42] First, the JBT Group suggests that there is a recognized preference for a receivership over CCAA in situations where the debtor's primary asset is real estate (and is a holding company rather than active operating company). In contrast, relief under the CCAA may be more appropriate than a receivership where there is an operating going-concern business: see, for example: *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775; and *Plan of Compromise or Arrangement of 2039882 Ontario Ltd. o/a Shelter Cove*, CV-24-00713069-00CL, Unreported Decision of Conway J. dated January 18, 2024.

[43] The business in *Ashcroft* was the management of already developed real estate holdings. In that sense, the JBT Group argues that its Business is different and more conducive to a debtor-led CCAA process. However, *Ashcroft* employed 200 people so it cannot be characterized as an

entirely passive real estate holding business. Similarly, while the primary asset of the JBT Group is its transport and logistics Business, one of its highest valued assets is the Melair Property which is, at least according to the stalking horse bidder, not essential to the operation of the Business since it is not part of the management led stalking horse bid<sup>1</sup>.

[44] Like in *Ashcroft*, this case is not clearly in either category. Further, it has been made clear that in a CCAA scenario, the focus will be on selling the Business, rather than a more traditional restructuring of an operating business. In other words, this would be a liquidating CCAA. While recognized in appropriate cases, the fact that this is a liquidating CCAA detracts somewhat from the underlying rationale of utilizing the CCAA over the BIA to preserve a going concern business. Further, there is nothing to prevent the stalking horse bidder from presenting its bid to the Receiver. TD Bank has not foreclosed the possibility of a going concern sale within the receivership.

[45] Second, the JBT Group contends that, where a debtor has been working cooperatively to resolve its issues, and management has been working in good faith and with due diligence, courts have not placed a lot of weight on blanket statements by creditors that they have lost confidence in management of the debtor. In these circumstances, the generic assertion of a loss of faith in management should be viewed in the broader context of the dispute over the appropriate manner of proceeding and not taken at face value without probing for further objective grounds for the loss of confidence: see *Pacific Shores*, at paras. 25-33.

[46] The type of loss of confidence in management that has supported creditor led, as opposed to debtor led, restructurings often involves some type of lack of co-operation, lack of candour or non-disclosure (see *Ashcroft at paras. 104-106 and Antibe at para. 85*). These reflect concerns that go beyond the obvious and always present circumstance of the debtor being in breach of its loan obligations and having been unable to repay the outstanding indebtedness through refinancing or other means prior to the commencement of the proceeding.

[47] However, here the loss of confidence of TD Bank in management of the JBT Group is not generic. It is specific and there is an objective basis for it: TD Bank has lost confidence in management's ability to do that which they say they are trying to do under the CCAA process, namely to sell or refinance the Business on a going concern basis. This is what management has been trying to do since at least October 2023 if not longer, with the benefit of TD Bank's forbearance.

[48] Yet, Debtors now propose to go to market the Business under a proposed SISP, burdened by a stalking horse agreement that would require other bidders to over bid by at least \$125,000

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<sup>1</sup> Given this, TD Bank asked the court, in the alternative to appointing the Receiver over all of the Debtors' Property, to appoint the Receiver at least over the Melair Property since the stalking horse agreement does not include this property. I do not need to consider this alternative position in light of the decision to grant the Receivership Application and appoint the Receiver over all of the Debtors' Property, including but not limited to the Melair Property.

plus \$65,000 for the break fee to be economically superior to the stalking horse bid, and they would have to separately negotiate for the Melair Property if they wanted it for the operation of the Business. Furthermore, the continued existence of the stalking horse agreement will itself be uncertain until March 31, 2025 (the deadline for proof of binding commitments from lenders), so that may deter interested parties from even committing to doing any due diligence before then, which will significantly reduce their ability to make a qualified bid within the prescribed time line.

[49] The fact that management is behind the stalking horse bid that introduces uncertainty and complications into the SISP is a further ground for TD Bank's loss of confidence in management's ability to fulfill their professed CCAA objectives. This leads TD Bank to be skeptical about the SISP and to view the CCAA process as a means for management to buy back the Business and force TD Bank to accept reduced recoveries on its debt without having to put forward a plan of arrangement to a creditor vote.

[50] The Debtors have shared with TD Bank their analysis and view that the value of the cash component of the stalking horse bid will likely be greater than the proceeds received under a liquidation scenario. This did not persuade TD Bank to go along with the CCAA scenario and proposed SISP and with the backstop Stalking Horse Agreement.

[51] Overall, even though it is not suggested that the Debtors have acted in bad faith, the TD Bank's expressed lack of confidence in management is understandable and justified in the circumstances and given the history of dealings between the parties in this case. It is not just a bald assertion.

[52] Third, the JBT Group emphasizes that a specific contractual right to appoint a receiver merely relaxes the burden on the applicant seeking what is otherwise considered to be extraordinary relief, since it involves enforcing a term of a bargain that the parties have already agreed to: see *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27. An agreement that a creditor may ask the court to appoint a receiver upon default, and even a specific agreement consenting to the appointment of a receiver if certain conditions or milestones are not met, does not dictate the outcome and does not necessarily mean that a receiver will be appointed: see, for example, *Bank of Montreal v. Maple City Ford Sales (1986) Ltd.*, 2002 CanLII 23166 (ON SC), at para. 142; *Callidus*, at paras. 29 and 31; and *Bank of Nova Scotia v. Smiling Simba Learning Academy Inc.*, 2025 ABKB 11, at paras. 31-32.

[53] However, where a creditor has a contractual right to appoint a receiver upon the debtor's default, has already agreed to forbear and defer exercising its enforcement remedies and, in exchange, has received further confirmation of the Debtors' consent to the appointment of a receiver if the forbearance did not lead to the promised refinancing of the debt: "Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order": see *ATB Financial v. Mayfield Investments Ltd.*, 2024 ABKB 635, at para 40.

[54] That expectation reasonable arises in this case. This is not a situation where TD Bank has come rushing to court to seek the appointment of a Receiver without affording the Debtors any

opportunity to explore the possibility of other options; the Debtors had a long period of forbearance and were not able to achieve a refinancing or sale that was satisfactory to their senior secured lender. They were given a final further opportunity to come up with a plan that their senior secured creditor could support when the Initial Order was made. They have been unable to do so.

[55] Like in *Ashcroft*, it appears that the Debtors here have sought CCAA protection to buy time to continue their ineffective attempt to raise new funding, that will now be used to support the stalking horse bid. That will put TD Bank in the position of having to accept a repayment shortfall along the lines of what it rejected in January when presented with the Debtors last proposed refinancing option. That outcome is not appropriate, fair or reasonable in the circumstances of this case. In terms of other potential outcomes under the CCAA, if the results of the past one plus year of efforts by the Debtors are any indication, as they surely are, the chances of any other better going concern proposal or refinancing emerging in a debtor-led CCAA proceeding are low.

[56] TD Bank acted reasonably and worked with the Debtors and it has earned the right to exercise its enforcement remedy and appoint the Receiver. In the circumstances of this case, I find that it is more appropriate, just and convenient to grant the Receivership Application rather than the CCAA Application which is most likely to end with the court being asked to approve the Stalking Horse Agreement and a separate sale of the Melair Property.

[57] I will address briefly some of the other points raised.

[58] Although arguments were made by TD Bank about the potentially higher costs of a CCAA process, that has not influenced my decision in this case. While “CCAA proceedings are inherently expensive [because] [t]hey require regular court attendances, probably with greater frequency than a receivership does” (see *BCIMC* at para. 93), the possibility of an incrementally higher cost is not a driving factor in this case because there will be a steep learning curve (and associated cost) for the Receiver and its counsel who do not have the background with the Debtors and their business that they themselves and the Monitor already have.

[59] Aside from the Debtors' speculation that a receivership will be less effective than a debtor-led sale process, TD Bank argues that there is no specific evidence that a court-appointed receiver would negatively impact the interests of employees or third parties. However, I do not need specific evidence to appreciate that there is a greater possibility of a liquidation of assets that does not involve a going concern transaction and to infer that that employees, contractors and third party suppliers may be negatively impacted by that.

[60] Counsel for the Debtors asked the court to take into consideration that the Supreme Court of Canada has recognized that heightened creditor entitlements can be subordinated to the interests of other stakeholders in appropriate, albeit exceptional cases. The examples referenced were: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271; *Canada v. Canada North Group Inc.*, 2021 SCC 30, [2021] 2 SCR 571, cases that considered priming court ordered super priority charges based on statutory deemed trusts.

[61] This submission was not developed in any detail, but was rather mentioned in passing during oral argument. Having given it some thought, I am not convinced that this is one of those

exceptional cases where subordinating the senior secured creditor's interests under its loan and security documents to the interests of other stakeholders who may be affected if the Business cannot survive under the burden of that debt is warranted. The interests of other stakeholders, while a relevant factor to take into consideration, do not in the circumstances of this case trump the interests of the Debtors' senior secured and largest creditor that has been supporting the JBT Group's restructuring efforts for more than a year, is still owed over \$16 million and is facing the prospect of a shortfall.

[62] Having considered all of the above, and the more fulsome written and oral arguments and submissions on behalf of the parties, I find it to be more appropriate, just and convenient to appoint a receiver now in the circumstances of this case. TD Bank's security has been eroded in the interim, and it should not be forced to continue to finance this Business through a debtor led CCAA that does not propose any payment of interest or principal under the TD Bank Credit Facilities.

#### *Other Relief Sought*

[63] Since I have decided to grant the Receivership Application and not grant the CCAA Application, I do not need to consider the requirements for the approval of the DIP Financing and DIP Charge, or the increased Administration Charge under the proposed ARIO, or the requirements for approval of the SISP and the stalking horse agreement under the proposed SISP Approval Order.

[64] As part of the CCAA Application, the Debtors and the Monitor asked the court to seal a Confidential Exhibit that discloses confidential information about the valuation of their Business. The parties agree that if this analysis is made public it will negatively affect the ability to maximize value and maintain integrity in any sale efforts under either of the CCAA or receivership scenarios. The requested sealing order is of a limited scope. It is necessary to protect commercially sensitive information that could negatively impact the JBT Group and its stakeholders in the continuing efforts to sell their Property. Even though the proposed SISP under the CCAA is not proceeding, for so long as there remains a prospect of some sale process being carried out by the Receiver, it would be harmful to that process for the terms of the Confidential Exhibit to be available to participants in that later process.

[65] The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the requirements in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, at para. 53, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 SCR 75, at para. 38. Preservation of the confidentiality of information inherent in a sale process is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*, at para. 85, when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary.

[66] Counsel advised at the conclusion of the hearing on February 27, 2025 that they would propose language to be incorporated into the Receivership Order, or a CCAA termination order or some other order to seal the Confidential Exhibit if the court so orders, which I do.

[67] Counsel is directed to ensure that the sealed Confidential Exhibit is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that it can be physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order, if necessary.

[68] Trade-Mark Industrial Inc., Trade-Crete Ltd. and Comtrade Ltd. (the "Trade-Mark Group") brought a motion returnable on February 27, 2025 for relief carving out its construction lien action commenced in 2023 from any ongoing stay such that: (a) it has leave to continue its action bearing Court File No. CV-23-00001474-0000, commenced at Kitchener, Ontario (the "Lien Action"), against Waydom Management Inc., Melair Management Inc. and JBT Transport Inc.; and (b) any stay of proceedings in these insolvency proceedings will not apply to the continued pursuit of the Lien Action. This motion is not urgent. It was acknowledged that the Trade-Mark Group only needs the stay of proceedings to be lifted before October 2025 when the Trade-Mark Group is otherwise required to set the Lien Action down for trial if it is proceeding.

[69] This motion in respect of the Lien Action was adjourned. It may be brought back before the court with reasonable notice to the service list, if necessary. Nothing in this endorsement shall have any bearing on the merits of any relief eventually sought in respect of the continued pursuit of the Lien Action.

[70] There was some discussion at the hearing about the form of order(s) to be signed once my decision has been released. It may be that there are some additional terms that could be appropriately added to the proposed Receivership Order, for example, to address any immediate concerns about Critical Suppliers. Accordingly, I will wait for counsel to confer among themselves and then send me the form of receivership order and any other order(s) that are deemed necessary, arising out of this endorsement, together with blacklines against the last versions of the orders(s) that were before the court. This will need to be done before the current Stay Period expires on March 6, 2025. If there is no agreement, I will sign the originally proposed form of Receivership Order, which counsel for TD Bank should forward directly to me on or before March 6, 2025.

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Kimmel J.

**Date:** March 4, 2025

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*,  
2009 BCSC 1527

Date: 20090923  
Docket: S095413  
Registry: Vancouver

Between:

**Maple Trade Finance Inc.**

Plaintiff

And:

**CY Oriental Holdings Ltd.**

Defendant

Before: The Honourable Mr. Justice Masuhara

## **Oral Reasons for Judgment In Chambers**

Counsel for the Plaintiff:

J.J.L. Hunter, Q.C.  
B.R.H. Johnston

Counsel for the Defendant:

P.J. Reardon

Place and Date of Hearing:

Vancouver, B.C.  
September 21, 2009

Place and Date of Judgment:

Vancouver, B.C.  
September 23, 2009

[1] **THE COURT:** This is my ruling with respect to the application of Maple Trade Finance Ltd. made Monday.

[2] The plaintiff seeks an order pursuant to s. 39 of the *Law and Equity Act* and Rule 47 for the appointment of the Bowra Group as receiver and manager over all of the defendant's current and future assets undertaking in properties, including all proceeds. The application arises out of the default by the defendant of a loan owed to the plaintiff. The principal of said loan was some \$3.5 million. The plaintiff says that as of July 15, 2009, the outstanding balance owed was \$5.7 million.

[3] The defendant does not dispute that it is in default of the loan. Though it disputes the level of interest that has been accrued. It does not dispute that the amount owing is sizable. However, it is prepared to make payments in the order of some \$4 million in six equal monthly installments and to have the interest dealt with as a sole issue. In this regard, the defendant has filed a statement of defence and counterclaim.

[4] In terms of background, the plaintiff firm provides accounts and receivable financing to various businesses, including the defendant. The defendant is a holding company whose principal asset is its wholly owned subsidiary, CY Oriental Garments Inc., a private BC company which in turn owns a BBI based company, which in turn owns a Hong Kong company called Huge Best International, which in turn owns two operating companies in China. The operating companies in China are in the garment manufacturing business.

[5] Until early July 2009, the plaintiff company was listed on the TSX Venture Exchange. In January 2006, the plaintiff and defendant entered into a financing agreement dated January 4, 2006. On June 27, 2006, the defendant executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The finance agreement and the GSA were registered in the BC Personal Property Registry.

[6] The GSA provides, *inter alia*, that in the event of default, the following rights:

- 1) the plaintiff may, by instrument in writing, appoint any person as a receiver of all or any part of the collateral;
- 2) the plaintiff may from time to time remove or replace a receiver or make application to any court of competent jurisdiction for the appointment of a receiver.

[7] In July 2007, the January 2006 agreement was amended and restated by way of a credit letter which confirmed the earlier agreements and further increased the defendant's credit facility with the plaintiff from \$5 million to \$8 million.

[8] In furtherance of the financing agreements, the accounts receivable of Huge Best International were assigned to the defendant, who in turn assigned them to the plaintiff. As well a customer, Ideal Century's accounts receivable was also assigned to the plaintiff and to which Century acknowledged such assignment.

[9] The payments to the plaintiff from Ideal went into default. By letter dated March 3rd, 2009, the plaintiff demanded payment in full of the plaintiff's outstanding indebtedness and gave notice to the defendant pursuant to s. 244 of the *Bankruptcy and Insolvency Act*.

[10] In late March, the defendant made a payment of \$100,000 to the plaintiff as a gesture of good faith in furtherance of negotiations related to forbearance. In early June 2009, the defendant made a further payment of \$270,000 to the plaintiff as part of what it says was an agreement in principle on forbearance. The defendant has strongly denied any such agreement in principle. However, it accepted the monies.

[11] The current application was originally scheduled to be heard on August 27, 2009. On August 26, 2009, at the defendant's request, the plaintiff agreed to adjourn the application to September 11th in order to give the defendant more time to attempt to satisfy its indebtedness to the plaintiff.

[12] Further communications between the plaintiff and the defendant and their counsel carried on, and a letter dated September 10th, 2009, marked "with

prejudice" was delivered. The plaintiff adjourned the within application from September 11th to September 17th in order to fully consider the contents of the "with-prejudice" letter. The plaintiff concluded that the contents of the letter did not set out an acceptable basis for resolving the indebtedness.

[13] The matter now is before the court. The applicable test is whether it is just and convenient to make the order sought for a receiver and manager. The authorities relied upon by the applicant state that the court ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default, which is as in the case of the instant application.

[14] A further case presented to the court, *Bank of Nova Scotia v. Freure* [1996], 40 C.B.R. (3d) 274, the plaintiff has indicated that the test of just inconvenience was said to be met where:

... it is more in the interests of all concerned to have the receiver appointed by the court.

[15] In this regard, the applicant submits that for the following reasons, it is more in the interests of all concerned that a receiver and manager be appointed by the court: that the parties have agreed the plaintiff may seek the appointment of a receiver in the event of a default; that the defendant owes a significant sum of money; there appears not to be a dispute with the fact of the size of the indebtedness; and, that the defendant is in default.

[16] The plaintiff noted that there were irregularities within the defendant, including the resignation of its board of directors and its recent delisting from the TSX exchange, which evidences a need to ensure that the defendant's assets are preserved for the plaintiff's benefit; that there are concerns with respect to the financial statements of the defendant; and that the defendant does not indicate what steps are being taken, to address the prospects for early repayment of the defendant's indebtedness.

[17] Further, that the plaintiff is reasonably concerned that the prospect of the defendant performing its various obligation is in jeopardy; that the plaintiff has given the defendant reasonable opportunities to resolve the indebtedness, including the already mentioned adjournments; that the efforts to resolve or restructure or refinance the defendant's indebtedness to the plaintiff have to date proved unsuccessful; and that the defendant is essentially a holding company and presumably exercises oversight over the affairs of subsidiary companies, including the operating companies. As such, the defendant's value is likely to be optimized by a receiver manager ensuring the continued operation of the defendant's subsidiaries.

[18] The respondent in reply submits the following: that it has made a payment of \$100,000, and as well as \$270,000, which were after the March 2009 notice; that the negotiations had been initiated by the defendant with the plaintiff for terms of forbearance after the March 2009 notice; that the plaintiff has recourse to legal execution and thus the equitable remedy applied for is not warranted, but notes that the plaintiff has started a:

... baseless action in the United States against one of the defendant's customers.

[19] In this regard, a sanctions motion is currently before the US court regarding whether the plaintiff's actions there was an abuse of process.

[20] Further, it notes that notwithstanding the cease-trade orders and the delisting of the company from the TSX Venture Exchange and the issues regarding its audited financial statements; that the defendant has a fully functioning board of directors; that the ongoing operations of the defendant's subsidiary operating companies have not been impacted by these issues; and specifically that these operating companies are profitable.

[21] Further, that it has made a with-prejudice proposal to the plaintiff as mentioned on September the 10th, that the essence of which is that the principal majority shareholder of the defendant, who holds 44 percent of the outstanding

shares, would be provided as security. I am assuming that is the 20,715,100 common shares referred to in the affidavit of Mr. Gee.

[22] That \$4,084,767, which is the principal and non-default interest accrued, will be paid as follows: that the defendant will pay \$1,016,019 plus non-default interest to the plaintiff, which it stated in the September 10th letter would be within ten days of that letter; that the balance of some \$3 million would be paid in six equal installments every 30 days thereafter with a seven-day curative period, together with interest at the non-default interest rate.

[23] Further, during the course of the hearing, Ms. Carteri advised that the defendant would agree that it would consent to an order that would lead to the immediate appointment of a receiver upon default of any of the said payments.

[24] The position of the defendant is also that there is no evidence of jeopardy to the plaintiff's security.

[25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

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

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

[26] The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.

[27] However, on the other hand, there is a proposal by the defendant to repay a significant amount which was further expanded during the hearing by defendant's counsel. This lends support to the defendant's position. I note as well, the more recent payments made by the defendant to the plaintiff are not insignificant, as well as Mr. Gee's statement that since the summer of 2006, the amounts advanced by the plaintiff are in the order of \$7.6 million and that repayments through August 2009 have been in the order of \$5,238,766. I recognize that interest has been accruing on the principal.

[28] The proposal as explored and discussed during the course of the hearing would align with the factor of controlling the costs to the parties at this point. It would also, align with the likelihood of maximizing return to the parties.

[29] If the company's condition as to its viability was accepted, this would deal in part with the plaintiff's concern regarding jeopardy. The difficulty is the confidence that one can have in the defendant's ability to make good on its payments.

Mr. Hunter, stated the concern really is not as much to do with the promise, but more to do with performance. I would agree.

[30] However, balancing the factors, an order that would have the automatic imposition of a receiver, upon default in any payment required by the defendant, would address the concerns at this point. I think the balance of convenience can further be achieved through a further modification of the defendant's proposal to reflect the concerns over the lack of financial information to support the contention regarding the financial strength of the operating companies.

[31] To that extent, the payments will be made in this manner: the defendant is to pay the plaintiff on or before the 28th of September, 2009, the sum of \$1,016,019 plus non-default interest.

[32] MR. REARDON: Sorry, My Lord, because I'm not familiar, would you mind repeating that number.

[33] THE COURT: Okay. \$1,016,019.

[34] MR. REARDON: Yes, thank you.

[35] THE COURT: \$1,016,019 plus non-default interest. The defendant is to pay the plaintiff, over four months, the remaining outstanding balance plus non-default interest in equal installments.

[36] The defendant will also provide financial statements related to its company and operations, including its wholly owned subsidiaries. Mr. Chen's shares will be delivered as security to the plaintiff.

[37] There will be a term that any default in payment, not cured within three days, as opposed to the seven days suggested by defence counsel, will lead to the automatic appointment of a receiver on the terms as sought in the application.

[38] There will also be a term that the defendant, will not permit the disposition of any of its property, including wholly owned subsidiaries, except in the ordinary

course of business; and that Mr. Chen and Mr. Gee. are to make monthly representations confirming adherence to this term.

[39] Further, any material adverse change in circumstances in the condition of the defendant or its wholly owned subsidiaries are to be reported immediately to the plaintiff, at which time the plaintiff has leave to bring a further application for the immediate appointment of a receiver.

[40] That concludes my ruling.

***“The Honourable Mr. Justice D. M. Masuhara”***

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Royal Bank of Canada v. 1343173 B.C.  
Ltd.,*  
2025 BCSC 2124

Date: 20251029  
Docket: H63775  
Registry: Kamloops

Between:

**Royal Bank of Canada**

Plaintiff

And

**1343173 B.C. Ltd. and Matt Ashley Stromsten**

Defendants

Before: The Honourable B. Smith

## **Reasons for Judgment**

Counsel for the Plaintiff:

S.A. Dubo

Counsel for the Defendants:

S.M. Gardner

Place and Date of Hearing:

Kamloops, B.C.  
September 11, 2025

Place and Date of Judgment:

Kamloops, B.C.  
October 29, 2025

**Introduction**

[1] This is a summary trial application by the plaintiff, Royal Bank of Canada (“RBC”), concerning various loan and security agreements (collectively, the “Agreements”) between it and the defendants.

[2] RBC has concerns over its security position with respect to the Agreements and seeks to advance enforcement proceedings by now obtaining an order for judgment and a receivership order.

**Orders Sought**

[3] RBC seeks three orders:

- an order for judgment (“Judgment”) against the defendant, 1343173 B.C. Ltd. (“134 BC”), as borrower and the defendant, Matt Ashley Stromsten (“Mr. Stromsten”), as guarantor;
- a receivership order (“Receivership Order”) appointing Grant Thornton Limited (“GT”) as receiver, without security, of all assets, undertakings, and property of 134 BC, including all proceeds thereof (collectively, the “Property”); and
- an order for all of RBC’s fees, costs and expenses.

[4] For the following reasons, the matter is suitable for determination by summary trial and all three orders sought are granted.

**Summary Trial**

[5] The defendants submit the application is not suitable for determination by summary trial because I am unable, on the whole of the evidence before me on the application, to find the facts necessary to decide the issues of fact or law, as is required by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 9-7(15)(a)(i) [Rules]. Specifically, the defendants submit that I am unable to determine the Judgment amount. In the alternative, the defendants submit I could pronounce

judgment in favour of RBC and refer the matter to the registrar to determine the Judgment amount. The defendants submit that any determination of whether to appoint a receiver would be premature until the Judgment amount has been determined.

[6] The suitability of determining a matter by summary trial procedure was discussed in *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 30–31:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[7] Having reviewed and considered the affidavit evidence, I am satisfied that the matter is suitable for determination by the summary trial procedure. The evidence establishes the amount of indebtedness and addresses the factors for consideration in determining whether to grant a receivership order. It would not be unjust to give judgment based on the summary trial procedure. The matter is not particularly complex. There is some urgency in having the matter resolved, in that further delay will prejudice the plaintiff, specifically concerning its security position. Credibility is not a factor in the determination of the matter.

**Sealing Order**

[8] At the hearing before me on September 11, 2025, the defendants applied for a sealing order with respect to Mr. Stromsten's five affidavits until further order of the court. The application was based on the affidavit contents and the exhibits, which contain confidentiality provisions prohibiting disclosure and engage the commercial interests of the defendants. The defendants' position was that these reasons outweigh any limited public interest in access to the documents until further order of the court.

[9] RBC took no position on the defendants' application.

[10] I granted the application and imposed the sealing order because I was satisfied it was appropriate, having regard to the test in *Sherman Estate v. Donovan*, 2021 SCC 25.

**Background Facts**

[11] The background facts set out below are derived from the affidavits of: Alex Wang, RBC Senior Manager of Special Loans and Advisory Services; a legal assistant to counsel for RBC; and Mr. Stromsten.

**Parties**

[12] 134 BC operates a trucking business under the name Stromsten Enterprises, which is headquartered in Kamloops. Mr. Stromsten is the director and owner of 134 BC and guaranteed payment of 134 BC's indebtedness to RBC.

[13] RBC is the primary secured creditor of 134 BC.

**Pleadings**

[14] RBC commenced the action by notice of civil claim filed on November 25, 2024. 134 BC and Mr. Stromsten filed a response to civil claim on January 2, 2025, in which they denied all claims against them.

**Credit Facilities**

[15] RBC and 134 BC entered into a credit agreement dated October 27, 2023 (the “Credit Agreement”).

[16] Pursuant to the Credit Agreement, RBC agreed to extend certain credit facilities to 134 BC, including a revolving credit line demand facility (the “Credit Line”) and a Visa credit card to a maximum of \$100,000 (the “Visa”).

[17] Concerning the Visa, RBC and 134 BC also entered into a business card agreement dated April 4, 2023 (the “Visa Agreement”).

[18] Pursuant to the terms of the Credit Agreement, 134 BC agreed to pay all of RBC’s costs.

**Security**

[19] Pursuant to a general security agreement in favour of RBC dated April 4, 2023 (the “GSA”), 134 BC granted RBC a security interest in all its present and after-acquired personal property as security for all obligations, indebtedness and liability of 134 BC to RBC.

[20] Pursuant to the terms of the GSA, 134 BC agreed, among other things, that RBC is entitled to appoint a receiver upon default by 134 BC, and that it would pay all of RBC’s costs.

[21] Financing statements were properly registered in respect of the GSA with the BC personal property registry (“BC PPR”), including a first-in-time registration with respect to all 134 BC’s present and after-acquired personal property as granted by the GSA.

[22] RBC is the only creditor with a financing statement registered in the BC PPR in respect of a general security agreement from 134 BC. The remaining creditor registrations relate to collateral which are specific serial numbered goods consisting of vehicles or equipment.

### **Leases**

[23] RBC and 134 BC also entered into an RBC lease agreement dated July 25, 2023, together with the following two associated leasing schedules (collectively, the “Master Lease”):

- a) Leasing Schedule #201000075208, dated July 28, 2023 (“Lease 1”), in connection with the lease of a used dump trailer; and
- b) Leasing Schedule #201000077149, dated November 1, 2023 (“Lease 2”), in connection with the lease of four trucks and two used side dump trailers.

[24] Pursuant to the Master Lease, 134 BC agreed, among other things, to make certain periodic lease payments to RBC, and pay all of RBC’s costs.

[25] No lease payments have been received by RBC under Lease 1 since April 2024, and under Lease 2 since May 2024.

### **Guarantee**

[26] Pursuant to a written guarantee and postponement of claim dated July 13, 2023, Mr. Stromsten guaranteed payment to RBC on demand of all debts and liabilities at any time owing or remaining unpaid by 134 BC to RBC, limited to the amount of \$500,000 (the “Guarantee”).

[27] Pursuant to the Guarantee, Mr. Stromsten agreed to pay RBC on demand on August 29, 2024, at the rate of prime plus 5% p.a., and pay all of RBC’s costs.

### **Defaults and Demands**

[28] The Credit Line and the Visa are payable on demand, regardless of default.

[29] On August 29, 2024, RBC issued demand to 134 BC demanding immediate repayment of its indebtedness due and payable pursuant to: the Credit Agreement; the Visa Agreement; Lease 1; and Lease 2. Concerning the GSA, RBC enclosed notices of intention to enforce security, pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3 [BIA].

[30] 134 BC did not pay.

[31] Also on August 29, 2024, RBC issued a demand letter to Mr. Stromsten demanding immediate repayment of his indebtedness due and payable pursuant to the Guarantee.

[32] Mr. Stromsten did not pay.

[33] RBC has concerns about its security position. RBC's security is mostly over vehicles and equipment, and without timely seizure of such assets, RBC's security position will deteriorate. In addition, interest continues to accrue on the indebtedness.

#### **Current Indebtedness**

[34] As of February 13, 2025, the defendants were indebted to RBC in the amount of \$2,214,710.40, plus accruing interest and costs.

#### **Guarantee**

[35] Pursuant to the Guarantee, Mr. Stromsten is guarantor in the amount of \$500,000, plus interest from and after the date of demand on August 29, 2024, at the rate of prime plus 5% p.a.

#### **Receivership**

[36] 134 BC has substantial tax debt outstanding for GST and unremitted source deductions. A balance sheet 134 BC provided to RBC dated July 31, 2024, disclosed GST payable of more than \$200,000 and unremitted source deductions of more than \$160,000. Interest and penalties are accruing on the outstanding tax debt.

[37] 134 BC has come to an agreement with the Canada Revenue Agency ("CRA") concerning payment of the outstanding tax debt. Part of the agreement requires 134 BC to make all necessary payments for 2025, which it has done.

[38] GT is a licensed trustee with experience in insolvency proceedings, including receiverships, and has consented to act as a receiver if appointed by the court.

[39] The proposed receivership order substantially reflects the terms of the BC Model Receivership Order.

## **Discussion**

### **Judgment**

[40] RBC is entitled to judgment.

[41] 134 BC has failed to make payments to RBC as and when due under the agreements between them.

[42] By failing to make payments when due, 134 BC is in default of its contractual obligations to RBC under: the Credit Agreement; the Visa Agreement; Lease 1; and Lease 2.

[43] 134 BC does not dispute its indebtedness to RBC and Mr. Stromsten does not dispute being a guarantor. 134 BC and Mr. Stromsten are contractually bound to do certain things which they have failed to do. Despite RBC's demand, the debt remains unpaid.

[44] RBC has been trying to get its application heard since March 2025:

- March 11, 2025 (RBC filed its notice of application);
- April 14, 2025 (adjourned because of a scheduling dispute between counsel);
- May 12, 2025 (adjourned because of lack of court time);
- June 16, 2025 (unanticipated closure of the court);
- August 4, 2025 (no judge available); and
- September 11, 2025 (summary trial, judgment reserved).

[45] During the almost 14 months since RBC issued its repayment demand to the defendants, and the more than seven months which have elapsed since RBC filed

its notice of application, the defendants have not paid any amount towards their indebtedness.

[46] The amount of the Judgment is based on the amounts of indebtedness as at February 13, 2025, which are set out in Alex Wang's affidavit, as follows:

| <b>Facility:</b> | <b>Indebtedness:</b> | <b>Interest Rate:</b> |
|------------------|----------------------|-----------------------|
| Credit Line      | \$434,534.86         | Prime plus 2.88% p.a. |
| Visa             | \$96,273.26          | 19.99% p.a.           |
| Lease 1          | \$81,933.10          | Not applicable        |
| Lease 2          | \$1,601,969.18       | Not applicable        |

[47] The principal amount is not in dispute. Interest is not payable on the leases. The affidavit of a legal assistant for counsel for RBC establishes that, accounting for further accrued interest, the indebtedness as of April 14, 2025 was \$2,223,607.33, plus costs.

## **Receivership**

### ***Legal Framework***

[48] Pursuant to s. 243(1) of the *BIA*, on application by a secured creditor, a court may appoint a receiver to do any or all 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.

[49] Pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], a receiver or receiver manager may be appointed either unconditionally or on terms and conditions the court thinks just.

[50] In *Maple Trade Finance Inc. v. C.Y. Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25 [*Maple Trade*] Masuhara, J., referenced the list of factors found in *Bennett on Receivership*, 2d. ed. (Toronto: Carswell, 1999) at p. 130 (“Bennett Factors”), which may inform the determination of whether it is just or convenient to appoint a receiver:

- a. whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c. the nature of the property;
- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;
- f. the balance of convenience to the parties;
- g. the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i. the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k. the effect of the order upon the parties;
- l. the conduct of the parties;
- m. the length of time that a receiver may be in place;
- n. the cost to the parties;
- o. the likelihood of maximizing return to the parties;
- p. the goal of facilitating the duties of the receiver.

[51] At para. 26 of *Maple Trade*, Masuhara, J. said: “The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver”.

[52] Pursuant to s. 227(4.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), His Majesty in right of Canada has priority over all other security interests regarding some tax debt concerning GST and employee source deductions.

***Analysis***

[53] It would be just and convenient to appoint a receiver. GT is an appropriate receiver. The proposed receivership order is appropriate.

[54] 134 BC has been in default of its obligations to RBC since at least August 2024, and RBC does not foresee any reasonable prospect of recovery without further enforcement action.

[55] 134 BC has not presented a refinancing plan or other plan satisfactory to RBC.

[56] Based on 134 BC's financial reporting available to RBC, 134 BC appears to be unable to meet its obligations as they come due.

[57] The defendants submit that RBC has not met the statutory test for appointment of a receiver. Accordingly, the defendants submit that appointment of a receiver should be denied or, in the alternative, postponed or, in the further alternative, the receiver's powers concerning marketing and sale of the defendants' assets ought to be postponed.

[58] Mr. Stromsten filed five affidavits on behalf of the defendants. RBC does not oppose my considering them all, noting that RBC is not prejudiced thereby, as they provide updates about proposed funding. RBC also submitted a further affidavit. The defendants do not oppose my considering it.

[59] In Mr. Stromsten's first affidavit, dated April 28, 2025, he deposed that the defendants had secured various long-term trucking contracts, as well a \$2,500,000 financing commitment from a private lender. The funding in respect of the \$2,500,000 financing commitment was supposed to have occurred on April 4, 2025, but did not, due to delays associated with obtaining appraisals on certain property

the private lender was using as collateral for its own loan from an institutional lender to fund its financing commitment to 134 BC.

[60] In Mr. Stromsten's second affidavit, dated May 14, 2025, he deposed that the appraisals which had prevented funding, on April 4, 2025, of the private lender's financial commitment to 134 BC, had since been completed, and that funding was expected to occur within the next 60 days. Mr. Stromsten acknowledged RBC's concerns regarding 134 BC's tax debt to CRA, stating:

As for RBC's concerns regarding CRA, we have already been in contact with CRA and have a payment arrangement in place. CRA has provided us with more than enough time to payout any existing debts using the profits from the existing contracts and we are current with our payroll source deductions.

[61] In Mr. Stromsten's third affidavit, dated May 22, 2025, he deposed the outstanding tax debt to CRA was approximately \$602,0000 and that between RBC and CRA there was "roughly 2.8 million owed".

[62] In Mr. Stromsten's fourth affidavit, dated June 17, 2025, he deposed that funding of the private lender's financial commitment to 134 BC had not yet occurred, and that he had been advised that "funding has been delayed due to some internal compliance issues" between the private lender and the institutional lender it had been dealing with concerning its own loan to fund its financing commitment to 134 BC. He deposed that the private lender had "pivoted and secured financing through a different third-party lender" that had "approved the deal and is proceeding to fund subject to minimal conditions". He deposed that as of June 17, 2025, the private lender had "advised that the funds will be released following the approval of title insurance, which is expected to be completed by the end of the week at the latest". A supporting mortgage approval document from the new third-party lender referred to an advance amount of \$2,082,545 net of fees.

[63] In Mr. Stromsten's fifth affidavit, dated July 31, 2025, he deposed that on June 24, 2025, 134 BC received funding of \$1,945,000 from the private lender, contingent on 134 BC being able to get RBC to discharge its security. 134 BC

returned the \$1,945,000 to the private lender after it was unable to get RBC's agreement.

[64] Mr. Stromsten's affidavits are supported by various contracts and financing documents. I am satisfied that these documents are what they purport to be, namely legitimate commercial documents evidencing legitimate efforts by the defendants to keep 134 BC a viable operation able to pay its creditors.

[65] I have considered the defendants' affidavits and submissions, *Maple Trade* and the Bennett Factors in my determination of whether it is just and convenient to order a receiver.

[66] Based on the information in its possession, RBC is unable to determine the amount 134 BC owes CRA which takes priority over its own security interest. RBC is concerned that the Crown may have a large in trust claim with priority, as the deemed trust arises from the time the tax and deductions should have been remitted. While there is a payment plan in place between 134 BC and CRA, CRA have not agreed to a waiver of their priority position, and any payment plan agreed to between 134 BC and CRA does not affect the Crown's priority position.

[67] The defendants rely on the authority of *Access Road Capital, LLC v. Bron Media Corp.*, 2023 BCSC 497, in which Macintosh, J. determined that a two-month postponement was justified due to the debtor's assurance that adequate financing to pay the creditor's claim would be in place within two months. Here, however, there is no such assurance.

[68] In essence, the defendants say they need more time to pay. Yet, despite already having had a lengthy period to pay, the defendants' prospects for financing have not materialized. There is no realistic plan for financing in the foreseeable future. The debt far exceeds the financing which was eventually obtained. It is not appropriate to delay enforcement any further. The secured assets are being used and are depreciating.

[69] The defendants submit RBC is the largest financial institution in Canada and, therefore, the impact on RBC of a postponed receivership is minimal. The defendants submit that, conversely, the impact on them, their families and their employees is severe and will negatively impact their safety, security and livelihood.

[70] I am sympathetic to the plight of the defendants and am alive to, and have considered, the impacts which appointment of a receiver will have on them and others. However, like any litigant, RBC is entitled to rely on its legal rights. For the following reasons, I find it would be both just and convenient to appoint a receiver:

- a) pursuant to the GSA, RBC has a general and continuing security interest in all of 134 BC's property;
- b) 134 BC has defaulted under its agreements with RBC and under the GSA, which entitles RBC to enforce its security, and gives RBC a contractual right to appoint a receiver;
- c) appointment of a receiver will protect RBC's interests by preserving and protecting 134 BC's assets;
- d) RBC appears to have no reasonable prospect of recovering 134 BC's indebtedness with enforcement action; and
- e) the balance of convenience favours the appointment of a receiver.

### **Costs**

[71] RBC is entitled to costs on a full indemnity basis.

[72] RBC seeks costs of the application on a full indemnity basis, in an amount to be assessed. The defendants made no submission concerning RBC's entitlement to the costs order sought.

[73] In the Credit Agreement, 134 BC agreed as follows:

## FEES, COSTS AND EXPENSES

The borrower agrees to pay the Bank all fees stipulated in this Agreement and all fees charged by the Bank relating to the documentation or registration of this Agreement and the Security. In addition, the Borrower agrees to pay all fees (including legal fees), costs and expenses incurred by the Bank in connection with the preparation, negotiation, documentation and registration of this Agreement and any Security and the administration, operation, termination, enforcement or protection of its rights in connection with this Agreement and the Security. The Borrower shall indemnify and hold the Bank harmless against any loss, cost or expense incurred by the Bank if any facility under the Credit Facilities is repaid or prepaid other than on its Maturity Date. The determination by the Bank of such loss, cost or expense shall be conclusive and binding for all purposes and shall include, without limitation, any loss incurred by the Bank liquidating or redeploying deposits acquired to make or maintain any facility.

[Emphasis Added.]

[74] No special wording is required to confirm an obligation to pay full costs: *Epoch Press Inc. v. Sewak*, 2011 BCSC 323 at para. 13; *Wanson (Bristol Development) Ltd. v. Sabha*, 2017 BCSC 2140 at paras. 9–13.

[75] I am satisfied that the above provision supports a finding that the intention of RBC and 134 BC was that RBC would be fully indemnified by 134 BC, and that costs on a full indemnity basis are therefore appropriate.

**Orders**

[76] The orders sought are granted.

[77] RBC's summary trial application is granted.

[78] RBC is granted judgment against 1343173 B.C. Ltd. as borrower and Matt Ashley Stromsten as guarantor, in the amount of \$2,223,607.33 together with post-judgment interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[79] Pursuant to s. 243(1) of the *BIA* and s. 39 of the *LEA*, Grant Thornton Limited is appointed as receiver, without security, of all the assets, undertakings and property of 1343173 B.C. Ltd. operating as Stromsten Enterprises (the "Debtor"), acquired for, or used in relation to a business carried on by the Debtor, on the terms

set out in the proposed receivership order attached as Schedule “A” to RBC’s notice of application filed March 11, 2025.

[80] RBC is awarded costs on a full indemnity basis in an amount to be assessed.

“B. Smith J.”

B. SMITH J.

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Royal Bank of Canada v. Canwest Aerospace Inc.*,  
2023 BCSC 514

Date: 20230308  
Docket: S230764  
Registry: Vancouver

Between:

**Royal Bank of Canada**

Plaintiff

And

**Canwest Aerospace Inc.  
Can West Global Airports Inc.  
Thomas George Jackson**

Defendants

- and -

Docket: S231354  
Registry: Vancouver

**In the Matter of the *Companies' Creditors Arrangement Act*,  
R.S.C. 1985, C. C-36, as amended**

**and**

**In the Matter of the *Business Corporations Act*,  
S.B.C. 2002, C. 57, as amended**

**and**

**In the Matter of the *Canada Business Corporations Act*,  
R.S.C. 1985, C. C-44, as amended**

**In the Matter of a Plan of Compromise and Arrangement of  
Canwest Aerospace Inc. and Can West Global Airports Inc.**

Before: The Honourable Mr. Justice Gomery

**Oral Reasons for Judgment**

In Chambers

Counsel for the Royal Bank of Canada:

J.D. Schultz  
E. Watson

Counsel for Canwest Aerospace Inc. and  
Can West Global Airparts Inc.:

C.J. Ramsay  
N. Carlton

Place and Date of Trial/Hearing:

Vancouver, B.C.  
March 8, 2023

Place and Date of Judgment:

Vancouver, B.C.  
March 8, 2023

**Introduction**

[1] In these reasons, I will refer to Canwest Aerospace Inc. and Can West Global Airparts Inc. collectively as "Canwest" and to the Royal Bank of Canada as "RBC".

[2] Canwest comprises two privately-held related companies engaged in providing aircraft maintenance, repair and overhaul services, and related manufacturing services to international companies. It is a specialized business and Canwest has been engaged in it since 2004. Unfortunately, Canwest has gotten into financial difficulties in recent years. Canwest blames the difficulties on the COVID pandemic, but they began before the pandemic in 2019, and appear to have worsened in 2022. It is common ground that Canwest is presently insolvent because the companies are unable to service their obligations to RBC, which is their largest creditor.

[3] RBC is a secured creditor. It applies for an order appointing a receiver for the orderly liquidation of the companies under court supervision in the interests of all the creditors. The premise of RBC's application is that Canwest is no longer a commercially-viable entity and there is nothing left to do but wind it up.

[4] Canwest applies for an initial order under s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. 36 [CCAA], staying all proceedings against the companies, including RBC's application, with a view to facilitating a rearrangement of their affairs. The premise of Canwest's application is that there is a reasonable prospect of a restructuring that would permit something to be saved of Canwest's business.

[5] On February 27, 2023, Justice Iyer ordered that the two applications be heard together today on a peremptory basis.

**Background**

[6] At present, Canwest has nine employees, although it had 42 employees in 2018. Its assets consist principally of accounts receivable owed by foreign debtors, prepaid expenses in connection with a substantial contract in Bangladesh, and

inventory. On paper, its assets exceed its liabilities, but the realizable value of the assets is uncertain.

[7] Canwest owes RBC approximately 3.8 million Canadian dollars. Some of this debt is in relation to receivables that are probably protected under the Export Development Canada Export Guarantee Program. The amount owing to RBC that is clearly unprotected is approximately 2.1 million Canadian dollars.

[8] Canwest owes trade creditors approximately \$700,000 and employees approximately \$100,000 in respect of vacation pay. It owes persons apparently associated with the companies, other than its shareholder, approximately \$917,000 and has other smaller secured and unsecured debts and liabilities.

**RBC's receivership application**

[9] The court has jurisdiction to appoint a receiver under s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, *Supreme Court Civil Rule* 10-2, and s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The cases frequently reference a long list of factors enumerated by Justice Masuhara in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25, viewing them not as a checklist but rather as a collection of considerations to be viewed holistically: *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Inc.*, 2021 BCSC 2449 at para. 24. The fundamental question is whether the appointment is just or convenient in all the circumstances.

[10] If I were to consider RBC's application in isolation without reference to Canwest's cross application under the CCAA, I would allow it and appoint a receiver. The following considerations particularly favour the appointment of a receiver in this case. Absent an appointment, RBC is entitled to appoint a receiver by instrument, obtain judgment, and execute against Canwest's assets. Many of the assets are located outside Canada and the process is likely to be complicated and chaotic. There is a risk that the rights of employees and trade creditors will not be respected. There is a risk that steps that might be taken to preserve the value of assets for the creditors, such as the value of the partially-performed contract in Bangladesh, will

not be taken, even though it would be in the best interests of everyone due to a lack of coordination.

[11] However, Canwest's CCAA application raises other considerations.

**The CCAA application**

[12] An initial application under s. 11.02(1) results in an order that will only be in effect for up to 10 days, during which time the applicant and its creditors have an opportunity to consider whether a lengthier stay of proceedings against the applicant is appropriate. During that time, an independent monitor is appointed to investigate the applicant's affairs and prepare a report to the court. An application for an initial order is usually made without notice, but in this case, notice was required because RBC had already commenced a proceeding against Canwest for the appointment of a receiver and Canwest was seeking to stop that proceeding in its tracks.

[13] The applicant must satisfy the court that it is applying for relief under the CCAA in good faith and with due diligence, and that the stay of proceedings sought is appropriate. On this application, RBC does not contest Canwest's good faith or its due diligence. It objects to the order sought solely on the ground that it is not appropriate. I should add that I am satisfied on the evidence that the application is brought in good faith and with due diligence.

[14] The purpose of a stay of proceedings under the CCAA is to give the applicant breathing room to negotiate a way out of insolvency because debtor companies retain more value as going concerns than in liquidation: *Canada v. Canada North Group Inc.*, 2021 SCC 30 at paras. 19 to 21. Continuing as a going concern benefits the shareholders, employees, and other firms doing business with the debtor company. In *Canada North*, the court observed:

[20] The view underlying the entire CCAA regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios . . . The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company . . . Thus, this Court recently held that the CCAA embraces “the simultaneous objectives of maximizing creditor

recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* . . . )

[15] The applicant must satisfy the court that it has at least "a germ of a plan" presenting a "reasonable possibility of restructuring": *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36 at para. 20.

[16] In *Industrial Properties*, Justice Herauf explained:

[21] For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. If the debtor corporation satisfies this onus, the court may grant the initial application and provide the conditions under which the debtor corporation can attempt to reorganize, namely, staying creditor enforcement to preserve the debtor corporation's status quo for a limited period of time. If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: *Rescue! The Companies' Creditors Arrangement Act* at 53–54.

[17] RBC submits that Canwest's application fails to satisfy this onus. It has not even a germ of a plan, says RBC, and its application is nothing more than an effort to postpone an inevitable liquidation.

[18] In his first affidavit, Canwest's principal, Thomas Jackson, addresses the question of its plan to restructure in three paragraphs. He states:

8. The Petitioners require time to restructure their affairs under the CCAA, so that they can meet their obligations to RBC and other creditors. With the benefit of a CCAA stay, the Petitioners will be able to take steps with the assistance of the court appointed monitor to restructure their financial affairs, continue their business, seek refinancing and/or raise equity.

. . .

72. The Petitioners require CCAA relief to provide breathing [space] to explore their restructuring options, which would include continuation of the business to generate revenue, collecting receivables, considering opportunities to re-finance and raise equity. In particular, it is anticipated that they will be able to generate enough revenue from the Bangladesh Contract in the next 12 months to be able to fully repay RBC.

. . .

89. The Petitioners are seeking relief under the CCAA on short notice to preserve and stabilize their operations, to prevent enforcement steps from being taken in respect of their indebtedness, and to preserve the opportunity to restructure their business to offer the greatest benefit to numerous stakeholders.

[19] Paragraphs 8 and 89 are unhelpful. They do not even hint at what a restructuring plan might consist of. Paragraph 72 is somewhat more specific. It identifies a particular option, namely running Canwest's business for a period of time in order to raise money from the Bangladesh contract in an amount sufficient to pay RBC the 3.8 million Canadian dollars it is owed. The contract price for the Bangladesh contract is 3.1 million U.S. dollars, which would generate enough money to pay out RBC. However, the evidence does not disclose the cost of the work still required to be performed under the contract, nor does the evidence disclose whether Canwest is expected to maintain a positive cashflow for more than the next four weeks or the basis for its belief that it will manage even that.

[20] RBC submits that Canwest should have a better plan by now, pointing out that it was invited to submit to the bank a plan on January 17, 2023, when the bank made demand. Nothing was forthcoming. While this submission is not without substance, it should be put in context. Canwest was clearly preoccupied by legal and financial difficulties consequent on the bank's demand that led to its retaining insolvency counsel and petitioning the court for relief under the CCAA on February 24, slightly less than two weeks ago.

[21] Both sides stress that Canwest's present financial picture is murky. In his first affidavit, Mr. Jackson states that Canwest's business has begun to rapidly improve at an exponential rate, but there is nothing in the financial information before the court to substantiate that assertion. In an interim profit and loss statement provided to RBC on December 7, 2022, Canwest Aerospace showed a year-to-date loss of \$424,482 on revenues of \$2.1 million.

[22] In addressing this issue, I place particular weight on two considerations. First, the order sought is only an initial order to be followed in short order by a substantive

application informed by the findings of an independent monitor. While the expense of the monitor will burden the companies, so would the expense of the receiver sought by RBC.

[23] Second, the appointment of a receiver is, for all intents and purposes, an irrevocable step, removing the control of the companies from their present management and placing it in the hands of a third party. That may well be necessary, but it is not at all obvious that a receiver will be in a better position to realize value for the benefit of all stakeholders than Mr. Jackson and his colleagues.

[24] In the context of this application, Canwest just barely satisfies me that an initial order will usefully further its efforts toward an attempted reorganization. I am not persuaded that its application is nothing more than an attempt to avoid its obligation to its creditors and postpone an inevitable liquidation. Accordingly, I allow Canwest's application for an initial order under the CCAA.

[25] Canwest will need better evidence and a much more cogent account of its proposed restructuring when this matter comes back before me. That will be on March 17, 2023, at 2:00 p.m.

[26] I am inclined to make the order in the form sought, but I have not heard whether, Mr. Schultz, you have any particular submissions on the form of order sought.

[27] CNSL J. SCHULTZ: I do not, Mr. Justice.

[28] THE COURT: Then I will make that order which I have reviewed, including the \$50,000 administration charge.

[29] CNSL N. CARLSON: Thank you, Mr. Justice. I'm not sure the version you have in front of you. There was a slight change made on the admin charge.

[30] THE COURT: Well, then --

[31] CNSL N. CARLSON: I think it originally said that it would be subject to pre-existing purchase monies security interests. I don't know if the version you have still has that. We've taken that out as notice -- as subsequently granted to those secured creditors and they're not present before us today.

[32] THE COURT: Well --

[33] CNSL N. CARLSON: Yeah, they were served, yeah.

[34] THE COURT: Which paragraph are we in?

[35] CNSL N. CARLSON: Just give me -- administration charge would have -- depending on which version you have, paragraph 30, "which charge shall not exceed an aggregate amount of 50,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making -- "

[36] THE COURT: The version I have, it is paragraph number 30?

[37] CNSL N. CARLSON: It would be -- I believe it would be paragraph 30, if there was a reference to purchase monies security interest.

[38] THE COURT: There is -- the paragraph I have says:

The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$50,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring.

[39] CNSL N. CARLSON: That sounds like the right one.

[40] THE COURT: That is fine.

[41] CNSL N. CARLSON: Seeing that the next section is "Validity and priority of charges created by this order", I am scared that it is actually somewhere in that, but I remember it being a part of paragraph 30 previously.

[42] CNSL C. RAMSAY: I think perhaps, if I may speak, perhaps it makes sense if we provide a vetted order -- we haven't yet got a vetted order -- that has the correct language, make sure what everyone last reviewed to make sure -- give it to Mr. Jordan [sic] to make sure and then bring it up and have it signed, if that --

[43] THE COURT: That is fine.

[44] CNSL J. SCHULTZ: Fair enough, thank you.

[45] CNSL C. RAMSAY: Thank you.

"Gomery J."

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ward Western Holdings Corp. v. Brosseuk*,  
2022 BCCA 32

Date: 20220131  
Docket: CA47481

Between:

**Ward Western Holdings Corp. and Westrike Resources Ltd.**

Appellants  
(Plaintiffs and Defendants by Counterclaim)

And

**Raymond Brian Brosseuk, Jacqueline Grace Brosseuk, Peter Hipp,  
Donna Hipp, Hipp Joint Spousal Trust, R.J. Sales Ltd.,  
Northern Placer Technologies Inc., D. Manning & Associates Inc. and  
Accurate Effective Bailiffs Ltd.**

Respondents  
(Defendants)

Before: The Honourable Mr. Justice Goepel  
The Honourable Mr. Justice Fitch  
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated  
April 15, 2021 (*Ward Western Holdings Corp. v. Brosseuk*, 2021 BCSC 919,  
Vancouver Docket S209762).

Counsel for the Appellants:

O.C. Hanson  
A.J. Piercy  
H. Esslinger, Articled Student

Counsel for the Respondents:

C. Cash  
L.J. Marriner

Place and Date of Hearing:

Vancouver, British Columbia  
November 30, 2021

Place and Date of Judgment:

Vancouver, British Columbia  
January 31, 2022

**Written Reasons by:**

The Honourable Mr. Justice Voith

**Concurred in by:**

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Fitch

**Summary:**

*The appellants appeal an order appointing a receiver over their company. They challenge the order on the basis that the judge erred in finding as a fact that the appellants breached a share purchase agreement, applied the wrong legal test for the appointment of a receiver by erroneously reversing the burden of proof, and improperly appointed a receiver where the underlying default was disputed. Held: Appeal dismissed. The judge's reasons as a whole demonstrate that the judge applied the correct law and burden of proof. There were several undisputed breaches before the judge and it was open to the judge to conclude that appointing a receiver would advance the interests of justice. The appellants failed to identify any error in principle in the judge's exercise of discretion, and his decision is entitled to deference.*

**Reasons for Judgment of the Honourable Mr. Justice Voith:**

[1] This appeal arises from the court appointment of a receiver. Several of the grounds of appeal are not relevant to the judge's determination and the remaining grounds are, in my view, without merit. For the reasons that follow, I would dismiss the appeal.

**Background**

[2] These proceedings arise from the acquisition by the appellant Ward Western Holdings Corp. of the French Creek Mine, a placer gold mine located near Revelstoke, British Columbia (the "Mine"). The appellant Westrike Resources Ltd. presently owns the permits and mining claims for the Mine.

[3] Though the record before the judge was relatively voluminous, and though the appellants refer to numerous facts, the relevant aspects of the parties' dispute can be succinctly expressed.

[4] Before June 2020, most of the shares of Westrike were owned by the respondents Raymond and Jacqueline Brosseuk, while Peter and Donna Hipp, as the trustees of the Hipp Joint Spousal Trust, held a minority interest.

[5] Mr. Brosseuk became involved with the Mine site in 1991 and had been committed to developing the Mine since 2001. From 2017 to July 2020, Northern

Placer Technologies Inc. (“NPT”), a company wholly owned by Mr. and Mrs. Brosseuk, operated the Mine.

[6] In the spring of 2020, Ward Western engaged in negotiations for the purchase of Westrike’s shares and certain mining equipment owned by the respondent R.J. Sales Ltd., a company owned by Mr. Brosseuk, for a total of \$6.5 million. Mr. Slavik, a defendant by counterclaim, is the president and sole director of both appellant companies. Mr. Slavik and Mr. Brosseuk knew each other before this transaction, as they had previously worked together on a number of occasions.

[7] Between March and May 2020, Mr. and Mrs. Brosseuk and Mr. Slavik negotiated the terms of a proposed share purchase agreement for the purchase of the Mine through the acquisition of Westrike shares. Both parties were represented by counsel. At least 22 drafts of the proposed agreement were exchanged.

[8] The final signed version of the share purchase agreement (the “SPA”) is dated June 1, 2020. The agreement provided for the sale of all of Westrike’s shares to Ward Western.

[9] The majority of the \$6.5 million share purchase price was financed by \$4.5 million in vendor takeback financing provided by Mr. and Mrs. Brosseuk and Peter and Donna Hipp as trustees of the Hipp Joint Spousal Trust (collectively, the “Vendors”).

[10] For present purposes, the following clauses of the SPA are particularly important, and are tied to the fact that a significant portion of the share purchase price remained outstanding when the SPA was executed:

3. Until gold having a value of at least C\$1,812,500 (after operating costs at a rate of \$4.25 per yd<sup>3</sup>) has been produced from the French Creek mine, Raymond Brosseuk shall have absolute authority over mining operations at the mine, with the goal of the Shareholders and WWHC and its principal (the “Parties”) being to maximize gold production to produce C\$1,812,500 of gold, after operating costs, in the shortest time possible. WWHC shall have the right to contribute by way of a cash advance to Westrike all or any portion of the C\$1,812,500, rather than having Westrike realize such amounts from gold production, with such advanced funds to be used by Raymond Brosseuk in the manner set out below.

Raymond Brosseuk shall use the cash derived from the sale of C\$1,812,500 of gold, after operating cost, or from advances from WWHC, in the following manner:

- a. to pay up to 20% of such amount, to WWHC, or as WWHC may direct (the “WWHC Allocation”);
- b. to pay any permit, bond or licensing expenses required to operate the mine;
- c. to purchase the equipment described in Attachment 5 on behalf of Westrike; and
- d. the balance on account of partial payment of the unpaid Purchase Price of the Shareholders’ shares of Westrike and the Shareholders Loans, as applicable.

To the extent that WWHC does not require payment of all or [a] portion of the WWHC Allocation, then the C\$1,812,500 threshold shall be reduced by the amount of the WWHC Allocation not paid to or as WWHC may direct, provided the minimum amount subject to direction for payment by Raymond Brosseuk shall not be less than C\$1,450,000.

4. After realizing gold from mining operations having a value in excess of C\$1,812,500, as may be adjusted pursuant to section 3 above, after operating costs (or a combination of WWHC having advanced cash and cash realized from gold production), the principals of WWHC shall have authority to operate the mine and deal with the gold produced, as they may determine, but subject to the provisions of section E(5) below, in consultation with Raymond Brosseuk as a consultant to WWHC.

[Emphasis added.]

[11] The appellants, in their factum, accept that the purport of Section 3 was that “until gold having a value of \$1,812,005 was produced (net of operating costs of \$4.25/yd<sup>3</sup> of gravel process), Mr. Brosseuk would have absolute control over mining operations at the Mine.”

[12] The appellants similarly accept that the object of Section 4 of the SPA was that “after \$1,812,500 had been netted from gold production or a cash payment by Ward Western, authority over mining operations would transfer to Ward Western, with Mr. Brosseuk acting as a consultant.”

[13] One of the “Additional Terms” in the SPA, found at Section H.4, was that Mr. Brosseuk would act as a consultant to Ward Western for a consulting fee of \$5,000 per month. At Section H.10, the parties acknowledged that they had entered into earlier letters of intent and agreements and that “all such letters of

intent/agreements [were] terminated and hereafter of no further legal force and effect.”

[14] On June 19, 2020, the SPA was amended through the signing of an amendment agreement (the “Amendment Agreement”). The Amendment Agreement changed the number of shares in Westrike that were being purchased by Ward Western from 100% to 90%. Importantly, the Amendment Agreement also contained an entire agreement clause (the “Entire Agreement Clause”), which stated that the SPA and the Amendment Agreement “constitute the entire agreement between the parties pertaining to the subject matter of this Agreement and supersede all prior correspondence, agreements, negotiations, discussions and understandings, written or oral.”

[15] On June 19, 2020, the parties also entered into a number of other agreements. This included an advisory agreement (the “Advisory Agreement”), whereby Mr. and Mrs. Brosseuk would act as advisors to Westrike and Ward Western for a monthly advisory fee of \$5,000. It included a general security agreement (the “GSA”) granted by Westrike to the Vendors. It also included various other forms of security, including a guarantee, various fixed and floating charge demand debentures, a pledge of securities, a guarantee and a promissory note.

[16] The operation of the Mine commenced on July 15, 2020. Relations between the parties deteriorated rapidly. The appellants, in their Amended Notice of Claim, allege various misrepresentations or deficiencies in performance on the part of Mr. Brosseuk. Central to the dispute between the parties, however, was the fact that Mr. and Mrs. Brosseuk sought to be reimbursed for certain expenses associated with the start-up of the Mine that were incurred by NPT.

[17] The parties exchanged various communications and ultimately arranged for a videoconference on July 29, 2020. What was said during the videoconference is in dispute. Mr. Slavik deposed that Mr. Brosseuk said that if NPT was not reimbursed for its outstanding start-up costs he would shut down the Mine and that the Mine’s operations were, in fact, suspended at the direction of Mr. Brosseuk.

[18] Mr. Brosseuk deposed that mining operations were shut down at the direction of Ward Western.

[19] Each party pleads the other breached the terms of the SPA and the Amendment Agreement.

[20] What is not in doubt is that immediately after the videoconference, Mr. Slavik sent an email to Mr. and Mrs. Brosseuk stating that he had arranged for “24-7” security at the Mine, that Mr. and Mrs. Brosseuk’s access to the Mine was thereafter restricted and that they would need to advise Mr. Slavik or his colleagues if they wished to obtain access. Furthermore, it seems clear that Westrike commenced mining operations on September 2, 2020, without Mr. and Mrs. Brosseuk’s knowledge, consent or involvement.

[21] On September 2, 2020, counsel for the respondents sent Ward Western a demand for payment in full, within 10 days, of the outstanding indebtedness of \$4.5 million as a result of various defaults committed by Ward Western.

[22] On September 15, 2020, the Vendors appointed D. Manning & Associates Inc., pursuant to the terms of the GSA, as receiver over all of the tangible and intangible assets and property of Westrike. On September 16, the receiver attended at the Mine to decommission and remove certain pieces of equipment. On September 17, the receiver sent an email to Mr. Slavik requesting various categories of information, as well as details regarding the gold that had been produced while the Mine was under Mr. Slavik’s control. None of that information was provided.

[23] On September 30, 2020, counsel for the appellants wrote to the receiver denying the powers and authority of the receiver without a court order. Thereafter, the appellants applied for an interlocutory injunction to enjoin the respondents from interfering with the mining operations of Westrike. The respondents opposed the application and applied for a court-appointed receiver and manager of Westrike. The judge heard these cross applications on April 7 and 9, 2021.

**Thesis of the Appellants' Claim**

[24] Before turning to the judge's reasons and the various grounds of appeal that have been raised, it is useful to understand the different components of the legal theory that was relied on by the appellants to explain their control and operation of the Mine to the exclusion of Mr. Brosseuk. This is important on account of the clear language in Clauses 3 and 4 of the SPA and because it was this legal theory that the appellants advanced in their application for an interlocutory injunction.

[25] The theory relies on three somewhat interrelated propositions. First, the appellants rely on what they describe as the "Turnkey Representation." They have pleaded that Mr. and Mrs. Brosseuk, either fraudulently or negligently, represented that the Mine was a "Turnkey" operation, meaning that it would be self-financing through the production of gold without the need for Mr. Slavik to put up funds for start-up costs or operations. This allegation is denied by Mr. Brosseuk, and it appears to be inconsistent with a series of *pro forma* statements that were provided to Mr. Slavik.

[26] Apart from the underlying factual issue, neither the SPA nor the Amendment Agreement contains any such representation. Nevertheless, the appellants contend that their pleading of fraudulent misrepresentation provides a potential answer to the Entire Agreement Clause.

[27] Next, the appellants contend that there was an implied term in the SPA and the Amendment Agreement that if Mr. Brosseuk was either "unable or unwilling" to fulfil his role as mine manager, they could assume control of the Mine (the "Implied Term"). To prove the Implied Term, the appellants must ultimately establish their version of what took place during the videoconference on July 29, 2020. They would also have to establish that the Implied Term is necessary as a matter of business efficacy, that it is not inconsistent with the language of Clauses 3 and 4 of the SPA, and that it is not ousted by the Entire Agreement Clause. They argue that whether the Implied Term offends the Entire Agreement Clause is a "complicated and fact-dependent determination" that likely cannot be resolved without a trial.

[28] Alternatively, the appellants have pleaded, and argued before the judge, that Mr. Brosseuk's refusal to operate the Mine "unless the Brosseuks and NPT were paid for costs to which they were not entitled, was a fundamental breach of the SPA" that allowed Mr. Slavik to replace Mr. Brosseuk as mine manager.

### **Judge's Reasons**

[29] I will address some of the detailed aspects of the judge's reasons when I turn to the specific grounds of appeal that have been raised. For present purposes, the following synopsis is adequate.

[30] The judge first addressed the appellant's application for an interlocutory injunction. He described the legal test for an interlocutory injunction. He identified that there was urgency to the application because the appellants sought to begin operating the Mine on or about May 1, 2021. Accordingly, the judge recognized that his summary of the facts was "somewhat cursory when measured against the voluminous affidavits the parties filed, in which allegations of wrongdoing, and denials of wrongdoing, [were] ever-present."

[31] He identified that the appellants sought to overcome Clauses 3 and 4 in the SPA by arguing that Mr. Brosseuk had fundamentally breached the SPA, with the result that the appellants were entitled to take over the operations at the Mine. Alternatively, the appellants argued that if Mr. Brosseuk's breach was not fundamental, there was an implied term, for the sake of business efficacy, "that the [appellants] could take over running the Mine if Mr. Brosseuk was not running it as he had agreed to do."

[32] He observed that he "[saw] no reasonable evidence of Mr. Brosseuk breaching his or the other [respondents'] obligations, certainly not doing so fundamentally." He referred to various authorities that discuss the requirements for a fundamental breach, and he said that "[a] fundamental breach occurs where the failure of one of the contracting parties to perform a primary obligation under the contract has the effect of depriving the other party of substantially the whole benefit which the parties intended that party to receive."

[33] He concluded that:

[20] ... There is not a serious question to be tried that Mr. Brosseuk is guilty of any such failure. At best for the [appellants], it could be argued that they have a very weak case for fundamental breach. The weakness of an applicant's case on the merits, when seeking an interlocutory injunction, is a factor against the injunction being granted when the balance of convenience is being considered at the later stages of the injunction analysis ....

[34] In relation to the appellant's assertion that there was an Implied Term in the SPA, the judge said:

[21] The implied term the [appellants] assert in the alternative, that they could come in and take over the Mine, is plainly inconsistent with the express terms in clauses E4 and E5 of the SPA, and on that ground alone cannot stand. The so-called implied term is also inconsistent with the entire agreement clause, found at page nine of the amendment to the SPA. If Mr. Brosseuk had breached the SPA by not properly running the Mine, perhaps the [appellants] could sue for damages, but they could not add a provision to the SPA allowing them to take over. As a matter of law, for a term to be implied, it must be required as a matter of business efficacy. That is not the case here because at any time, the [appellants] had the right to take over the Mine's operation by paying what remained owing of the \$1,812,500.

[35] After referring to aspects of the evidence in greater detail, the judge said:

[41] Of course there are disputes on the evidence, but to repeat, I do not find a serious question from the evidence and the related law that Mr. Brosseuk was in fundamental breach of his obligations, or that there was an implied term that the [appellants] could take over the mine before \$1,812,500 was earned in net gold production or alternatively paid by the [appellants]. The alleged implied term not only would violate clause E3 of the SPA, as noted earlier, it was also uncalled for as a matter of business efficacy because the [appellants] had the right to take over the Mine operation at any time upon paying the balance owing on the \$1,812,500, as agreed.

[36] The judge concluded the status quo was better preserved by a result that was "consistent with the requirements of the agreement the parties [had] made." He also concluded, for a number of reasons, that the appellants were unable to establish irreparable harm. In relation to the balance of convenience, he determined that aspects of his earlier conclusions, relating to the adequacy of damages, whether damages would be paid, the strength of the applicant's case, the preservation of property and the status quo, all militated in favour of the respondents.

[37] He concluded that the appellants were unable to make out any of the three requirements that are necessary for an interlocutory injunction. He dismissed the appellants' application.

[38] In relation to the court appointment of a receiver and manager, the judge referred to a number of relevant facts. After stating that he had reviewed the written submissions of both parties, he accepted the submissions of the respondents in support of the appointment of a receiver and he incorporated paras. 49–54 of those submissions, verbatim, into his reasons.

[39] Based on the detailed considerations he described, he ordered the appointment of D. Manning & Associates Inc. as the receiver and manager of Westrike. After the application, the judge made an order that is dated April 15, 2021. The order addressed, over some 40 paragraphs, the powers of the receiver, the obligations of the parties and other relevant matters.

### **Leave Application**

[40] The appellants' application for leave to appeal was heard by Justice Willcock. His oral reasons for judgment are indexed at 2021 BCCA 390. Justice Willcock noted that the original application for the appointment of a receiver was brought pursuant to both the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[41] The provisions of Part XI of the *Bankruptcy and Insolvency Act* enable the court to appoint a receiver on the application by a secured person to take possession or exercise control over the property of an "insolvent person" or bankrupt. Justice Willcock noted that there was "no evidence before the chambers judge in support of the conclusion that Westrike was insolvent, as that term is defined in the Act, or a bankrupt." He considered that the judge "clearly appointed the receiver without regard to the insolvency or otherwise of the appellants" and concluded that the "apparent authority for the appointment of the receiver was the *Law and Equity Act*."

[42] In relation to the appointment of the receiver, Willcock J.A. said:

[72] ... [T]here is a dearth of authority on the strength of the case that must be made out in support of the appointment of a receiver under the *Law and Equity Act* where there is a dispute with respect to the existence of the breach. I am of the opinion that specific issue is of importance to the profession.

[43] Justice Willcock accepted that the issue on appeal was also clearly important to the parties, and he granted leave to appeal the order appointing the receiver.

[44] Justice Willcock dismissed the application for leave to appeal the order dismissing the application for an interim injunction.

### **Analysis**

[45] The appellants raise numerous grounds of appeal and argue that the judge erred by:

- a) making the Impugned Findings of Fact despite irreconcilably conflicting affidavit evidence;
- b) summarily rejecting the Implied Term Claim by finding that the Implied Term is not a term of the SPA;
- c) accepting, without due consideration and analysis, that the respondent's appointment of D. Manning as receiver was in accordance with the GSA;
- d) in the alternative, implicitly finding that the appellants had committed the events of default alleged in the September 2, 2020 letters; and
- e) applying an incorrect legal test for the appointment of a receiver by:
  - i. relaxing the burden on the respondents because the GSA contemplated *ex juris* direct appointment of a Receiver; and
  - ii. appointing a receiver, where the underlying alleged events of default are actively disputed based on irreconcilably conflicting evidence.

[46] In my view, grounds (a) to (d) are largely irrelevant to this appeal. Broadly speaking, the appellants seek to transplant the issues that were relevant to their injunction application to the assessment of the court appointment of a receiver. However, those two applications, and the bases for them, were materially different in important respects.

[47] First, the facts that were relevant to the appellants' application for an injunction had largely taken place by early September 2020. By that time, the dispute between the parties had emerged, the July 29 teleconference had taken place and the appellants had taken control of and begun to operate the Mine. However, the application for the appointment of a receiver overwhelmingly focused on the appellants' conduct subsequent to their taking control of the Mine and its operations.

[48] A second and important difference between the two applications is that the appellants' application for an injunction had them seeking to explain why the court should enjoin any interference by the respondents in the operations of the Mine in circumstances where, on the face of the SPA and the Amendment Agreement, it was Mr. Brosseuk who was to have "absolute authority over mining operations." However, under s. 39(1) of the *Law and Equity Act*, the central question in an application for the appointment of a receiver is whether "it appears to the court to be just or convenient" in the circumstances to appoint a receiver. In this case, those circumstances, in the main, pertained to the conduct of the appellants, since they had taken control of the Mine, rather than to the question of whether they should be in control of the Mine.

[49] Another reason that the issues the appellants seek to advance are largely irrelevant to this appeal is that they are immaterial to the judge's determination that it was "just and convenient" to appoint a receiver. Before the judge, the respondents argued, relying on *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 at para. 50, and Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 130–32, that the following non-exhaustive list of factors governs the question of whether it is "just and convenient," in all of the circumstances, to appoint a receiver:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties; and
- p) the goal of facilitating the duties of the receiver.

The judge listed these various factors at para. 57 of his reasons.

[50] It was the analysis and consideration of most of these specific factors that the respondents addressed in their written submissions before the judge and that the judge then adopted in his reasons. That detailed analysis had little to do with most of the grounds of appeal that the appellants now advance.

[51] Thus, the "Impugned Findings of Fact" that the appellants refer to in their sub-issue (a), found earlier at para. 45, pertain to four instances where the trial judge appeared to make findings of fact in circumstances where there were conflicts in the evidence before him. Each of these findings of fact arose in the context of the injunction application. None played any meaningful role in the discretionary considerations that the judge addressed in support of the court appointment of a receiver.

[52] Similarly, the judge's "reject[ion of] the Implied Term Claim," which the appellants raise in their sub-issue (b) and which would be more accurately described as the judge concluding that the appellants had failed to raise a serious question in relation to the issue, again played no meaningful role in the judge's decision to appoint a receiver.

[53] The judge's assertion that the respondents' instrument appointment of D. Manning & Associates as receiver "was in accordance with the GSA," the appellants' sub-issue (c), was similarly largely irrelevant to his decision to appoint a receiver, because the validity of that earlier instrument appointment was not a live issue before the judge.

[54] Finally, the acts of default that were "alleged in the September 2, 2020 letters," the appellants' sub-issue (d), and that were said to ground the initial instrument appointment of a receiver, were of little moment in the application for a court-appointed receiver.

[55] That leaves only the two issues that are identified in subparagraph (e) of the appellants' grounds of appeal.

**i) Did the judge impermissibly relax the burden on the respondents because the GSA contemplated the direct appointment of a receiver?**

[56] This first issue is grounded in the following statement made by the judge:

[55] The appointment of the receiver was in accordance with the general security agreement. A secured creditor, in this case the Defendant shareholders in Westrike, is ordinarily entitled to the court appointment of a receiver and manager where, as here, the secured creditors may appoint a receiver under the terms of their security agreement. The burden on the applicants for obtaining the court appointment is, at the very least, relaxed where the parties have expressly contemplated the employment of a receiver in their agreement: *United Savings Credit Union v. F & R Brokers Inc. et al*, 2003 BCSC 640; *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437.

[56] The overall test for the appointment is the attainment of justice and convenience: *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477.

[57] The statements made by the judge in para. 55 are expressed too strongly. In isolation, they appear to understate the burden on the applicant for a court-appointed receiver. However, a judge's reasons are to be read as a whole: *R. v. R.E.M.*, 2008 SCC 51 at para. 16; *Shannon v. Shannon*, 2011 BCCA 397 at para. 5.

[58] The balance of the judge's reasons demonstrate that he did not improperly "relax" the burden on the applicant. In particular, para. 56 accurately sets forth the legal issue that was before the judge. Furthermore, the judge's review of the various discretionary considerations that he addressed confirms that he attached a more measured significance to the fact that the GSA allowed for the appointment of a receiver in certain circumstances.

[59] Thus, factor (g) in the list of discretionary considerations identified in *Bennett on Receiverships*, refers to "the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan." In relation to this factor, the judge, relying on the respondents' written submissions, said:

g. The GSA gives the Receivership Applicants an ability to appoint a Receiver:

An event of default is defined under clause 8.1 (a) [of the GSA] as "Performance of Obligation. The Debtor defaults in payment or performance of the Obligations."

Obligations is defined in clause 3.1(b) as "Performance of Agreements. The strict performance and observance by the Debtor of all agreements, warranties, representations, covenants and conditions of the Debtor made pursuant to this Security Agreement or any other agreement between the Debtor and the Secured Parties all as now in effect or as hereafter entered into or amended."

Pursuant to Clause 9.1(a), upon the occurrence of an event of default, all of the Obligations shall become immediately due and payable and the Receivership Applicants may appoint a receiver or receiver and manager by instrument in writing...

[60] Factor (h) of the discretionary considerations the judge addressed is "the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others."

[61] In relation to this factor, the judge said:

- h. As set out in the letter from legal counsel for the Injunction Applicants to legal counsel for the Receivership Applicants, dated September 30, 2020, “Westrike and Ward Western do not accept the appointment of the Receiver and will not recognize any powers or authority without a court order.”

...

Further, the Receiver has received a letter from counsel for the Injunction Applicants that states: “You are hereby on notice that if the Receiver takes any further action against Westrike, including instructing Accurate Effective Bailiffs Ltd. or any bailiff, we have instructions to pursue the Receiver...for any and all loss and damages suffered by Westrike as a result...”

...

The Receiver has encountered the following difficulties with the Injunction Applicants as follows:

- i. Failing to respond to any of the Receiver’s questions since September 29, 2021 (other than where to return certain equipment that Mr. Slavik or one of his companies own);
- ii. failing to make any payment on account of insurance premiums to RCU Insurance Services since October 5, 2020;
- iii. Denying the Receiver any access to the French Creek Mine;

[62] The judge’s reasons as a whole demonstrate that the existence of a provision in the GSA allowing for the appointment of a receiver where an event of default occurred was but one of numerous considerations that he addressed. Moreover, his reasons demonstrate that he did not ultimately attach any inappropriate pre-eminence to the fact that the GSA provided for the potential appointment of a receiver.

[63] Thus, the real question is not whether the judge relaxed the burden on the respondents. Rather, it is whether it was appropriate for the judge to consider, as one of numerous factors, that the GSA provided the respondents with the right to appoint a receiver.

[64] The answer to this question is straightforward and it is found, in part, in some of the discretionary factors identified in *Bennett on Receiverships* and referred to by the judge in his reasons. I have addressed factors (g) and (h) from that list of considerations.

[65] The relevant jurisprudence is also consistent with this conclusion. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 26, Justice Masuhara, who referred to the same list of factors identified in *Bennett on Receiverships*, said, “The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.”

[66] In *Textron*, Willcock J., as he then was, said:

[55] ... Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver.

See also *Bank of Montreal v. Gian’s Business Centre Inc.*, 2016 BCSC 2348 at paras. 22–24.

[67] In my view, based on the foregoing considerations and authorities, there is no merit to this first ground of appeal.

**ii) Did the judge err in appointing a receiver “where the underlying alleged events of default are actively disputed based on irreconcilably conflicting evidence?”**

[68] The appellants, in their factum, contend:

[The] basic principle [is] that, where the alleged default or debt underlying the receiver application is [in] dispute, unless the court can conclusively resolve that dispute on the basis of credible evidence, the matter should be remitted to the trial list, unless the applicant can demonstrate a serious and immediate risk to the secured assets, in which case an appointment of an interim receiver can be considered on the basis of *Textron* factors.

[69] This submission suffers from three difficulties. The first is that there were numerous uncontested events of default before the judge. The second is that there was evidence before the judge that established a basis for concern about the assets that had been secured by the parties’ various agreements. The third is that the judge did assess the application for the appointment on the basis of the factors in *Textron* and *Bennet on Receiverships*.

[70] Before turning to the appellants' uncontested acts of default, it is useful to step back and again reflect on the appellants' theory of their case. They allege the respondents committed either a breach or a fundamental breach of the SPA and the Amendment Agreement. The appellants did not, however, accept any purported repudiation of those agreements. Rather, they purported to affirm the agreements they had made. Accordingly, they were not discharged from the obligations they had assumed.

### ***Appellants' Breaches***

[71] The appellants, in their factum under the heading "Receiver Should Not Be Appointed Where Default Disputed," undertake an analysis of numerous authorities, but do not identify the specific breach that is said to be in dispute. However, as I understand it, the appellants again seek to assert that the existence of the "Turnkey Representation," the validity of the Implied Term, or whether Mr. Brosseuk had committed a fundamental breach of the SPA and the Amendment Agreement, could not be decided on the basis of the materials that were before the judge.

[72] For reasons that I have explained, these issues played a limited role in the judge's assessment of the various discretionary factors he considered. Instead, the judge focused on different breaches and concerns.

[73] The appellants, both in their factum and in their oral submissions, argued that Mr. and Mrs. Brosseuk improperly, and in breach of the Turnkey Representation, sought to be reimbursed for \$135,000 in "previously undisclosed start-up costs." That submission is not accurate. Instead, it is clear that almost \$55,000 of this \$135,000 is unrelated to any start-up expenses. That \$55,000 is made up of two different amounts and pertains to two different obligations.

[74] First, the appellants owe the Vendors \$44,939.45 on account of legal fees incurred by Affinity Law Group, the solicitors for the Vendors during the negotiation of the SPA and other agreements. Section 5.1(t) of the GSA expressly required Westrike to pay all legal expenses incurred by the Vendors that were related to,

among other things, the GSA and other documents. No issue is taken with this account. Instead, the appellants have simply failed to pay what they owe.

[75] Second, the appellants owe \$10,000 for the advisory fees Mr. Brosseuk earned in June and July 2020. Those fees are owed under both section H.4 of the SPA and section 2.1 of the Advisory Agreement. Though the amount is not disputed, it has similarly not been paid.

[76] The appellants began to operate the Mine on September 2, 2020. In its September 17 email, the receiver requested details regarding the gold that was produced during Westrike's September 2020 operations. The appellants did not respond to that request. The respondents again demanded details about gold production on December 17, 2020, January 29, 2021, February 4, 2021, and March 22, 2021.

[77] On March 30, 2021, after the parties filed their respective application materials and on the eve of the application before the judge, the appellants finally provided the information they had been asked for. Their failure to respond earlier is in breach of their obligations under sections 5.1(k) and 5.1(p) of the GSA, respectively, to permit the Vendors access to Westrike's books and accounts and to deliver to the Vendors promptly, upon request, all records relating to the collateral and to Westrike's business. The appellants have provided no explanation for their failure to account to the respondents for approximately six months for the gold that Westrike produced and then sold.

[78] When the appellants finally provided the information they had been asked for, it became apparent that in October 2020, Westrike had sold the gold it had produced to Premier Jewelry, a pawnshop in Kelowna. Under section E.6 of the SPA, however, the parties had agreed to sell the gold they mined to an entity called Technic Inc., a gold processor. These actions were further defaults under sections E.6 of the SPA and 5.1(d) of the GSA. The appellants have provided no explanation for their actions.

[79] Next, during the September 2020 operations, Westrike failed to pay its insurance premium for its equipment. This put the Vendors' security at risk and was a default under section 5.1(q) of the GSA. Mrs. Brosseuk paid for the missed September insurance premium payment on September 24, 2020. Mrs. Brosseuk and the receiver have thereafter paid for all but one of the monthly insurance premium payments.

[80] We were advised that each of these breaches was addressed before the judge. A number of them are specifically referred to in the judge's consideration of the discretionary factors he addressed.

### ***Risk to the Respondents' Assets***

[81] Before the judge turned to the numerous discretionary considerations that grounded his decision, he said, "[M]any of the consideration for an injunction (e.g. balance of convenience, apprehended wasting of assets, conduct of the parties) have application in the analysis of whether a court should appoint a receiver/manager."

[82] The appellants do not contest this assertion and it aligns with their own acknowledgement that even when an underlying debt is in dispute, a receiver manager may be appointed if there is evidence of serious potential prejudice or jeopardy to a creditor's rights to recover under its claim and security interests.

[83] This proposition is also supported by several of the considerations that are identified in *Bennett on Receiverships*. For ease of reference I have repeated some of these factors, each of which was addressed by the judge:

- 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;

[84] There were several undisputed facts before the judge. After the July 24 conference call and after the appellants continued operations without Mr. Brosseuk, they sought to limit or bar Mr. Brosseuk's access to the Mine. They thereafter began to operate the Mine without notice to the Vendors. Quite apart from the question of whether the Implied Term permitted Ward Western to continue operations without Mr. Brosseuk because he was "unable or unwilling" to exercise his authority, there was no apparent basis for these actions, each of which reflects a lack of openness.

[85] Furthermore, each of the uncontested breaches I have identified, individually and, particularly, in combination, supported a real concern for the protection or safeguarding of the Vendors' assets. The fact that the appellants had failed to pay the legal and advisory fees they owed many months after those obligations were incurred is a clear source of concern. The fact that the appellants repeatedly ignored requests for basic information materially exacerbates that concern. So too does the fact that Westrike failed to insure equipment and that it sold the gold that had been mined in contravention of the agreements they had signed.

[86] There is nothing in these behaviours that suggests the appellants intended to operate the Mine in an open and transparent manner or that they would now adhere to their various obligations. Certainly, it was open to the judge to conclude, as he did, that the appointment of a receiver would advance the interests of justice and convenience.

[87] An order appointing a receiver pursuant to s. 39 of the *Law and Equity Act* is a discretionary decision entitled to deference: *Evanton Ltd. v. American Bullion Minerals Ltd.*, 2003 BCCA 317 at para. 11 (Chambers); *Business Dev. Bank of Can. v. Shagoras Ent. Ltd. et al*, 2004 BCSC 1741 at paras. 14–16. In my view, the appellants have failed to identify any error in principle in the judge's exercise of that discretion.

**Disposition**

[88] In my view, the appeal should be dismissed.

“The Honourable Mr. Justice Voith”

I AGREE:

“The Honourable Mr. Justice Goepel”

I AGREE:

“The Honourable Mr. Justice Fitch”

# Secured Creditors and Receivers

## Court may appoint receiver

**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.

## Restriction on appointment of receiver

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

## Definition of *receiver*

**(2)** Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of *receiver* — subsection 248(2)**

**(3)** For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

**(4)** Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

**(5)** The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

**(6)** If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of *disbursements***

**(7)** In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Injunction or mandamus may be granted or receiver appointed by interlocutory order**

- 39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
- (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.
- (3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the 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.

## **Rule 10-2 — Receivers**

### **Appointment of receiver**

- (1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

### **Form of security**

- (2) Unless the court otherwise orders, a receiver must give security as the court may direct in either Form 38 or Form 39 and, until that security is given, the order appointing the receiver must not be presented for entry.

### **Remuneration of receiver**

- (3) The court must fix any remuneration to be paid to a receiver.

### **Accounts of receiver**

- (4) Unless the court otherwise orders, a receiver must file and deliver the receiver's accounts annually.